RESPONSE BY BRODIES LLP

CONSULTATION: RULES COVERING THE MODE OF ATTENDANCE AT COURT HEARINGS

15 NOVEMBER 2021

BRODIES LLP

ENLIGHTENED THINKING

1 Executive Summary

1.1 This is the response on behalf of Brodies LLP to the Scottish Civil Justice Council Consultation on Rules Covering the Mode of Attendance at Court Hearings issued in September 2021. Brodies LLP accepts that this response can be published.

1.2 Brodies LLP carried out its own informal consultation exercise to understand better the views of its client base. We received a relatively modest number of responses (24) of which 50% were from clients or former clients of the firm. We have summarised the responses from the survey below (acknowledging the limitations of the survey):

- 82% of respondents were agreed that online hearings should be an option for conducting civil cases.
- Only 34% of respondents were of the view that all hearings, including those where evidence would be led, would suit being dealt with online.
- 78% of respondents felt that legal debates and procedural hearings would suit being dealt with online.
- 74% of the respondents felt that the views of the parties on whether a hearing should be dealt with online or in person should be considered.
- Respondents also felt that the subject matter of the case, its legal importance, importance to the parties, availability of technology, accessibility, testing of evidence and proximity to courts should be factors in any decision.
- 82% of respondents considered that a judge should make the final decision on whether a hearing be dealt with online or in person.
- 91% of respondents considered that any changes to the rules should be reviewed with 56% indicating that review after 12 months would be appropriate.

1.3 Fundamentally, we consider that it is in the interests of justice that the court rules provide clients (and the profession) with flexibility to seek authority from the court to conduct substantive hearings remotely or in person depending on the circumstances of each case - while still recognising that much procedure can be dealt with by the court and court users in an efficient way on-line.

2 Principle and approach

2.1 Brodies LLP and our clients have embraced the opportunities afforded by online courts through engaging constructively in consultations and by putting in place the necessary investment in training and technology to deal with the new challenges that the pandemic presented. There have been many good examples of cases running smoothly and quickly to a conclusion over the past two years that, without remote practices, may still have been at an early stage of procedure. It was firmly in the interests of justice that clients' cases were dealt with online during this time.

2.2 Our view is that the legal profession can continue to maximise the advantages presented by the new procedures and technology available to our courts. However, with the rapid deployment and use of new technology to enable "remote" procedure/hearings, it seems prudent to continue to advance the roll out of those new ways of doing things incrementally while accumulating evidence and experience of users to better inform further reform.

2.3 As the profession, clients and the courts gain more experience of on-line hearings it seems inevitable that there will develop a more sophisticated understanding of when it is and is not appropriate to hear cases online.

2.4 As we explain in our answers to the questions posed by the consultation paper, we are not persuaded that there is a need for a presumption in favour of online hearings (or in favour of in person hearings) in any category of case or hearing. Instead, we consider that the decision in each case should be dictated by what is in the interests of justice in the particular case.

3 Rules of the Court of Session and Ordinary Cause Rules (OCR)

3.1 **Questions 1 and 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?

3.2 **Response:**

Professor Richard Susskind, the foremost advocate for online courts and the digitization of the delivery of justice, writing in August 2020, stated:

"*The current provision of remote courts, as noted earlier, can be regarded as a huge, unscheduled pilot scheme that is no doubt testing many of the ideas and changes that are embedded in existing digitization programs.*"[1]

Professor Susskind advocated capturing data, learning lessons, and putting in place "*more robust procedures and technologies than have been valiantly cobbled together in the last few months*".

As online courts are a relatively recent innovation there appears to be a view that there is a lack of data and analysis to arrive at a final opinion on whether the "*general presumption*" is appropriate.

Types of cases

We are not convinced that there is a justification for a distinction between family actions and other types of cases (to warrant specific provision for a presumption in favour of in-person hearings). A wide range of civil litigation can have a significant impact on the rights and lives of individuals and the rights and obligations of corporate bodies. It is not clear what distinguishes cases involving families and children to merit those cases being treated as an exception to a more general approach. We think that such a distinction risks the inference being drawn that, as matter of policy, some rights are viewed as being more important than others.

If distinctions are to be drawn, it might well be argued that petitions for judicial review should be subject to a similar presumption in favour of 'in person' hearings as those are very often liable to involve issues of general public importance and/or the determination of fundamental individual rights. We are certainly not persuaded that there is evidence suggesting that petitions for judicial review should be subject to a presumption in favour of attendance by electronic means. Yet there will be cases that could fit well into the on-line category.

