Response by Optimum Advocates to the Scottish Civil Justice Council's Consultation: Rules Covering the Mode of Attendance at Court Hearings

General comments

The benefits of hearings by electronic means

1. As is acknowledged in the consultation paper, electronic attendance at court hearings has benefits in respect of reduced travel time and inconvenience. It is agreed that there are work/life balance benefits to those appearing in court from removal of unnecessary travel for procedural hearings. However, such benefits to individual counsel and solicitors are of limited importance if the operation of justice was to be adversely affected.

2. In a wider sense, counsel's experience during the period since March 2020 has been that they have been able to provide services to some clients to a greater extent than would have been possible if all hearings were 'in person'. Counsel have been instructed to appear at hearings when, had that hearing been an 'in person' hearing, the client would not have been represented by counsel. Recurring examples are appearing at pre-proof hearings, procedural hearings, child welfare hearings or opposed motions in rural courts when, despite important issues relating to the expeditious progress and fair outcomes in the case, the funding implications would render counsel's instruction on an in person basis unaffordable. Prior to the development of hearings by electronic means during the pandemic, the reality was that clients in rural areas of Scotland had a reduced ability to instruct counsel for hearings in which counsel would otherwise have been instructed. Counsel are aware of the benefits of hearings by electronic means extending to hearings in which the principally instructed solicitor can, now, also appear more readily. In short, the development of hearings by electronic means has had a significant benefit in extending access to justice across Scotland and ensuring that those who are principally instructed for a client can appear at important procedural hearings.

3. The consultation paper also suggests that hearings by electronic means are more efficient including that, rather than sitting in court, other work may be done from a remote location (either off camera or pending a phone call) by the solicitor or counsel. Again, this benefit is acknowledged although it should not be overstated. Clearing a diary for a case to call and waiting for it to then do so impacts on counsel's ability to accept and undertake other work. There are also significant

issues regarding the efficiency of hearings by electronic means in practice as are touched on below.

4. These benefits and the advances in usage of technology during the pandemic are such that it is appropriate that the courts continue to have an ability to hold hearings by remote electronic means.

The difficulties with hearings by electronic means

5. Significant concerns arise about an adverse impact on the quality of the hearing and, potentially, the advocacy. One of the most fundamental lessons taught to every court practitioner is to 'watch the pen' of the decision maker. Hearings by electronic means limit that possibility. The multitude of faces on screen renders the advocate unable to know if the decision maker is even looking at them during submissions. Knowing if the judge has the production to which you are referring is problematic. The advocate does not 'get the air of the court'. For any case in which there is any fundamental dispute, the quality of advocacy is reduced. The likelihood of justice being served and being seen to be done is, accordingly, reduced. These issues are multiplied significantly if the remote hearing is conducted by telephone.

6. Throughout the pandemic, there has been an unprecedented reliance on written submissions to supplement hearings by electronic means (as is addressed in paragraph 39 of the consultation paper). Indeed, this has, at times, replaced any form of hearing with sheriffs deciding matters on the papers. There are concerns about funding for written submissions in relation to routine cases (as opposed to appeals, debates etc), payment for which is not included in the SLAB tables of fees. Careful consideration requires to be given to how legal representatives are to be paid for work undertaken in producing written submissions to assist hearings by electronic means. If payment is not to be included in SLAB tables or form part of assessed expenses, the provision of such submissions is not likely to be maintained. The perceived efficacy of hearings by electronic means at the present time may be illusory.

7. The benefit that remote working enables more experienced practitioners to be more available across different jurisdictions in the same day also has a negative impact. Junior lawyers (especially trainee solicitors but also newly called counsel) may not gain crucial experience from appearing in court if more experienced colleagues can cover a greater number of cases. There is also a significant concern about crucial experience being denied to those who require that in order to

develop their necessary advocacy skills. If hearings by electronic means become the standard for the majority of work (including opposed motions), there is a significant concern that a practitioner's first time standing in a court room may be when they appear in a debate or proof. The ability to learn from appearance in a courtroom in less demanding hearings shall be lost. That shall impact on the quality of service to the client.

