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Response by Ledingham Chalmers LLP to the Consultation Paper on the Rules covering the SCJC Consultation in relation to Remote Hearings

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Introduction

1. Our firm which has offices in Aberdeen, Edinburgh, Inverness and Stirling carries out litigation work across Scotland. In particular, we deal with litigation work in Sheriff Courts throughout the country, as well as in the Court of Session. In addition to what may be termed "normal adversarial" litigation, we also deal with issues such as guardianship applications and Adults with Incapacity related cases where Hearings take place in the Sheriff Court. The majority of the litigation work our firm carries out is in the civil sphere.

2. This response is submitted following dialogue within our firm involving solicitors who have substantial experience of carrying out civil litigation in Courts across Scotland. Two of our solicitors also have very recent experience of acting in Court of Session Proofs which took place remotely. One of those was a three-week remote Proof in the Commercial Court which took place in early April 2021.

3. Except where the contrary is clearly stated, the observations contained in this response will relate equally to Court of Session work and to Sheriff Court work.

4. Before the specific queries contained in the consultation are considered, it is worth highlighting that the theme of our response is to express extreme concern at the apparent "default" rule to the effect that most civil litigation will in future take place remotely. It is our view that that is a regrettable and short sighted proposal, the advantages of which are limited to only certain types of Hearing, and in particular purely procedural business. For reasons which will be further discussed the advantages of proofs/ substantive Hearings, and more complex Hearings such as complex Opposed Motions taking place remotely are vastly outweighed by the disadvantages. The proposal is not in keeping with any desire to have a modern and enviable justice system fit for the 21st Century.

5. We have had an opportunity to consider the response to the Consultation Paper issued both by the Faculty of Advocates and also by the "Junior Junior" Bar within the Faculty and agree entirely with all of the responses contained therein.

6. It is recognised that the emergency measures which had to be put in place were necessary and desirable to enable the civil justice system to continue during the pandemic. This meant that practitioners and litigants had to make the best of what was available the only alternative being that the civil justice system would grind to a halt. All Court users learned valuable lessons. Now that we are reaching the end of that emergency period, there should no longer be any basis for a "default" that most civil Hearings will take place remotely unless some compelling reason is put forward to the contrary.

7. On the contrary the default should be that remote Hearings will be the usual mode of attendance **only** for purely procedural Hearings, By Orders or short Motions which will not be determinative of the outcome of the case - unless at an appropriate juncture in the proceedings the parties and the Court make representations as to the mode of attendance which can be properly weighed up by the Sheriff of Judge. Such an outcome may include a "hybrid" Hearing where parts only of the case are heard remotely.

Observations which relate to each element of the questions posed in the Consultation

The following observations are relevant to each of our responses below and we will not repeat them in response to each question. The principal concern we have (in conjunction with most civil practitioners) are summarised below Each of these points, both individually and cumulatively, points strongly away from there being any justified basis for a "default" presumption that substantive Hearings and other important Hearings likely to be determinative of the outcome of the litigation should take place remotely: -

A. Remote Hearings where evidence is heard or where substantial arguments are being advanced likely to be determinative of the outcome of the case require interaction between the Bench, Counsel (and/or solicitors) as well as the ability to take immediate instructions and be able to explain a particular issue to a client. There is no substitute for such interaction taking place in a live courtroom setting. Such interaction is far less likely to be satisfactory or even possible in a remote setting. In a remote Hearing, those participating may be more reluctant to seek to make contributions or interruptions during the Hearing. It is believed that judges have commented similarly in relation to having a sense of reluctance to intervene.

