MOBILE DEVICES IN COURT: A JUDICIAL PERSPECTIVE

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Three divisions of my Court in NZ have recently completed a pilot using iPads to store, retrieve, and annotate, large quantities of evidence and other materials in long trials. The pilot has been a great success, although there were some minor drawbacks to be dealt with. Use of iPads for all hearing work in the Environment Court is now "business as usual", all members of the Court now being provided with the tablets and appropriate training.

In this paper I describe my experiences with the technology, and analyse the advantages and offer some cautions.

Case 1: The $2b urban motorway proposal

Imagine a case involving applications for dozens of resource management (planning) consents; the proposed works valued at approximately $2b(NZ); approximately 200 parties, of whom about 65 were active in the hearing; application documentation extending to 40 lever arch folders plus hundreds of large coloured plans and other graphic exhibits; 30 more lever arch folders of material created during pre-trial and trial processes and significant numbers of large graphic exhibits; five panel members for the hearing, from around the country; approximately 40 prime issues and several dozen subsidiary issues; approximately 65 active parties; six weeks of hearing after all material pre-read by the panel and the parties; extensive cross-examination of many technical witnesses; extensive submissions by many counsel and some self-represented parties[1].

[1] Proceedings conducted during 2011 by a Board of Inquiry chaired by the author as an Environment Judge; legislative requirement that the ultimate decision be delivered within nine months of the date of public

Case 2: Proposal for an open cast coal mine on the remote West Coast of New Zealand's South Island

This was a proposal for a moderate sized open cast coal mine in an area of rich biodiversity containing numbers of rare or endangered species; case considered under relative urgency; all case materials including the application contained within approximately 20 lever arch folders plus many large and detailed graphic exhibits; a Court panel of three members, chaired by the author as an Environment Judge; panel members drawn from Auckland, Wellington and Christchurch; four weeks of hearing, variously conducted in Christchurch and in towns on the remote West Coast; a requirement for hearing materials to be available not only in Court at the various locations, but in the panel members' chambers throughout the country[2].

General Background

New Zealand's planning system is conducted under the Resource Management Act 1991, and is known for the processing and hearing of large multi-party, multi-issue, cases concerning provision of infrastructure of various kinds and major development proposals, and regional and district planning.

The first of the cases noted above is at the extreme end of the range for volume of paper, numbers of parties, and complexity and number of issues. The second case is quite typical of the work of the Environment Court of New Zealand processing and hearing appeals from decisions of councils, and sometimes on direct referral of cases where the Court becomes the first instance hearing body.

The consequences are clear for all to see – vast quantities of paper, huge costs in copying, sending by courier, transporting materials during and after a hearing, and significant overheads generally, particularly on account of the myriad manual processes to support all this.

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notification; the stated volumes of documentation created despite directions limiting the length of statements of submissions and of time for cross-examination of most witnesses.

[2] Application for consent to an open cast coal mine on the Denniston Plateau by Buller Coal Limited, a subsidiary of Bathurst Resources Limited of Australia.

A solution

In each of the two large trials just described, the quantities of paper required were significantly reduced by the Court adopting the use of i-pads pre-hearing, during the hearing, and for deliberation afterwards and preparation of the decision. And many days, even weeks, of hearing time were saved !

Advantages

The advantages of conducting a significant hearing using i-pads is essentially in the areas of the savings just described, speed of process, and mobility. Bring to mind the following scenarios using traditional processes.

- The hearing is conducted in several centres. Consequence: mountains of paper have to be moved.
- Panel members are drawn from centres away from the main hearing centre. Consequence: their personal mountains of paper have to be moved up and down the country between hearing centres and their primary places of work[3].
- Three (3) or five (5) sets of materials required to be accommodated on shelving behind the panel members' seats at the Bench. Question: How do you accommodate 350 lever arch folders of materials plus umpteen sets of large plans, in a position accessible to the panel members? As a consequence, does one cut down on the numbers of sets available to panel members; if so, what becomes of the personal annotations, highlighting, and notes placed by panel members on their individual copies of materials?
- How much time gets consumed during the course of a hearing while panel members and others in the courtroom hunt for each successive relevant folder, and locate the materials upon which a witness is being questioned? And then to find another folder containing materials generated by the opposite number of that witness, so that that witness may be questioned on statements of that other witness as well?

[3] In the coal mine case, our registry believes it saved about $3000 in courier charges alone, in 2 months. The iPads immediately paid for, and ready for many more cases !

All these problems are fixed in significant measure using i-pads. There exist some excellent and very cost-effective apps, such as GoodReader and iAnnotate. We are using GoodReader. Once having one's materials uploaded, the user can pretty much treat the screen like paper. You can highlight, scribble notes in the margin, underline, and place things that look like sticky tags at any point you want. If one's case involves a lot of pages, you can open many of them at once and flip between them. You can type and even dictate notes onto the document. You can full text search all materials stored concerning the case, at the push of a button.

Notably, these steps are all really easy to learn and remember. After that, there are all sorts of sophisticated actions that can be taken with the materials, almost all of them also really simple to do.

There are various means of uploading materials to tablets, and our registry staff have been experimenting with some of them. One is a whole of Government cloud service established by New Zealand's Department of Internal Affairs. Others are as simple as receiving an email on thei-Pad (ours have 3G and wifi capability), and then saving attachments into GoodReader.

