RESPONSE TO SCJC CONSULTATION ON DRAFT RULES ON MODE OF ATTENDANCE AT COURT HEARINGS

Introduction

Digby Brown LLP have offices in seven locations across Scotland: Aberdeen, Ayr, Dundee, Edinburgh, Glasgow, Inverness, and Kirkcaldy. We specialise in personal injury and clinical negligence work.

We would like to take the opportunity to make some general comments on remote hearings prior to answering the particular questions.

General Comments

There are a number of measures which have been introduced since the start of the pandemic and which certainly ought to be retained, if not developed further. The ability to transact business electronically has had a very positive effect. The signing and lodging of documents electronically and the ability to serve court documents using electronic means, have added greatly to the efficiency of the system.

The issue of virtual hearings is one which is much more nuanced.

There is no doubt that the use of virtual hearings in certain circumstances has added greatly to the efficiency of the court system. Their use in procedural matters has made a significant difference, in terms of time, distances to be travelled, and allowing practitioners, and other court users, greater flexibility.

Our firm's view is that the default position in relation to substantive hearings, ie proofs, trials, debates and appeals, ought to be that these should be in-person. We take the view that the default position in relation to procedural hearings, is that these ought to be conducted virtually, unless there is a good reason not to do so.

We think that there are a number of general points that ought to be considered.

- The approach should not be one size fits all. The draft rules envisage two separate lists of hearings, one of which entails an in-person hearing, and the other a virtual one. Such polarisation is not required. Whilst the rules do allow exceptions to the presumption, the procedure suggested is potentially cumbersome.

- The majority of cases will involve situations where a hybrid approach may well be appropriate. There will be witnesses whose evidence ought to be taken in person, and those who are perfectly able to give their evidence remotely. Indeed, the quality of evidence may be enhanced by the ability to take evidence from witnesses in a distant part of Scotland, or much further afield, and who may not be able to attend in person. This will vary from case to case. Parties ought to be capable of coming to an agreement as to whose evidence should be taken in person and whose remotely.

- Access to justice and transparency are two cornerstones of any civilised legal system. For many clients the ability to vindicate their legal rights in a litigation means having the ability

to give evidence in front of a judge, a sheriff, or a civil jury. We do note that sections 9 and 11 of the Court of Session Act 1988, and sections 41 and 63 of the Courts Reform (Scotland) Act 2014 entitle a pursuer to have his or her personal injury case heard by a jury. That right has been maintained through the pandemic with measures being adopted to allow jury trials to proceed with the use of remote centres. We note that the draft rules specifically allow for civil jury trials to be heard in person, and we would suggest that that principle ought to apply to all evidential hearings.

- Parties require to pay significant amounts to the Scottish Court and Tribunal Service for the privilege of accessing the courts. Court fees have increased extensively over the last decade. Between 2012-13 and 2019-20 the fee income received by SCTS went up by 54%. Those using the courts ought to be entitled to appear in person and to have the opportunity to present their case in the best way possible.

- We would also make the point that issues of open justice and transparency come into play. In the current climate, anyone who wishes to observe proceedings, requires to apply to the court for access. It is important that journalists and members of the public have the ability to have ease of access.

- As with other more substantive hearings, there is a benefit to younger, less experienced members of the profession having the ability to witness first hand how such hearings are dealt with. Whilst experiencing proofs, trials, debates, and appeals are clearly the more important, there are lessons to be learned from attending the daily procedural courts, whether that is to note the traits of individual sheriffs and judges, or simply to improve one's advocacy skills.

Experience

We have had experience of a number of virtual proofs that have been undertaken both in the Sheriff Court and the Court of Session.

A number of themes have emerged.

Quality of Webex links for Evidence

This can be variable. Most witnesses' evidence was able to be taken without issue. There have been instances where significant difficulties arose. In a recent Court of Session proof, evidence was being taken from a number of police officers. They were based at a police station in Glasgow. The connection was so poor that the presiding judge eventually ruled that their evidence ought to be taken from our Glasgow office and the officers had to travel there. Whilst it is accepted that giving evidence remotely, especially in the case of police officers and other public servants, may be a much more efficient use of time, it must come with the appropriate safeguards in terms of quality of link.

