

RESPONSE BY DENTONS UK AND MIDDLE EAST LLP
TO SCOTTISH CIVIL JUSTICE COUNCIL CONSULTATION
ON MODE OF ATTENDANCE AT COURT HEARINGS

- 1 We welcome the opportunity to contribute to the Scottish Civil Justice Council's consultation on mode of attendance at court hearings. Our observations on the proposals are outlined below. These are informed by our substantial experience of advising clients on commercial disputes. We express no views on the types of proceedings where other consultees are better placed to respond, such as family disputes and personal injury litigation.
- 2 We make the following observations on the proposals:

QUESTIONS 1, 2, 6 & 7 – Cases suitable for an in-person hearing/ remote hearings

- 3 We welcome the proposals to put remote hearings on a permanent footing for some types of hearings, although we are concerned by the extent of the proposed shift of court business to remote hearings.

Procedural hearings

- 4 Our view is that remote hearings work well for procedural hearings and bring significant time and cost savings. We are supportive of the proposal that the default position for procedural hearings is remote attendance.
- 5 In order to deliver efficiency benefits, it would be helpful if the Sheriff Courts could adopt a consistent practice to the scheduling of remote procedural hearings that avoids a volume of cases being listed at the same time with representatives having a lengthy wait watching a screen until their case is called.

Evidential hearings – proofs/ PBAs

- 6 We do not consider remote attendance to be the best option for evidential hearings. We should not confuse having "got by" over the last 18 months using remote hearings with what is best for delivering justice to litigants in Scotland. We have several concerns with the proposals for remote attendance as the default position for some evidential hearings (and for all evidential hearings in the Commercial Court of the Court of Session).
- Firstly, in our experience, witness evidence, both from expert witnesses and factual witnesses, is less impactful when given remotely. We have experience of a hybrid proof where we had the opportunity to compare in-person and remote evidence and this was particularly evident.
 - Secondly, solemnity is lost in remote hearings, particularly when witnesses give evidence in their home environment. Giving evidence in court should be a solemn experience and that is best served by a purpose designed courtroom environment rather than home/ casual environment. We also have concerns that the more casual environment may affect parties' perception of justice being done.
 - Thirdly, a large number of people are usually involved in a proof/ PBA, giving rise to increased potential for disruption as a result of IT mishaps, particularly when witnesses give evidence from their homes and are therefore dependent on domestic wifi provision.

- 7 Courtrooms provide a more suitable physical environment for accommodating the many people involved in court hearings than homes or offices. We have recent experience of setting up a series of boardrooms with screens to accommodate counsel, witnesses and clients for a lengthy hearing. As well as being time-consuming to set up, this took over much of our boardroom suite. Courtrooms are purpose-built for such purposes.
- 8 As regards the draft rules, we do not consider the proposal that evidential hearings be held remotely unless "there is a significant issue of credibility of a party or witness which is dependent upon an analysis of the party's or witness's demeanour or character" to be workable. If there are conflicting accounts of factual events, such that an evidential hearing is required, then witness evidence always needs to be assessed for credibility and reliability in order to decide which account of events is to be preferred. Analysis of a witness's demeanour and character is central to that exercise.
- 9 Where particularly significant issues of credibility occur, they may not arise until the course of the hearing itself. How do the proposals deal with a significant issue of credibility arising in the course of a proof. Is there an option at that point to shift to an in-person hearing? How is the issue of witness contempt to be dealt with in a remote hearing?
- 10 It is therefore our view that in-person hearings should be the default for evidential hearings. We do not discount retaining the option of remote evidential hearings. On occasion, evidence may be needed on a particular point of relatively short order and having the flexibility to take that evidence remotely would be a useful option (on the application of either party or *ex proprio motu*).

Debates

- 11 Factors for and against remote hearings are more finally balanced in the context of debates. Overall, we are comfortable with the proposal that debates should proceed online unless they raise a point of particular difficulty or importance. Where they do so, an in-person hearing should be readily available.

Court of Session Commercial Court

- 12 We are not supportive of the proposal that all Court of Session commercial court business is held remotely as the default position. We are concerned that the shift of commercial business to a fully online court could diminish Scotland's attractiveness as a forum for the resolution of complex commercial disputes. In our view, litigants in complex cases should not have an online form of dispute resolution imposed on them.
- 13 Commercial judges already have a large degree of flexibility in determining how cases should progress in terms of their current case management powers. We are supportive of procedural hearings in the commercial court progressing remotely. There should not however be a default position that substantive hearings are held remotely. Parties should be asked to put forward their views as to whether a remote or in-person hearing (proof/ PBA or debate) is most suitable for resolution of the case as part of the discussion at the procedural hearing as to how the issues arising in the case should be disposed of.

QUESTIONS 8, 9 and 10 - Application for other mode of attendance.

- 14 We do not consider the proposed test to be applied to applications for a mode of attendance other than the default to be helpful or workable, particularly in circumstances where the

default is electronic attendance and a party makes an application to attend physically (new Rule 35.B.5 of the Rules of the Court of Session and Rule 28ZA.4 OCR 1993).

- 15 The proposed new wording is that the court/ Sheriff may direct that a person may attend a hearing by electronic means/ or physically only if "of the opinion that allowing a person to do so would not— (a) prejudice the fairness of proceedings; or (b) otherwise be contrary to the interests of justice." (Rules of Court of Session 35B.5(1) and (2) and Rules 28ZA.5(1) and (2) OCR). The consultation paper describes the test as a "reasonableness test".
- 16 The first difficulty with this language is that it tells us when an application should not be granted but does not provide guidance as to the considerations that the court/ Sheriff should apply when considering whether to grant the application. How should the court/ Sheriff approach that task? When will the application be considered to be reasonable? Secondly, we do not think situations are likely to arise where an application for an in-person hearing would prejudice the fairness of proceedings or otherwise be contrary to the interest of justice. If intended as a safeguard, it may be better suited to applications to have a hearing by electronic means when the default is an in-person hearing.

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