In order to gain the advantage of speed that I have mentioned, it is clearly important that counsel and parties be advised as early as possible during pre-trial processes that members of the Court are likely to be using tablets. This of course is only fair, failing which counsel and parties are going to be left trailing in the dust as they endeavour to follow the proceedings at the speed the Court is capable of.

Our experience is that, properly warned, counsel, witnesses and parties, are more than prepared to similarly equip themselves and reap the same advantages as members of the Court. We now have counsel cross-examining from an i-pad, addressing submissions from an i-pad, and conducting instant research electronically in order to answer questions from the Bench.

In this scenario it is to be recommended that pre-trial directions include that all materials prepared for the case have one single set of page numbers (five digit or six digit as required), so that everyone in the courtroom is literally "working off the same page". It is also quite

possible to introduce common tab references as a further navigation aid that resembles traditional means of accessing information during a hearing.

With such measures in place, each user can then manage his or her own i-pad as desired. For instance, as to indexing and sub-indexing formats.

Some cautions

Technology of this kind needs to be managed carefully and efficiently. A major risk in terms of fairness of access to justice, is that there will often be numbers of parties who do not have access to computer technology, or have the requisite skills. One of the beauties of Apple technology is that it is very intuitive, and that people with a modicum of computer skills can be trained to use it quite quickly and easily. However, at the Environment Court we quite often have some self-represented parties who do not have the resources and are not up to it. In a forthcoming hearing, I intend to appoint a process advisor to such parties (I believe there may several hundred of them) in an endeavour to have them form themselves into groups having common interest in some of the topics in the case, in the hope that there will be sufficient numbers of people adequately resourced and skilled in the technology to assist to keep things moving. I have also prevailed upon the respondent council to make certain computer technology available to self-represented parties, at least during the pre-trial phases. The Court or the council may need to offer certain technological process assistance during the hearing.

Exhibits for hearings in the Environment Court invariably include large plans, photos, aerial photographs, photomontages and the like. It is not realistic to expect to view a whole sheet on the iPad screen, so paper copies of those materials are needed, and/or they can be projected onto large screens in the courtroom if available.

While the iPads are 3G and wi-fi enabled, they do not offer connectivity to Ministry systems and databases, so we are unable to access our personal files and folders for daily work purposes. The technology may be around the corner (in a year or 2) via future and more advanced MS- Windows-based tablets (Microsoft Surface). Those may offer the necessary

compatibility for many government entities and corporates. For the moment however, having trialled an example, they are not offering the intuitive qualities of Apple iPads, and do not offer the ease of use that is so important for "users of a certain age".

I understand that there are some security limitations with these devices. Security stops at password protection (not encryption). Having said that, I have not yet investigated options, for instance I understand there is an App called iFortress. Meantime, I simply do not use the iPad to draft judgments (I don't want to leave it on the plane containing such ... acknowledging however that traditional paper drafts are even less secure!). In any event there is another reason for not drafting decisions on the iPad. The screen size is a bit limiting for this purpose, even when the iPad is linked to a separate keyboard. The above are not however reasons for eschewing the technology. The storage, research, annotation and note-making benefits alone are enough to constitute the use of iPads for Court hearing work a giant step forward.

Finally, it is sometimes the case that advances in technology simply invite the writing of more and more words. This needs to be managed closely by the Court. We Judges must not be afraid to impose page limits, time limits on cross-examination, and preach about succinctness, focus and the avoidance of repetition.

The future

My Court has now moved beyond the pilot and survey phase. Members of the Court have been excited by the advance. I understand this feeling has been shared by counsel and parties. The high water mark for me has been witnessing some older, not very computer-literate panel members and lawyers receiving a few hours of instruction, and taking to the process like ducks to water. Many of us are making use of i-Pads for our daily work, and increasingly for some of the smaller hearings as well as the big ones. Our area of work is known for its volume of legislation, national, regional, and local, and stacks of decisions, particularly those produced in large multi-issue multi-party cases. It is surprising the volume of such materials that can be stored in a 64 Gb i-pad along with all the evidence, submissions, and graphic exhibits!

What improvements might we see? I'm pretty happy with where things are at for the moment, but I can see the time coming when two tablets per user would be desirable, for instance where it is desirable to have two statements of evidence (say from a couple of opposing traffic engineers) open in front of one, at the same time.

Are there any losers? Having taken care of the self-represented litigant who does not have access to reasonable levels of skills and resource, the only losers should be paper manufacturers, couriers, and cabinet-makers.

Will we go completely paperless? Not in the short term. We are, like most jurisdictions, a Court of Record. We will need to maintain at least one full set of all proceedings on paper meantime, to satisfy the requirements of the Public Records Act 2005. In due time, if we can perfect our electronic systems, it may be possible to gain consent of the Chief Archivist under that Act to dispense with paper entirely. In order to achieve that however we would need to be able to demonstrate extremely robust and secure systems of storage and backup.

This initiative, which is now becoming business as usual, will hopefully ultimately be linked with interactive use of our Court's website which is slowly being revamped, and an electronic eFiling system to be run by the Environment Court as a pilot for Civil Courts nationally. The New Zealand Ministry of Justice is actively working on the latter, and will shortly call for expressions of interest from vendors of systems. Our ultimate aim is to link all of these initiatives in a quest to save trees! Not a bad thing for an Environment Court to aspire to?

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