We have had instances where evidence has been given by way of a mobile phone. That is simply not acceptable. If, as is often the case, a witness is being asked to look at documents, or as in one of our

cases, CCTV evidence, the ability to do so whilst giving evidence is significantly compromised, and casts some doubt on the quality, and indeed reliability, of that evidence.

In another case our practitioner's home Wi-Fi connection failed midway through an evidential hearing. He lived close to the firm's Edinburgh office and was able to conduct the remainder of the proof from there. However, unnecessary time and expense would have been incurred, had he been unable to access an alternative connection.

Communication within the Legal Team

This is an important aspect. Whilst we are aware that some teams set up separate email/text /WhatsApp arrangements, it is undoubtedly better for the running of a proof that the legal team be in the same place with the ability to interact immediately and to react to developments. We are aware that teams will often assemble at 142 High Street, Edinburgh, and the presiding judge or sheriff will be sitting in chambers a matter of yards away.

The Experience of Clients and Witnesses

We have spoken with a number of our clients and witnesses who have given evidence in virtual hearings, as well as practitioners within the firm who have conducted these hearings.

A variety of views have been expressed. Certainly some found the experience of giving evidence from their own home to be positive. They felt more comfortable and relaxed and one client described the experience as "less formal".

In one particular proof, the pursuer was elderly and unfamiliar with technology. He required assistance from a family member in order to participate in his proof. This was a particular source of concern for him and one which is likely to be experienced by those parties unfamiliar with recent advancements in technology.

Any apprehension of cross-examination seemed to be lessened by the ability to give evidence from home.

Generally, the witnesses we spoke to were comfortable with giving evidence remotely. As with clients, the particular technology could be an issue. Savings in terms of travel and time were highlighted.

Interestingly, one of the expert witnesses we spoke to was unsure as to who all the participants were on the screen and pointed to the advantage of an in-person hearing having the ability to observe body language. She found the cross-examination to be "less intense" than in an in-person hearing. Her view was that in straightforward cases remote hearings would certainly be possible but would not be appropriate for more complex cases.

Of course, there is a balance to be struck between having witnesses feel at ease in giving their evidence and ensuring that the environment is appropriate for someone who is on oath. We are aware of instances where parties/accused persons have appeared in remote hearings from a public

place, eg a train, or have clearly not had regard to the formal requirements of giving evidence, eg eating and drinking during the process.

Our practitioners report that in-person hearings ought to be the default position. Whilst they saw some of the benefits, there were certain issues which had a bearing on the running of the hearing. Technical difficulties impacted in a number of cases. There were particular issues with parties and witnesses giving evidence by mobile phone, as mentioned above. There were instances of connections being lost at crucial points and generally, it was found that the flow of questioning, particularly in cross-examination was not as effective or smooth as with an in-person hearing.

Several of our practitioners highlighted the importance of the courtroom set up (e.g. the deliberate elevation of the sheriff) in creating an appropriate and necessary sense of formality. Practitioners and several witnesses reported the risk of dilution of a sheriff's authority in proceedings if he/she appears as a picture on a screen.

We think it would be of value for independent extensive research to be carried out into the experiences of all court users, ie parties, agents, counsel, witnesses, court staff, sheriffs and judges.

<u>Cost</u>

There is undoubtedly an increased cost in preparing for and conducting a hearing virtually. These include:

- the additional liaison with witnesses, both lay and expert, in explaining the procedure involved, and the provision of documents/productions in the format which will be required for the use of the court
- additional work involved in liaising with the other side in preparing Joint Bundles comprising all the productions
- additional liaison with the Court, providing contact details for all witnesses, testing the Webex links

We have had our law accountants consider a number of cases which went to proof by way of virtual hearing, and they have calculated that the additional cost element in each case was between £2,000 and £3,000, with VAT to be added.

The wider issue of resource is one that ought to be considered. There is little doubt that remote hearings create extra demands on the court staff. This often involves work having to be carried out at a point when there is still some uncertainty as to whether the proof will actually go ahead. Practical issues such as making productions available to the right witness at the right time do involve a degree of resource which is not required in a physical setting. We are aware that there have been suggestions that court resource be dedicated to this aspect. We suspect that is unlikely to be practically possible.