B. The whole concept of a remote Hearing whether it be evidential or otherwise likely to result in the case being wholly or partly decided in favour of one party offends against the principle of "open justice" which is a cornerstone of the justice system in a democracy. Members of the public are entitled to know of and observe the civil justice system in action. Litigants who after all now contribute very substantially to the financing of the system will have a reasonable expectation of being able to witness it and contribute at an appropriate time. It is much more difficult for any interested parties, the press and other potential observers to participate in a remote Hearing. It has hitherto been common practice, for example, for law students and school pupils who may be considering embarking on a career in the law to attend Court to witness "live" Hearings. There is no substitute for such observers witnessing a real Court case in a live setting.

C. Remote substantive Hearings will lead to a sense of isolation, particularly for younger and less experienced lawyers or advocates. In addition, spending a period of hours (even with breaks) staring at a screen whilst trying to concentrate on a demanding task and making judgment calls in relation to questions to ask/not ask, or witnesses to call or not call, remembering when to "mute" and "unmute" is simply not desirable unless there are other compelling reasons why in the particular case a remote Hearing is more satisfactory.

D. The desirable possibility of there being face to face discussions immediately before the Court convenes or during breaks in the proceedings (e.g. to discuss the order in which certain witnesses may be lead, seeking to narrow down the argument or even to discuss settlement) will be very much restricted. In a remote environment such discussions could only take place in advance of the Hearing by separate means. That will be even more difficult in a case with several parties as compared to only two. That difficulty is a particularly compelling one which would not arise in a "live" Court setting.

E. Clients also have a reasonable expectation in most cases of being able to attend Court to witness a Proof or (for example) a substantive Hearing in a Judicial Review. After all they pay for the services of their representatives and in most cases also for the use of the Court facilities. They will have a reasonable expectation of being able to engage in dialogue with their representatives before and during the litigation, including where breaks in the proceedings may take place. That will be far more difficult in the case of remote Hearings. In the Court of Session each party is currently levied a Court fee of

approximately £2,000 per Court day in the Outer House and over double that figure in the Inner House. Litigants paying these large sums will rightly question whether they are receiving value for money if their involvement is limited to watching a screen with little or no opportunity to interact. To describe having to pay such sums in the circumstances envisaged as "value for money" would be preposterous.

F. The proposed default rule fails to take account of inevitable practical difficulties of which we and most solicitors and counsel have direct experience. In any litigation it is rare for everything to go to plan. That is certainly true in relation to technical issues. Even if the technology is set up to work perfectly, there are innumerable reasons why difficulties may still occur without any fault of the part of the parties. For example, in the three-week Proof which took place in April 2021, there were several occasions where an internet connection being used by one of the parties failed, where the video screen of certain attendees failed or where witnesses had difficulty connecting. There were also difficulties on many occasions with poor audio quality. The advocates had to be alert to these difficulties including opposing counsel suddenly "disappearing" whilst also having to concentrate on the task in hand. The end result of these technical problems occurring is likely to be that the overall duration of the Hearing will be longer.

G. It is unrealistic to suggest that all litigants and parties' representatives are well versed in the use of webex technology. Whilst most firms used to civil practice will have the necessary expertise and facilities for remote attendance, many witnesses will not and will require additional assistance or even hardware at the expense of someone. They may not have suitable facilities at their home or place of work to attend without interruption and will have to "hire" somewhere or travel to the office of one of the solicitors. Such witnesses also need to be put on "standby" with a series of phone calls and text messages needed to ensure they know when to click "Join". In some cases, the room being used by the witness will not have good phone reception. In a case involving only one solicitor on each side, marshalling witnesses to attend remotely given such difficulties creates an additional and unreasonable burden.

H. It is of course quite possible and appropriate for there to be a "live" proof at which certain witnesses still attend remotely using video technology. That is already a feature of the legal system and works well – for example for witnesses including experts who may be based abroad or who may have difficulties in attending Court such as the time taken for travel. If there is a technical problem in such situations the case can nevertheless proceed while the issue is resolved with perhaps witnesses being taken in a different order. If all parties are "remote" as soon as technical issue occurs the case has to be halted completely until the issue is resolved.

