Scottish Civil Justice Council

Response from Shoosmiths LLP

ANNEX A – CONSULTATION RESPONSE FORM

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?

Answer 1

We agree with the presumption that civil jury trials should generally be heard in person.

We also agree with the presumption in relation to legal debates on the procedure roll, reclaiming motions and appeals. However, we disagree with the qualification that the presumption only relates to certain types of such hearings. The qualification that such a hearing will only generally be heard in person if it raises a point of law of general public importance/particular difficulty or importance would require the application of a subjective test. The draft rules do not state how, when or by whom it would be determined whether the hearing raised an important or difficult point of law. Inevitably there would have to be some additional procedure to make that determination before the presumption could be applied.

In any event, it is unclear what the justification for the qualification is. Even if such a hearing does not raise an important or difficult point of law, all the reasons why in-person hearings are generally preferable still apply. The length of these types of hearing is often longer than it is comfortable to participate from behind a screen for. The issues raised are likely to be substantial, even if not of general importance. An in person hearing allows much greater interaction between the court and the advocates. It is much easier for counsel and solicitors to discuss matters before the hearing, and for counsel to obtain instructions on matters arising during the hearing, if the hearing is in person

For similar reasons, while we consider it appropriate that there should be a general presumption that proofs in an ordinary action should be heard in person, we do not agree with the qualification that the presumption should only apply where 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. Again, this would require some procedure, which the draft rules do not provide for, to determine whether there is such an issue.

Also, there are other reasons, apart from the ability to analyse a party's or witness's demeanour or character, why it is generally preferable that proofs should be heard in person. For example, in person hearings allow discussions to take place more easily between counsel, solicitors and clients before and after hearings and during breaks. It is also much easier for notes to be passed to counsel or for counsel to obtain instructions, if everyone is present in court. Workarounds, such as email or WhatsApp groups, are less efficient. For witnesses, while remote hearings might avoid the necessity of travelling to court, there can be significant disadvantages. A witness might not have access to a stable internet connection or might not have a suitable place from which to give evidence remotely. Attending court also emphasises to witnesses the solemnity of giving evidence.

For the above reasons, we would apply the general presumption that the hearing should take place in person to all proofs, legal debates, reclaiming motions and appeals. We would include in that presumption proofs and legal debates in commercial actions, as we do not

understand the justification for treating them differently from proofs in an ordinary action or legal debates on the procedure roll.

We would also add substantive hearings in a petition to judicial review, for the same reason that legal debates should generally be heard in person.

We do not practise family law and, therefore, feel unable to comment in relation to the presumption in relation to family actions and the types of application listed in draft rule 35B.2(2)(b).

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?

Answer 2

For the reasons given in answer to question 1, we do not agree that any proofs, legal debates, reclaiming motions or appeals should fall within the categories of cases in respect of which there is a general presumption that they are suitable for attendance by electronic means. We consider that the presumption in favour of attendance by electronic means should be restricted to hearings in relation to procedure, including preliminary hearings and procedural hearings in commercial actions.

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.

Answer 3

For proofs and legal debates on the procedure roll, we would suggest that, at the same time as moving for a proof or debate to be allowed, the parties should be required to address the question of the mode of attendance. In the case of disagreement, the matter could be dealt with at a by-order hearing. Such a requirement would dispense with the need for general presumptions, as the question would be addressed on a case-by-case basis.

In a commercial action, mode of attendance at proof or debate should be added to the matters to be considered at the procedural hearing. Likewise, we consider that, in a reclaiming motion, mode of attendance should be addressed at the procedural hearing. Again, such requirements would obviate the need for general presumptions.

For other hearings, eg those of a procedural nature, where a general presumption is appropriate, or where a change to an already determined mode of attendance is sought, we agree that lodging a motion is the right way to do it.

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

Answer 4

Yes. As with most other procedural matters, the parties should be encouraged to seek to agree the mode of attendance and any proposed change to it. And where parties agree, the court should generally be willing to give effect to the agreement, provided it is reasonable. However, we consider that the final arbiter of such matters has to be the court

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

Answer 5

The proposed rule changes do not deal with citation of witnesses or, more generally, with the issue of how a reluctant or uncooperative witness may be compelled to attend a proof or other evidential hearing, where attendance is by electronic means. Attendance by electronic means requires prior arrangements to be made to ensure that the witness has access to suitable technology and a suitable location from which to give evidence. That requires a substantial degree of cooperation from the witness. By contrast, attendance in person can be secured by citing the witness. It seems to us that there is no simple solution to this problem, other than that there should be no general presumption in favour of attendance by electronic means at any hearing at witnesses are to give evidence.

