

Response for Pinsent Masons LLP to the SCJC consultation on mode of attendance at court hearings

Introduction

On 6 September the Scottish Civil Justice Council (SCJC) published its consultation in terms of which it seeks views on proposed new rules covering the most appropriate mode of attendance at civil court hearings in the Court of Session and in the sheriff courts.

Since March 2020, the majority of civil court hearings proceeding have done so by electronic means as a result of emergency measures put in place in response to the covid-19 pandemic. Views differ on the merits of this and on what can be carried forward, with or without modification, into the post covid-19 civil court setting. The SCJC has indicated it is keen to consider all views before making more permanent change.

By way of background, Pinsent Masons is a global law firm with offices throughout the UK, in Europe, Asia and the Middle East, Africa and Australia. Our teams of specialist lawyers have a wealth of experience in all aspects of commercial litigation, with our lawyers appearing in matters in all courts in the UK, including the Supreme Court. Our clients tend to be commercial entities, often with a footprint spanning the UK and beyond. We rarely act for individuals.

General

As a general observation, we welcome the SCJC's desire to ensure the views of stakeholders are properly considered before embarking on any far-reaching change to court rules. We are also generally in agreement that the use of electronic hearings should be retained, and indeed encouraged, in appropriate settings going forward. However, there are some aspects of the proposed new rules with which we have concerns.

As a general point we are particularly concerned at the speed at which it appears it is hoped these proposed changes can be brought into effect. The current position came about as a necessary solution to a global emergency and there remains a considerable gap in the evidence required to support such a significant and permanent change to the delivery of civil justice. A recent House of Lords Select Committee report on Covid-19 and the Courts in England and Wales reported that:

“Regardless of the type of case, more data and analysis are needed on the effects of remote proceedings on the outcomes of cases and the satisfaction of participants in them. There is insufficient research at present to be certain about the effects of virtual hearings, but there is enough evidence to suggest that caution is required in expanding their use beyond the areas where they are universally seen to work well. Any expansion of remote proceedings will require measures to address the concerns about access to justice that arise.”

Several particular points which must be addressed first were noted which are equally applicable north of the border, including:-

- Access to legal advice, before and during proceedings - “there needs to be ways for lawyers and clients to communicate with one another during the hearings, because they are not sitting together and are not able to write notes or talk to one another”. This can be particularly problematic and must be resolved before any expansion in the use of remote hearings.
- Better and more reliable technology is required alongside guidance to ensure it is used effectively and consistently.
- More investment is needed in virtual document management systems and training to use new systems – this is particularly so for large complex commercial cases with significant volumes of documentation and challenging technical issues which current document management systems have difficulties handling.

In particular, the report concludes that “The pandemic should not be used as an excuse to initiate permanent changes without prior consultation and suitable evaluation of their effects.”

If Scotland is not to be disadvantaged as a forum of choice for litigation, and in particular commercial litigation, we have to be sure that similar research and investment are carried out here first too. This is particularly so for commercial hearings; Scotland has long sought to position itself as a forum of choice for business. Any suggestion that Scotland may not be able to provide a court capable of full and proper consideration of what may be complex and lengthy facts will undoubtedly discourage litigation here.

With that general caveat we turn to look at particular issues in the consultation.

Remote hearings – general

The consultation acknowledges the wide range of views on the benefits or otherwise of remote hearings. Experience suggests, however, that such hearings, particularly where witnesses are involved, are likely to incur greater cost than in person hearings. Court rules on recoverable expenses do not currently cover much of that additional expense and this will require careful consideration and suitable resolution. That should be done in conjunction with any change in court rules on mode of attendance at hearings.

Setting a default position

Our courts have always prided themselves in their flexible approach to dispute resolution, a quality which has been an attractive differentiator from the more prescriptive civil procedure rules in force south of the border. There is a danger that the suggested position, however, changes this and promotes inflexibility. We wonder if instead of setting a default position parties should be required to agree their position on hearings at particular points, with a failure to agree left to the discretion of the courts. The requirement to discuss and agree such matters is not new and should not increase the burden on courts or practitioners.

Particular hearings

We have particular concerns about the current proposal that the default position for commercial proofs be that they take place electronically; this concern is equally applicable to civil proofs in ordinary actions where, from the draft rules, it appears that the default position will be that they too will take place electronically, unless it can be shown that 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” – this exception does not appear to apply to commercial proofs. The aim of the rules is promote clarity and consistency. Unfortunately, we think that the opposite is in danger of being the case if the rules as presently drafted proceed. We foresee lengthy and costly argument about when this exception is brought into play, and we wonder if it is in fact workable at all, unless with a very low threshold such as to make it almost meaningless. None of this will do anything for the promotion of open and accessible justice.

Again, if parties are encouraged to agree on procedure at particular points, with failure left to the court’s discretion, this will be avoided.

We agree that remote hearings can significantly improve the delivery and accessibility of justice in appropriate cases. For procedural and preliminary hearings, in particular, properly resourced remote hearings can deliver a convenient and effective alternative to physical hearings. However, we consider that to stipulate that anything other than routine procedural hearings in ordinary or commercial matters must proceed in one format or another could be a hasty and costly mistake.

Summary

In summary, we agree that there is most definitely a place for an expansion in the use of electronic hearings in the future of civil court matters but that such change should not be made in haste without full and detailed consideration of all competing interests - and should not be made at the expense of Scotland’s place as a forum of choice for litigation.

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