Numbering used in the draft Rule for the Court of Session

This is a minor point, although the draft rules propose adding a new RCS Chapter 35B there is already a pre-existing Chapter 35B entitled "*Lodging Audio or Audio-visual Recordings of Children*". It was inserted by Act of Sederunt (Rules of the Court of Session Amendment No. 5) (Miscellaneous) 2012/275. That Act of Sederunt appears to still be in force and the Chapter is published in Parliament House Book Vol 8. It does not appear in the list of Court of Session Rules on the SCTS website although the equivalent chapter in the Sheriff Court OCR (Chapter 50) does appear on the SCTS website.

[1] https://thepractice.law.harvard.edu/article/the-future-of-courts

Existing rules regarding use of live links

Since January 2007 existing RCS 93.1 and OCR 32A provide for the use of live links for both the giving of evidence by witnesses and submissions on "*cause shown*". It is not clear how these rules are intended to interact with the proposed RCS Chapter 35B and OCR Chapter 28ZA.

It may be that it is intended that these rules should remain to accommodate any special cases that might arise in the course of a hearing that is otherwise 'in person' but the proposed new rules appear to provide for that eventuality (e.g. proposed RCS Rule 35B.4.(1)). If the proposed rules are made, then it would be desirable to have clarity around (and potentially the revocation of) the existing rules.

Determining general public importance, etc

Further clarity is needed as to when and how it is to be determined that a case or hearing raises a point of law of general public importance or is of particular difficulty or importance. Equally, it should be made clear that if a court has determined that a hearing does not concern a matter that is of particular difficulty or importance, that does not prevent parties from making an application at a later stage that a particular hearing or issue arising subsequently in the same case is of particular difficulty or importance.

Even motions can raise points of law of general public importance/particular difficulty or importance. When new rules have been implemented in the past, cases argued on the Motion Roll have been of considerable importance because they can clarify the application of the new rules. [2] It may be thought helpful to mention, perhaps in a Practice Note, that if parties consider that motions do raise such matters it should be narrated in the motion.

It is not apparent why it is thought appropriate to make a distinction between proofs on the Ordinary Roll and commercial proofs. The Consultation Paper refers to commercial cases as being an example of "*business that can be carried out most expeditiously by electronic means even if it does involve the appearance of witnesses*". We do not think that it can be assumed that commercial proofs are capable of being carried out more expeditiously by electronic means than proofs on the Ordinary Roll (or vice versa). Granted the use of witness statements can expedite any commercial proof, with witnesses proceeding straight to cross examination. Yet a default which requires that proofs in Commercial Actions be online is a matter on which litigants who intend to use commercial procedure would need advice when considering raising proceedings or continuing with proceedings on the commercial roll. [3]

[2] Cases argued after the introduction of the personal injuries rules in 2003 were of considerable importance in clarifying the application of those rules.

[3] Under the previous Optional Procedure for personal injuries actions in the Court of Session a Pursuer had no right to a jury trial. This was an important factor that the litigant required advice on when considering which procedure was to be used.

It is not clear how or when it is to be determined that a proof involves a "*significant issue of credibility of a party or witness*". Furthermore, the implicit assumption that such significant issues can be foreseen may be unwarranted: questions of credibility are often unforeseen and arise only after a proof is underway.

It is not clear whether a decision that a proof does not involve "*a significant issue of credibility of a party or witness*" will stand only so long as there is no change in circumstances. If the possibility of a review of an earlier decision is to be provided, clarity is needed on whether any such change in circumstances requires to be material and on how it is to be brought back to the attention of the court. It is not clear how matters are to be dealt with if a significant issue arises during a remote evidential hearing, for example whether all, or only part, of the evidence requires to be reheard. Requiring a party who intends to impugn the credibility of a witness during a hearing to give advance notice of that, so as to secure an 'in person' hearing, has the potential to disadvantage that party.

Review

If there is to be a procedure whereby the Court is to determine or apply the tests of general public importance/particular difficulty or importance or whether there is "*a significant issue of credibility*" parties must be heard and there ought to be a mechanism for review of that decision.

Rule 35B.5(2)

- The text of 35B.5 (2) appears to be mis-drafted. The word "*not*" requires to be deleted.

The test in rules 35B.4 & 35B.5

In these rules the court can only grant an application by a party or make a direction of its own accord if it is of the opinion that making the particular order

  - would not prejudice the fairness of proceedings
  - would not otherwise be in the interests of justice

It is not clear what kind of application might be thought to impinge on fairness or interests of justice to the extent that a departure from the arrangements set out in rules 35B.2 and 35B.3 is appropriate.

It may be simpler to prescribe that the test be set as positive one. To consider what the interests of justice require would include consideration of fairness.

