MACROBERTS

RESPONSE FROM MACROBERTS LLP TO THE CONSULTATION PAPER ON THE DRAFT RULES COVERING THE MODE OF ATTENDANCE AT COURT HEARINGS ISSUED BY THE SCOTTISH CIVIL JUSTICE COUNCIL

About MacRoberts

Established over 150 years ago, MacRoberts is an independent, full service, Scottish commercial law firm, with 38 partners and over 160 staff. Our legal expertise encompasses all sectors of the Scottish economy and we are recognised as one of Scotland's leading and award winning commercial law firms.

We practice in the Scottish courts, both in the sheriff courts and Court of Session, with a particular emphasis on commercial litigation (including construction litigation).

We also own Yuill & Kyle, a volume debt recovery business, involved in raising large scale debt claims (generally simple procedure).

Introduction

We welcome the opportunity to respond to the consultation. We hope our response is seen as constructive, and reflects our experience in pursuing and defending cases, both during the COVID crisis and prior to that.

It is notable (and welcome) that as from today, Inner House substantive business will be conducted in-person unless the court directs otherwise and Outer House substantive hearings may be allowed in-person "on cause shown". It will be instructive to see the effect of this guidance change and the experience of court users.

Generally, while we welcome the discussion points the consultation has raised, it does seem unnecessary and inadvisable to introduce permanent and far reaching rule changes at this time beyond very specific and limited aspects. To do otherwise would risk civil litigation in Scotland being seen as inferior or subordinate to criminal litigation in Scotland, or civil litigation in England and Wales.

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 consider that the general presumption given in the draft rules is appropriate. In our view, the draft rules do not strike the correct balance between hearings which are presumed to be in-person, and those which are to be held virtually.

The draft rules presume that the majority of hearings in civil actions should take place virtually. We do not consider such a presumption to be appropriate.

We consider that the conduct of procedural business by virtual means has been largely successful. In our view, it would be to the benefit of parties to a litigation, agents, counsel and the court, for procedural business to remain virtual.

However, we consider that the presumption should be that any substantive or determinative hearings should be held in-person, unless the parties themselves agree otherwise.

We consider that the court user's experience is far superior when a substantive or determinative hearing is held in-person. From our experience, everyone involved in a litigation benefits from these types of hearings being held in-person as one cannot virtually replicate the in-person engagement with the court, colleagues or witnesses that one benefits from in an in-person hearing.

It is also far easier for litigants to provide instructions to agents and counsel, and to engage with the proceedings, in-person. Further, we consider that advocacy, examination of witnesses and judicial decision making all benefit from these types of hearings being conducted in person. We do not consider that it is to anyone's benefit to remove the human element from litigation.

We should note that we agree that the types of actions listed in section 35B.2.(2)(a) and (b) (family, adoption, children etc) as well as civil jury trials, should take place in person.

However, we find it difficult to ascertain the rationale as to how the SCJC have drawn the dividing lines between hearings which are presumed to be held in-person, and those which are presumed to be held

virtually. It appears to us to be almost entirely subjective. For instance, why has it been determined that it is reasonable for civil jury trials to be held in-person, but proofs in civil actions are to be held virtually? It is not immediately clear to us why these two types of hearings are to be treated differently.

If a civil proof is to be held in-person, the draft rules set out that there must be significant issues of credibility of witnesses. We consider this proposed test to be far too subjective, and generally inadequate to properly determine the appropriate mode of attendance.

Firstly, it is for the court to analyse the credibility of reliability of witnesses <u>after</u> having heard evidence. Secondly, a significant majority of civil proofs involve some issues concerning credibility and reliability, many of which do not arise until evidence is being led. Thirdly, it is inevitable that parties will engage in a significant amount of litigation concerning these issues as the courts seek to determine where one draws the relevant lines. Fourthly, we consider that it should be for the parties to determine if it is appropriate for a Proof, or any other evidential hearing, to be held virtually. It strikes us as being entirely reasonable for parties to be able make that determination in most cases.

In any event, as we note above, we consider that the presumption should be that any hearing involving witnesses should be held in-person.

We also consider that the proposed test to be applied in relation to determining if a debate, reclaiming motion or appeal is to be held in-person (that the proceedings must raise a point of law of general public importance or particular difficulty) is very subjective and a very high bar. This is not least as it is, in effect, the same test as for any secondary appeals. In those circumstances, that test is intended to be a high bar.

The tenor of the rules in this regard suggests that legal debates and reclaiming motions are presumed to be held virtually. It is not immediately clear to us why the presumption should be so. Our experience of running legal debates, appeals, and even substantive motions, virtually is that they function far better in person. Leaving aside wider issues with technology that are often experienced in virtual hearings, we are of this view as we consider that having these hearings held in person provides significantly enhanced abilities for agents to interact and engage with the court, deal with authorities and make effective submissions. This is all to the benefit of our clients and all parties to a litigation.

