Response to Consultation

RCS

Watermans Solicitors Ltd & Watermans Legal Ltd

Question 1

It is our opinion that the general presumption given is appropriate; this being that the majority of hearings should be heard remotely. The presumption that most hearings in family actions, in particular Child Welfare Hearings, adoption petitions and Hague applications, should be conducted in person is welcomed. As attendees at the JIS conference noted, the potential significance of decisions in child-related matters requires particular attention to be paid to the principle of open justice.

In relation to additions or deletions, we would disagree that there should be a general presumption that legal debates on the procedure rule raising a point of law of general public importance/particular difficulty or importance should automatically be heard in person. Presumably the intention is to enable the media, public and interested third parties to observe this type of proceeding without concerns arising about contempt of court issues. However, this perhaps could be a type of hearing where agents could advise the Court as to whether or not a person or remote hearing would be required, rather than it being specified without reference to the subject matter.

We would further state that in general, we consider the presumption should be that all Proofs in relation to personal injury as well as family actions should be heard in person as this is the only way to assess the credibility of a person's evidence. In addition, where there is reference to documents and/or diagrams etc., being in a position to refer to these in person is better facilitated in person rather than electronically and it would be submitted that all Proofs would be presumed to be heard in person unless an exemption applies or there is a good reason to use a hybrid model e.g. witnesses living abroad

Furthermore, the presumption that only proofs which raise a significant issue of credibility or reliability should be conducted in person raises the question of when and how the court will determine that there is such an issue. It is difficult to see how this could be properly determined without hearing the evidence of the witnesses. However, the decision as to mode of hearing would have to be made prior to the diet of Proof being fixed, so a concern would be that this amounts to a prior judgment of the quality of the witness' evidence before they have given it.

A further issue arises in relation to productions. The paper suggests that greater use could be made of electronic productions. This is accepted in principle and our experience is that this can work well, but it is important to recognize that such a requirement places a potentially significant burden on smaller firms which do not have the IT infrastructure or staffing to easily produce hyperlinked PDF files. It also potentially increases the cost to parties of having productions prepared, lodged and intimated (and it is not clear if SLAB would pay for work done solely to hyperlink and scan productions as opposed to framing inventories).

In our submission, the rules should provide for an application to be made to hear a proof in person (or in hybrid mode) for reasons other than credibility and reliability. Conversely, there are Outer House dicta to the effect that credibility and reliability can be assessed over videolink and while our preference would be for proofs to be held in person, provision should also be made to enable a proof in an ordinary or family action to be held virtually (in whole or in part) where appropriate.

Question 2

We have no comments to make in relation to the presumption for attendance by electronic means.

Question 3

We are of the opinion that the lodging of a Motion would be the most appropriate way of dealing with the change of the mode of attendance. An alternative would be to speak to the keeper but then the keeper would require to take instruction from the Lord Ordinary which would require the Lord Ordinary having information in front of him/her which would simply result in the agent having to carry out further work in order to have the hearing changed. In summary, we are of the opinion that this is the best way forward.

Question 4

We do agree that the Court should have the final say in relation to departing from the general presumption but this would be on the basis that a clear and reasoned explanation for doing so must be given and the opportunity (and a clear procedural mechanism) for agents to disagree with this change must be allowed for.

Question 5

We have no other comments to make.

Question 6

We are of the opinion that the general presumption in relation to the attendance for hearing in persons is appropriate albeit we would omit that all Proofs should be assigned to be heard in person and it would be for the agents to apply to the Court to have that presumption changed with reason. In particular, it can be helpful to have people in person to explain complex and refer to documents in person rather than at hearings. Our responses to question 1 apply here.

Question 7

We would make no further amendments to that list.

Question 8

We are of the opinion that a Motion to change the presumption of appearance is the most appropriate way of proceeding in this matter. The Motion would allow the Sheriff to make an informed decision as to whether or not it would be appropriate. It may be helpful for a practice note to be issued detailing the test that would be used in order to change the presumption which would be helpful to all parties and to ensure fairness and clarity.

Question 9

Whilst the Court should be in a position to change the mode of attendance if circumstances warrant a different choice to the general presumption, there should be a method of appeal for agents who disagree with that change to be heard in Court by allowing a period of time after the Interlocutor has been granted for an appeal to be lodged.

Question 10

The changes to the Ordinary Cause rules are welcomed and will hopefully allow for Court to be run more efficiently with less time being wasted by agents sitting in Court awaiting for their case to call. Perhaps Sheriff Courts could stagger the calling of these cases by having a certain number call at 10:00 and thereafter having another set call at 11:00 which would avoid so many agents sitting waiting as would be if they were at hearings at Court. It may be assumed that agents can attend to other work while they wait for the case to call but this is not always practical, especially when the court could telephone at any minute (and so, for example, the agent cannot take another call). Perhaps use could be made of scheduling technology such as is used in commercial websites (queuing systems etc). We have an opportunity to make the Court system much more efficient and save the hanging about which occurs on a regular basis.

It would also be helpful if there were a consistent approach taken to remote hearings across Sheriff courts i.e. advising agents of the mode of hearing, issuing contact details, whether the agent dials in or the court dials the agent, etc. Resolving this can be time consuming and inefficient for the agent and it can be difficult for clients to accept that this type of administration may require to be charged for.

It is a matter of some concern that the proposed rule changes apply only to RCS and OCR and the implication is that the consultation outcomes will then be applied to other sets of rules such as Summary Applications. The matters dealt with by Summary Application are extremely varied and in our submission this area of the rules requires separate consideration, particularly in relation to Adults with Incapacity applications where there are specific concerns about vulnerable witnesses and open justice.

On another matter the fixing of a Proof on aizzie basis should be avoided at all costs. This is particularly expensive and inconvenient for all parties concerned as they are allocated a week and it means that witnesses have to keep that full week free and expert witnesses will then also have to keep that full week free and will then charge for that time. This makes it very costly both for Pursuers and for Defenders and the practice with these Sheriff Courts should stop.