We envisage that parties and the Court will mostly be concerned with witness evidence.

- Both 35B4 and 35B.4 suggest that the court will issue a direction and thereafter the onus will be on a party to seek to overturn that direction. It is suggested that before any direction were issued it would be helpful to allow parties an opportunity to express views. Such a consultative approach may make it less likely for a party to seek to overturn such a direction. There are various stages at which the parties to any action could make their intention clear e.g. on the commercial roll it could be set out in a statement of issues before the Preliminary Hearing or at the Procedural Hearing (both of which can be dealt with remotely). Likewise, the Options Hearing could serve as a useful point to highlight if there are any issues which could militate either way for an in person or a remote hearing.

- It is not clear how a court will seek to satisfy itself that these tests are met prior to making a direction in the absence of submissions from parties or when dealing with an opposed application by one or more parties.

- Additional complexity may arise from the likelihood that issues of fairness and the interests of justice may not come into focus at all until a hearing has already commenced.

As indicated above we are concerned that decisions under Rules 35B.4 and 35B.5 should not be taken without parties having the opportunity of addressing the court. There is no indication that the judge deciding the matter - whether at first instance or in the Inner House - would require to give reasons for their decision.

Any Outer House interlocutor could only be reclaimed against with permission which is unlikely to be granted given the impact of an appeal on progress of the proceedings.

- Effectively therefore decisions in relation to mode of hearing or mode of attendance of persons at a hearing will be final whether they are made in the Outer House or the Inner House. That reinforces the need for parties to have an adequate opportunity to address the court on the merits of any decision.

3.3 **Questions 2 and 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?

3.4 **Response:**

The direction that parties and their representatives "*must attend at the Hearing by electronic means*" could be seen as an indication that our court buildings are no longer open to the public. It may also be seen as an implicit indication that the rights of litigants who do not fall within 35B.2 are inherently less important.

Arguably there should be a clear distinction between hearings that are not likely to dispose of an action and those that are. Where hearings are likely to dispose of an action, such as Proofs, Debates, Procedure Rolls, Motions for Summary Decree, Peremptory Diets, etc, then one can see that the default ought to remain that they will be in person hearings. However, parties should be able to apply to have the hearing held by electronic means. If parties agree, then ordinarily the court should give effect to their common view, unless it would be contrary to the interests of justice.

3.5 **Questions 3 and 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? Please explain your answer.

3.6 **Response:**

Given that it will be a matter of significant importance to parties we think it is inappropriate that a motion under 35B.4 (4) should be capable of being determined without an oral hearing. Given that the Court requires to be satisfied on the test set out in sub paragraph (5) an oral hearing ought, at least, to be an option available to the Court and should be the default position if the motion is opposed or where the Court is considering altering the mode of attendance *ex proprio motu*. Such motions could therefore be placed within the category of being automatically starred.

3.7 **Questions 4 and 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.

3.8 **Response:**

3.9 Yes, the Court ought to have the final say. In many cases it may be that parties will agree the mode of attendance, but the Court should be able to overrule any agreement in the interests of justice.

3.10 Parties should be given the opportunity of an oral hearing if the Court is considering revoking a direction *ex proprio motu* or where a motion is opposed.

3.11 There should be a right of appeal, with leave of the court.

3.12 **Questions 5 and 10**

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

3.13 **Response**:

If there is "*an ongoing Public Debate about the merits of Remote Hearings*" it is probably only a debate amongst lawyers held in public rather than the wider public being engaged in any debate. Both sides of the profession and the judiciary appear to oppose the default position for all hearings being online hearings[4].

It is to the immense credit of the court staff, judiciary and the other lawyers engaged in litigation that the procedures and systems put in place during the pandemic have worked as well as they have. We ought not to abandon the ability to conduct remote hearings, and we should not look at that facility as an end in itself. Equally we should not abandon the ability to conduct important hearings in person. We must find the right balance between the use of on-line or remote hearings and in person hearings.

If the rules facilitate hearings being conducted virtually it seems likely that the lawyers and parties will continue to use those facilities when the advantages outweigh the disadvantages. For example, it may be that one might be able to secure an online hearing more quickly than an in person one. Litigators are keen to mitigate costs. Witnesses and/or representatives attending virtually may in many cases provide an opportunity to mitigate costs.

Whatever the outcome of the consultation and whatever the new rules may prescribe it is suggested that it would be sensible to review the position after 12 to 24 months.