I. In the April commercial proof to which we have made reference there was an unfortunate example where a witness due to give evidence on a particular day was admitted "early" to the Hearing without any fault on his part. The precise reason is unclear. Although he immediately suspended his connection he was then questioned on his "early" attendance by counsel for the other party with the insinuation that he had done so deliberately. This is simply one of many examples of things that can go wrong where technology is concerned.

J. Whilst telephone Hearings no longer seem to be put forward as a serious option (except perhaps where no other option is available) it is worth pointing out that before webex was properly in use this year we can also recall certain telephone Hearings where it was extremely difficult even to hear what the presiding Judge was saying.

K. A particular difficulty arises in remote Court Hearings in relation to displaying documents. Whilst in cases which may have a limited number of documents, screen sharing can be

relatively easily dealt with, in cases involving multiple documents managing these in a suitable manner will extremely difficult and onerous for the advocate or solicitor conducting the case, particularly if (as often occurs) there may be the need for documents to be lodged during the course of a Hearing.

L. The interests and wellbeing of younger solicitors and advocates need to be considered but in our view have been left out of account in the consultation. They are likely to be at a particular disadvantage in participating in remote Hearings and also being able to learn from their more experienced colleagues. We agree with the response by the Junior Bar at the Faculty of Advocates in relation to the particular impact on junior lawyers, both in relation to their lack of "visibility" during remote Hearings and the sense of isolation which remote Hearings may cause. There simply no substitute for younger members of the profession (as in any other profession) watching and learning by being able to witness more experienced colleagues in action. In cases involving counsel, solicitors will be prevented from "tugging on the gown" to raise an important matter which cannot wait until a later stage.

M. The prospect of remote Hearings becoming the "norm" may also discourage practitioners from deciding to follow a career in civil litigation. Anecdotally it is our understanding that the same view has been expressed by Sheriffs and Judges.

RCS

Question 1 – For the categories of case listed as suitable for an in-person hearing:

- **Do you think the general presumption given is appropriate? And**
- **Would you make any additions or deletions and if so why?**

No – that the general presumption is appropriate. See more detailed responses above and below.

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?**

No. See below.

Telephone Hearings should in any event only be used for very routine and non-contentious Hearings or where the Court has already heard detailed arguments on a previous occasion.

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**.

Yes, as it is the most straightforward way for the matter to be brought before the Court. It should, however, be made clear that the Motion can be lodged by one party, or by both on a

joint basis, and also that the mere fact parties are agreed that an exception to the rule should be made in their particular case does not bind the Court to order as moved.

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**

Yes, because ultimately it is for the Court to regulate and determine its own procedures. However, any decision to vary or maintain the general presumption in the face of a Motion to the contrary from either or both parties, ought to be fully and properly reasoned and explained.

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

- For reasons already explained there should be a "default" that only procedural or other Hearings not determinative of the outcome of the whole or part of the case should be remote. That "default" would be subject to alteration in appropriate circumstances.

- When framing a Motion seeking further procedure or otherwise seeking to fix a Hearing, the Motion should state whether it is suggested that the Hearing is to be in person or by remote means, and setting out the provision or provisions upon which reliance is placed as well as submissions as to why the Hearing should be in person or remote. Any opposition should similarly set out the provision or provisions relied upon and submissions.

OCR

Question 6 – For the categories of case listed as suitable for an in-person:

- **Do you think the general presumption given is appropriate? and**
- **Would you make any additions or deletions and if so why?**

No. See more detailed responses above.

Question 7 – 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?**

No. See other responses below and above.

Question 8 – 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?**

- **Is there any need for an application form to accompany the motion (in similar terms to RCS)? Please explain your answers**

Yes, see answer to Question 3 above.

Question 9 – 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**

Yes, see answer to Question 4 above.

Question 10 – Do you have any other comments to make on the proposed changes within the Ordinary Cause Rules?

See responses above.

JC 15.11.2021