We are also conscious that the availability of remote hearings can be restricted. Much of this firm's experience is within ASPIC. Generally, there is only capacity for one virtual proof to be heard each week. Theoretically, it is possible for more than one to be heard physically, depending on availability of court rooms and sheriffs. The knowledge that only one proof per week can proceed can affect behaviour. If it is known that a particular case will have priority, and will definitely go ahead, there is less incentive for parties to settle, as they know it is extremely unlikely their case will go ahead.

Rules of the Court of Session

Question 1 – For the categories of case listed as suitable for an in-person hearing: Do you think the general presumption given is appropriate? Would you make any additions or deletions and if so why?

We do not agree that the general presumption is appropriate. We take the view that the proposed categorisation is too unwieldy. The default position ought to be that substantive hearings, i.e. proofs, civil jury trials, appeals, debates, and judicial review hearings, take place in person. The option should be made available for parties to agree that in a particular case, a remote hearing should be fixed, or that the evidence of certain witnesses be taken remotely. It is entirely possible to place the onus on parties at a particular point in the proceedings to make their views known, eg in personal injury cases, at the point of the Pre-Trial Meeting, parties ought to identify what evidence can be agreed, and in the absence of such agreement, which witnesses can give their evidence remotely. If there is a dispute, then the default position would apply, though the matter could be brought before the court if necessary.

Similarly, in commercial cases, which involve a higher level of case management, there are opportunities within the procedure for decisions to be made as to which witnesses should give evidence in person, and which remotely.

The proposed wording in relation to credibility issues is very narrow. Often the principal issue in a proof is reliability. We would make the point that each case turns on its own facts and circumstances and consequently we emphasise that the default ought to be in-person.

In relation to debates, reclaiming motions and appeals, the test set out in the draft rules references a point of law of general public importance or particular difficulty. This is a high test and one which may be difficult to meet. The subjective nature of parties' analysis of cases may well lead to much time being spent arguing on which mode is appropriate. We do note that since the issue of the consultation paper, the Lord President has confirmed that Inner House reclaiming motions and appeals will now be heard in person. The principle of consistency would suggest that this approach be followed in relation to all appeals, and we would argue to debates.

Question 2 – For the categories of case listed as suitable for attendance at a hearing by electronic means (both video or telephone attendance): Do you think the general presumption given is appropriate? and Would you make any additions or deletions and if so why?

As stated above, we take the view that procedural hearings ought to be dealt with remotely. We would suggest that, if at all possible, these are conducted by video means. We are aware that telephone hearings have been used in certain proceedings for a number of years. However, there can be issues in relation to whether all parties are present, and the ability to refer to documentation is limited. Telephone hearings should only be used in the most straightforward of circumstances, and where video attendance is not possible.

We would like to specifically mention opposed motions. There may be occasions when it would be appropriate for an opposed motion to be heard in person, eg where it is anticipated to last a significant length of time. One aspect to consider is the extent to which a matter in dispute and the subject of an opposed motion could be dealt with by way of written submission.

Question 3 – The parties can apply to change the mode of attendance if their circumstances warrant a departure from the general presumption: Do you think lodging a motion is the right way to do that? Please explain your answer.

We take the view that parties are best placed to assess whether evidence should be taken in-person or remotely. As stated above, there are ways in which parties can engage, in a responsible way, to identify which cases, or which witnesses, should be heard in person or remotely. We would suggest that in the event that there is a dispute over the mode of hearing that requires to be resolved, then the court should be able to adjudicate by way of an opposed motion hearing. If the dispute was in relation to a particular witness, and the position of one or other of the parties was found to be ultimately unreasonable in insisting that a particular witness give evidence in person, then the court would have the power to reflect its view in an appropriate finding of expenses in relation to that attendance.

Question 4 – The courts can change the mode of attendance if circumstances warrant a different choice to the general presumption: Do you agree that the court should have the final say? Please explain your answer

As indicated above, we take the view that the primary decision should be that of the parties. In the event that there is a dispute, the court should adjudicate. We do not think that the court should have the power to change the mode of hearing in the absence of an application by one or other of the parties to do so. However, we maintain the view that a one-size fits all approach should not prevail. Each case will differ, and within each case there will be witnesses whose evidence can be taken remotely.

Question 5 – Do you have any other comments to make on the proposed changes within the Rules of the Court of Session?

We have nothing to add to the general comments made in our opening section of this submission.

Questions 6-10

These mirror the previous questions and our position is the same as in relation to the Ordinary Cause Rules.