

RESPONSE BY THE CONSULTATIVE COMMITTEE ON COMMERCIAL ACTIONS

to

SCOTTISH CIVIL JUSTICE COUNCIL CONSULTATION: RULES COVERING THE MODE OF ATTENDANCE AT COURT HEARINGS

1. This response is submitted by the Consultative Committee on Commercial Actions (“the Committee”). The Committee discusses matters relating to the practical operation of the commercial court in the Court of Session. The Committee’s membership includes the commercial judges along with representatives of the Court’s administration, of the profession and of court users. Further information about the Committee can be found on the commercial actions’ web page on scotcourts.gov.uk.
2. The Committee very much welcomes the consultation and the opportunity to respond on what are plainly matters of significant importance to the system of civil justice in Scotland. Accordingly, a meeting of the Committee was convened by the lead commercial judge for the specific purpose of discussing the consultation and this response follows on from and reflects that discussion among the Committee members who were present.
3. The background which sets the context for this response can be set out briefly as follows:
 - 3.1 The Court of Session has for many years had special provisions for dealing with commercial actions to enable specialist judges to handle commercial cases quickly and flexibly. That flexibility, providing the opportunity to tailor the procedure in an individual case to the issues and other circumstances of that case, is a particular mark of commercial procedure which is highly valued by the judges, clerks, practitioners and court users. Each commercial action is subject to active, early and ongoing case management by a commercial judge principally by means of the system of preliminary and procedural hearings.
 - 3.2 These features of commercial procedure are embodied in Chapter 47 of the Rules of the Court of Session (“RCS”). The rules are supplemented by Practice Note (presently Practice Note No.1 of 2017) and by Commercial Court-Guidance provided by the commercial judges from time to time. These items may all be found on the commercial actions’ web page.
 - 3.3 In the result, arrangements for hearings in the commercial court are the subject of discussion among the parties and the court leading to detailed arrangements being put in place as reflected in orders made by the commercial judge in the case, notes in the minute of proceedings and email correspondence. In a commercial action which is proceeding to proof, a pre-proof by order hearing commonly takes place at which final arrangements for the conduct of the proof can be discussed and

confirmed. One further point worthy of note for present purposes is that commercial actions which proceed to proof often involve expert evidence of some sort and, commonly, detailed arrangements for the hearing of such evidence are discussed before the court in advance of proof. Those arrangements may include parties' experts being called to give evidence at the same time.

- 3.4 The use of digital technology is also long established as an important feature of the arrangements for commercial actions. The significance of this feature has of course intensified in the response to the Covid 19 pandemic and hearings in the commercial court have continued to be scheduled principally by electronic means. This has covered the full scope of commercial procedure including preliminary and procedural hearings, motion hearings, debates, pre-proof hearings and proofs. A number of proofs have also taken place in hybrid form, with some witnesses appearing in person in court and some by electronic means.
4. In overall terms, the Committee takes the view that these arrangements have worked very well in enabling the work of the court to continue during the pandemic. The increased use of technology has delivered a number of benefits in relation to the efficient conduct of hearings. These include even more flexible and efficient conduct of procedural business, reduced travel time, reduced inconvenience to witnesses and, it is thought, reducing the carbon footprint of commercial business. There is a strong desire to retain these benefits at the same time as regaining the benefits of the option to hold more in person hearings again. The experience gained during the pandemic has shown parties' representatives and the judiciary what is possible with appropriate use of technology. We envisage that this acquired knowledge will inform discussions at preliminary and procedural hearings going forward.
5. In the context of commercial actions, as explained in this response, the Committee feels that the mode of attendance at hearings in commercial actions naturally falls to be considered against the backdrop of the flexible and tailored individual case management which already takes place in commercial procedure. While flexibility remains key, it is also recognised as potentially helpful for the RCS to contain what might be described as default positions for different types of hearings in commercial actions. However, consistent with flexibility and active case management, departing from any such default position should be a matter wholly within the discretion of the commercial judge, as other matters of case management are, without having to pass through a particular gateway or show cause for departing from a default position. It is envisaged that the default positions, in the form we propose below, may be departed from, at least to some extent, fairly frequently, for example to reduce the need for some witnesses, including expert witnesses, to attend at proof in person, especially where this would involve significant travel or disruption to other duties.
6. In light of the above, the Committee proposes the following principles in relation to making provision in the RCS for mode of attendance at hearings in commercial actions:

- 6.1 In order to maintain the integrity of Chapter 47 of the RCS, the relevant provisions for commercial actions should be included in that Chapter.
- 6.2 Attendance at all hearings in commercial actions, other than debates and proofs, should be by electronic means, unless the commercial judge directs otherwise.
- 6.3 Attendance at debates and proofs should be in person, unless the commercial judge directs otherwise.
- 6.4 The court may make or alter such a direction either of its own accord or on the application of a party but shall give parties the opportunity to be heard before making or altering a direction which relates to a debate or a proof.
7. There follows a response to the consultation questions which should please be read in light of the above comments. The Committee has restricted its response to the questions which pertain to the RCS. The Committee considers that the above comments and the responses below also apply to the RCS provisions for company petitions and intellectual property actions as well as to commercial actions. Attendance at sanctions hearings should therefore be in person, unless the judge otherwise directs.

RESPONSE TO CONSULTATION QUESTIONS

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?

Answer 1-the proposed new rules provide for a presumption for hearings in commercial actions, including proofs, to be held by electronic means. It is thought to be more appropriate in commercial actions to avoid a presumption and to make provision for hearings as proposed above.

Question 2-For the categories of case listed as suitable for attendance at a hearing by electronic means (both video and 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-we refer to our Answer 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.

Answer 3-Subject to what we have already said about not having a presumption in commercial actions, in commercial procedure, we suggest a variety of means by which parties could apply to the court in respect of mode of attendance. That could be by motion, in submissions during a preliminary, procedural or by-order hearing, in a note of proposals for further procedure or by email correspondence. This answer reflects the flexibility of commercial procedure as overseen by each commercial judge.

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-For the reasons set out above, we suggest that the final say on mode of attendance will be for the commercial judge in each case.

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

Answer 5-Please see our comments above.