The experience of the last 18 months has shown that there can be problems when dealing with online hearings[5]. Commonly cited problems include:

- internet connection speeds,

- lapses in internet quality,

- witnesses failing to follow guidance,

[4] See the Law Society of Scotland's Civil Courts Online Survey Summary – Analysis of Research dated April 2021, The Faculty of Advocates Discussion Paper on Remote Courts Post-Covid 19 submitted to the conference, Judicial Institute for Scotland Report on the survey of judicial attitudes dated April 2021.

[5] Professor Susskind refers to systems being "*valiantly cobbled together*", this may be taken to referring to those systems used by litigants too. Experience of connectivity and compliance with online attendance guidance has been mixed.

- unauthorised use of prompts and documents,
- misuse of mute buttons and failures to use mute buttons,
- difficulties sharing productions with attendees and witnesses,
- the increased cost of having to produce written submissions and highly engineered bundles,
- problems where evidence has not been recorded,
- problems with the quality of the recording of evidence.

It is fair to say that Professor Richard Susskind does not envisage, in his work on on-line Courts, that all Courts will be on-line. Specifically, he did not envisage that the highest value or most complex Civil Cases would be conducted exclusively online[6].

As we gain more experience of the pros and cons of on-line hearings we should review the rules to maximise he advantages while avoiding the pitfalls that may have been identified.

3.14 **Recruitment, Retention, increased costs and indirect impact on access to justice**

3.15 There has been a long-term decline in cases initiated in Scotland's Courts[7]. It would be unfortunate if an unintended consequence of any reform were that this apparent trend was exacerbated by a perception that one had a greater choice of how to resolve disputes through arbitration or in the courts of other jurisdictions. [8]

3.16 While the career aspirations and preferences of those within the profession should not prevent or dictate changes, it is a consideration that ought to be weighed in the balance. Advocacy is a vocation and aspiring advocates will look to find where they can best acquire the opportunities to excel in advocacy. It would be disappointing if Scotland lost its ability to produce the highest quality advocates because the lack of in person hearings was enough to push aspiring lawyers to practice in other jurisdictions. [9]

3.17 At present there is a perception that there are significant increased costs associated with online hearings. Online hearings, of all types, are more likely to routinely involve the preparation of witness

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[6] For example, see *Online Courts and the Future of Justice*, page 105, referring to commercial dispute resolution he states, "*I expect at the very least that work of courts will be disaggregated – routine parts of large cases will be handled online while some components will be conducted much as today, in person in courtrooms (where, for example face to face interaction in genuinely thought to be needed)."*

[7] Scottish Government, Civil Justice Statistics 2019-2020 https://www.gov.scot/publications/civil-justice-statistics-scotland-2019-20/pages/8/#T2

[8] See, for example, the Lord Chief Justice's remarks on the opening of the new legal year in England & Wales that "*most cases in all jurisdictions are now being conducted with judges and magistrates present in courts*" and the direction that "*It is important that judicial powers are exercised from courts and tribunal buildings*".

[9] Anecdotal evidence suggests that the decline in opportunities for oral advocacy, such as motion rolls, has led to it being more difficult for solicitors and advocates to gain exposure to and experience of oral argument.

statements, complex bundles, and written submissions. Even simple opposed motion hearings in the Sheriff courts are often preceded by an order for written submissions or position papers. Further thought would merit being given to how to further innovate our procedures to streamline processes and reduce costs.

3.18 It is not yet clear what impact most hearings being online may have in communities outside Scotland's cities. Historically, local solicitors dealt with agency appearances in their local Sheriff Courts. That source of work is likely to disappear completely if agents within the cities can conduct their own appearances remotely.

3.19 Local law firms will also face increased competition from major law firms for appearance work that would ordinarily have been done by those firms. For example, in family cases, where Hearings might be conducted remotely, or in cases involving property, a litigant may choose to use a larger city firm rather than a local firm with a more general practice.

3.20 This may lead to further difficulties in recruiting and retaining lawyers outside the cities.

3.21 A reduction in the number of lawyers and law firms outside our cities may adversely impact on access to justice if litigants require to travel further if they wish to meet the lawyers.

3.22 While the ability to deal with cases on-line is undoubtedly an asset to a modern system of law and can and should be deployed to good effect to mitigate costs and attract more litigation to Scotland, if it is deployed as the default the unintended consequences are not clear, may be far reaching and might be detrimental to access to justice.

3.23 Judicial expenses

Any move towards electronic hearings should be accompanied by a thorough review of the Tables of Charges which govern recoverable judicial expenses.

As indicated, remote hearings have been accompanied by a shift towards affidavit evidence, written submissions, and electronic bundles. The Tables of Charges should be amended at the same time as any rule change to ensure the Tables accurately reflect the work carried out by solicitors and any additional outlays that may be incurred by clients to comply with the requirements of remote hearings.