8. Counsel's experience is that technological problems have routinely disrupted hearings. This is for a multitude of reasons including lack of necessary equipment/wifi and technological knowledge on the part of litigants and, on occasion, professionals. Many civil hearings, especially family law hearings, involve vulnerable members of the public with limited resources and a move to hearings by electronic means prejudices such litigants. Counsel's experience is that even now, 20 months into the pandemic, hearings are regularly disrupted by technological hiccups. That is amplified in proofs when witnesses have limited technological skills or equipment.

9. The telephone system in the sheriff courts has a maximum participant limit which regularly excludes all participants in cases in which counsel appear. Examples have been given by counsel of them, their instructing solicitor and/or their client not being included in telephone hearings because the maximum number of participants has been reached. If the telephone system cannot operate to allow all participants to actually appear in a hearing, it simply should not be used.

10. The ability to refer to documents, even in routine hearings, is limited. Hearings are delayed and disrupted by electronic documents not being 'on screen'. The ready solution of handing papers to a judge is lost. Reference to documents is a particular problem in proofs where witnesses require to access productions without the assistance of a court officer. Delay and confusion has occurred causing inefficiency in procedure and unnecessary anxiety for witnesses. The alternative of screen sharing documents minimises the witness's face when they are giving evidence and requires the witness to have a suitable device large enough to read what is put on screen. In short, the quality of the evidence presented to the decision maker may be fundamentally prejudiced by the mode of proof.

11. Hearings have lost formality. There is a risk of the court's authority being undermined. Examples given by counsel indicate that this is a greater problem with party litigants who do not face the court's authority directly from the bench. There is a particular concern about the informality of telephone hearings.

12. Informal discussions between legal representatives prior to a court hearing have all but disappeared. The possibility of a five minute discussion in the robing room which would narrow issues is lost.

13. Collegiality has been adversely impacted by our absence from libraries and court buildings. Removing all but the most intense of hearings from 'live' hearings risks the profession descending into isolation from those we learn from and share experience with. Legal professionals learn from watching each other in court and informally speaking about cases. There is a risk that the skills and morale of the profession shall be adversely affected by retained use of hearings by electronic means.

14. These concerns are such that, despite their benefits, hearings by electronic means should not become the default mode of appearance and particularly so in any hearing at which the court is to hear substantive argument.

The scope of the draft amended Rules

15. The proposed amended rules of court in the Sheriff Court apply only to the Ordinary Court Rules. They do not extend to other forms of action in the Sheriff Court. It is noted, with reference to paragraph 48 of the consultation paper, that other sheriff court rules may be amended. In anticipation of that, the following views are offered:

    1) The amended Rules do not apply to proceedings under the Adoption and Children (Scotland) Act 2007 which are regulated by the Sheriff Court Adoption Rules 2009. Although the proposed amendments to the Rules of the Court of Session provide that the default position for proceedings under the 2007 Act is for the hearing to be 'in person', those amended Rules enable an application to be made to allow the hearing to take place remotely. With reference to the benefits of hearings by electronic means set out above, there appears to be no logical reason why it should be possible for procedural hearings such as pre-proof hearings or motions in terms of the 2007 Act to be fixed as a remote hearing in the Court of Session but not at all in the Sheriff Court. The Sheriff Court Adoption Rules should be amended to mirror the position in the Court of Session.

    2) The Ordinary Cause Rules do not apply to proceedings under the Children's Hearings (Scotland) Act 2011 which are regulated under the Act of Sederunt (Child Care and

Maintenance Rules) 1997. Such cases may include complex proofs or appeals in which there are a number of procedural hearings including motions, pre-proof hearings and case management hearings. They may also include applications, every 22 days, for Interim Compulsory Supervision Orders pending proof where, due to the need for repeat applications, there may be limited dispute between the parties. Particularly as such hearings must be held in local sheriffdoms, the access to justice benefits set out above shall be lost if the relevant Rules are not amended to include the possibility of the court allowing such hearings taking place remotely.

The questions for consultation

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? And

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

1. As reflected in the general comments above, our opinion is that any hearing in any civil case which will involve substantive advocacy should take place in person. However, the court should be given a power to assign hearings to take place by remote means if, in light of all the circumstances of the case, that is appropriate for the fair and proper administration of and access to justice.