As stated in answer to question 3, we disagree with the proposed approach of using general presumptions, except for hearings of a procedural nature. For all substantive hearings, there is an opportunity for the parties and the court to consider mode of attendance on a case-by-case basis. It is our view that a better approach than that proposed would be to add mode of attendance, in those cases where there is a procedural hearing, to the list of matters to be determined at the procedural hearing or, in other cases, as a matter that must be included in the motion to allow a proof or debate. That would force the parties to consider the appropriate mode of attendance at an early stage. By contrast, if general presumptions are applied, parties may only start to consider whether the presumed mode of attendance is appropriate for their case, when preparing for the substantive hearing, leading to late applications to change the mode of attendance.

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Question 6 – 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?

Answer 6

We agree with the appropriateness of the general presumption of an in-person hearing is suitable for (i) hearings under rule 24.2(1) (withdrawal of solicitors); and (ii) civil jury trials.

For the same reasons as given in our answer to question 1, we do not that any general presumption that legal debates should be heard in-person should be restricted to those raising a point of law of general public importance/particular difficulty or importance. Also, for the same reasons, we disagree with the general presumption in favour of proofs being heard in person being restricted to those where 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.

If general presumptions are to be used for legal debates and proofs, then we consider that the presumption should be that all legal debates and proofs should be heard in person. However, we do not consider that it is necessary or desirable for there to be a general presumption as to mode of attendance in relation to such substantive hearings. In every case, there is already a suitable opportunity for the issue to be considered on a case-by-case basis. We would suggest that, rather than having general presumptions for legal debates and proofs, the rules should be amended to require mode of attendance to be dealt with:

(i) at the options hearing or any procedural hearing under rule 10.6, when the sheriff allows a legal debate or proof;
(ii) in a commercial action, at the case management conference, when a debate or proof is fixed;
(iii) where the personal injuries procedure applies, in any motion under rule 36.G1(5) craving the court to allow a proof or preliminary proof.

We have no comment to make in relation to the suggested general presumption in relation to family and civil partnership actions and applications under the Child Abduction and Custody Act 1985, as we do not practice in those areas of the law.

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?

Answer 7

We agree with the general presumption that most hearings of a purely procedural nature should be heard by electronic means. That includes most of the categories of cases listed in the draft rules, except for legal debates and proofs. For the reasons already stated, we do not consider that there should be a general presumption as to the mode of attendance at such hearings, but that, if there is to be such a presumption, it should be for all legal debates and proofs to be heard in person.

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

Answer 8

Generally, we agree that lodging a motion would be the right way for a party to apply to change the mode of attendance at any hearing. We would suggest that, where a party considers that a hearing that would normally be heard by electronic means should be heard in person, the party should be encouraged/required to lodge the motion at the earliest opportunity. For example, where a party enrolling a motion or making an application by minute considers that any hearing of the motion should be heard in person, that could be stated in the motion or minute. Equally, a party opposing a motion or answering a minute could be required to state in the notice of opposition or answers, if they consider that the hearing should be in person.

A party moving for a change of mode of attendance at a hearing should be required to state reasons for the motion. That could be done in a separate application form. However, we consider that it would be equally satisfactory to include a requirement for reasons to be stated in the motion.

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

Answer 9

Where parties are in agreement about the mode of attendance, we would suggest that the court should be slow to refuse a motion to change the mode of attendance or to make such a change on its own motion. However, we agree that, if the parties are not in agreement or in unusual cases where the court considers the parties' agreed position to be unreasonable, ultimately the decision as to mode of attendance should rest with the court.

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

The proposed changes do not cover the methods of attendance by electronic means or how such hearings are to be organised. We appreciate that such details may be beyond the proper scope of the rules. However, in practice, different courts are taking different approaches to virtual hearings, some of which work more well than others. There are, in our experience, three main ways in which virtual hearings are organised.

The first is the Webex meeting, where all those appearing in cases on the roll join at the same time and the cases are called in turn. This works similarly to the ordinary court calling

in person. It works reasonably well and allows principal agents to appear rather than instructing local agents.

The second is a telephone conference call or Webex meeting, for which a particular time slot is allowed for the hearing, so that parties and their representatives dial in at the given time. That follows the model already used for case management conferences in most commercial actions. It generally works well and means that those appearing know when the hearing will take place and allows them to plan around it.

Finally, in some cases the parties are required to provide a telephone number to the court, and the court then calls the parties. This method works far less well than the others. It means that those appearing, whether solicitors, advocates or party litigants are left waiting for a call from the court, sometimes for hours, with no way of knowing when that call is likely to be received. We have experienced cases where the court has called the wrong number or has decided that a case cannot call, because the other side had not provided a telephone number, but not informed us, so that a solicitor has been left waiting for call that never came.

If it is not considered appropriate for the rules to specify how virtual hearings should take place, we would suggest that guidance should be provided on this. Specifically, in our view, normally only the first two methods described above should be used and the third method, of the court telephoning the parties, should be discouraged.