Further, it is not immediately clear to us why the proposed 'test' is even determinative as to which mode of hearing is appropriate. We also consider that the subjective nature of the draft rules in this regard may also lead to a slew of hearings in which parties argue as to whether or not an action raises a point of law of general public importance or difficulty, and what those terms mean, in the circumstances.

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?
- Would you make any additions or deletions and if so why?

In terms of our submissions to Question 1, we do not consider that the general presumption given is appropriate. Whilst we consider that it is appropriate for procedural business to be conducted virtually, we consider that the presumption should be that any substantive or determinative hearing is held in person, unless the parties agree otherwise.

For the avoidance of doubt, this includes, *inter alia*, any determinative hearing on a petition for judicial review, all civil proofs, all legal debates, and all reclaiming motions and appeals.

Our reasons in this regard are set out in our submissions to Question 1.

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 consider that any such application should be made by way of motion.

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

We do not consider that the court should have the final say. As we have set out in our submissions to question 1, we consider that any move away from the presumed mode of attendance should generally

be determined by the parties themselves. The parties should be empowered to take the decision as to how their case is to be litigated. The court's role should be to adjudicate on any differences between the parties in relation to moving a hearing which is presumed to take place in person to virtual means.

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

No, beyond our comments in relation to Questions 1 to 4, we do not have any further comments to make.

Ordinary Cause Rules

Question 6 - 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 consider that the general presumption is appropriate and our response and comments to Question 1 above should be applied *mutatis mutandis*.

In addition, we note that while the Court of Session has largely benefited from the majority of its remote hearings being conducted via (videoconference) WebEx, the same is not applicable for the Sheriff Courts which continue to use teleconference for procedural and, in some events, substantive opposed motions (e.g. motions for summary decree, motions for diligence on the dependence, etc.) akin to legal debates. It has been our experience that Sheriff Courts have not had the technological capability to accommodate WebEx hearings were parties have requested these in view of the complexity of the matter to be heard at the relevant hearing. Nothing in the proposed draft rules assures us that "*attendance by electronic means*" has the meaning of videoconference. While we would prefer for the mode of attendance at substantive hearings and opposed hearings to be a question for the parties (as stated above in response to Question 1), the draft rules signal that teleconference is unlikely to be phased out as "electronic means" for attendance. At the very least, substantive and opposed hearings should be mandated to be conducted via videoconference. Continuing to conduct such hearings by teleconference is detrimental to the justice process as the same becomes disembodied and it has been our experience that this leads to less interaction and engagement from all parties involved.

While we maintain that it should be for parties to decide the mode of attendance and for the Court to adjudicate on any dispute arising between the parties therefrom, we note that draft Rule 28ZA.4(4) (which mirrors draft Rule 35B.4(4) in relation to the Court of Session) limits parties' opportunity to address the Court on applications for a change of the mode of attendance. A motion under this provision is to be decided by the Sheriff in chambers without an oral hearing. The Sheriff does not themselves appear to have a discretion to call a hearing on the matter. We anticipated that in certain instances, this type of motion would require elaboration and advocacy which cannot be conveyed on paper alone. We further anticipate that if parties are not provided with an opportunity to address the Court on this, there might be a number of unnecessary and avoidable appeals on procedural matters.

Finally, it should be noted that we do not agree with the general presumption to be interponed via the proposed changes in the Rules as it fundamentally shifts the responsibility for establishing a stable environment during the court process from the Court to parties and agents. Under the proposed regime, agents would be required to assess clients' and witnesses' ability to access electronic platforms and the suitability/operational viability of their devices and broadband. This is an undue burden which should not be imposed on the legal profession as access to the Court is a fundamental right of litigants which the State must facilitate (the SCTS in this case being a manifestation of the State). We further echo the Lord Chief Justice's statement of 1 October 2021 made in relation to the justice system in England & Wales:

> "*It is important that judicial powers are exercised from courts and tribunal buildings. While it was necessary to make exceptions at earlier stages of the pandemic, that must now once more be the default position. No judge or magistrate should conduct hearings from home (or premises other than courts and tribunal buildings) save in exceptional and unavoidable circumstances.*"

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?
- Would you make any additions or deletions and if so why?

Our response to Question 2 is to be applied *mutatis mutandis* in response to Question 7. We also refer to our comment in response to Question 6 on the use of teleconference for substantive/opposed hearings.

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, we consider that any such application should be made by way of motion. The motion should be accompanied by an application form similar in terms to the proposed draft Forms 35B.4-A and 35B.4-B.

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

Our response to Question 2 is to be applied *mutatis mutandis* in response to Question 9.

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

No, beyond our comments in relation to Questions 6 to 9, we do not have any further comments to make.

MacRoberts LLP

15 November 2021