2. With reference to the list in the draft Rules, the following opinions are offered:
    1) It is appropriate that almost all callings in family law cases, including those listed in draft Rule 35B.2(2)(b), should be 'in person'. If hearings by electronic means are to be maintained, the hearings identified as excluded from the 'in person' list, i.e. pre-proof and case management hearings in family actions, are the appropriate ones to differentiate. Thought should be given to whether this should extend to include the pre-proof hearings in 2007 Act cases assigned in terms of RCS 67.18 and RCS 67.32. There appears to be no reason why a pre-proof hearing in those cases should be 'in person' if that is not the position in wider family law proceedings.

2) All debates on the procedure roll, reclaiming motions and appeals should be in person not only those which raise "a point of law of general public importance/particular difficulty or importance". The option to assign such hearings as by electronic means should be retained for cases where that is justified (such as if there is a short, narrow point with limited authorities), but, as all hearings of these kinds can be expected to involve substantive advocacy, the default position should be that they take place in person. Reference is made to the negative impact on the delivery of substantive advocacy as addressed in the general comments above.

3) Similarly, the default position for all proofs should be that they take place in person. Again, reference is made to the general comments above. The court should be given the option to assign a case for hearing by electronic means if it is of the view that doing so shall not prejudice the fairness of the proceedings or otherwise be contrary to the interests of justice. In short, the presumption in the draft Rules should be reversed.

3. We refer to our answer to question 2 in respect of judicial review proceedings and opposed motions/minutes.

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?

4. Our answer to question 1 is referred to in respect of the inclusion of some proofs (including in commercial cases), debates, reclaiming motions and appeals. It is our opinion that these forms of hearing should not be included on the presumed 'electronic means' list.

5. We are also of the opinion that the substantive hearing in judicial review petitions should be presumed to be an 'in person' hearing. It can be expected that substantive advocacy with reference to authorities and productions shall be required at such a hearing.

6. The 'catch all' provision in draft Rule 35B.3(j) would mean that motions and minutes which are assigned to call, of whatever nature and complexity, shall be presumed to be heard by electronic means. This will include all opposed motions and minutes. It is considered that such hearings

should be presumed to require substantive advocacy of a kind which may be prejudiced by a hearing other than an in person one. If the matter is short or narrow in scope, the option to assign the case to be heard by electronic means can be identified and ordered.

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.

7. Yes. There should be a mechanism to depart from any presumption. Motion procedure is familiar to practitioners and the scheme in the draft Rules is appropriate.

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

8. Yes. The principles to be applied in making the determination, i.e. a consideration of prejudice to fairness and otherwise serving the interests of justice, are appropriate. The views of the parties, especially if those are at one, should weigh heavily but not be determinative.

Question 5

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

9. We have set out in our general comments why significant concern is held at a move towards hearings by electronic means for hearings of a kind likely to involve substantive advocacy. There are benefits in conducting short, procedural hearings determining matters of limited controversy. When decisions are being made which are fundamental to the outcome of civil cases, advocacy should be presumed to be in person and in open court. Justice will be best served by ensuring that a client's case is put to the decision maker using advocacy in its best form. The limitations of hearings by electronic means risk prejudicing that fundamental principle.

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?

10. We acknowledge that the SCJC intends to look at the rules for practice in cases other than Ordinary Causes. We refer to paragraph 15 of our general comments in relation to that.

11. We refer to our answer to question 1 above in relation to debates and proofs. Our view applies equally for sheriff court cases.

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?

12. As reflected in our general comments and our answer to question 5, we consider that any hearing at which substantive advocacy can be expected should be presumed to be an in person hearing. We refer to our answer 2 in respect of the inclusion of motions and minutes. The draft list, insofar as it identifies procedural hearings of a type where substantive advocacy may not be expected, is appropriate.

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

13. We refer to our answer to question 3. A standardised application form shall ensure consistency of practice.

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

14. We refer to our answer to question 4. The position is no different for sheriff court practice.

Question 10

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

15. We refer to our answer to question 5 and to our general comments.

Optimum Advocates

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