RESPONSE ON BEHALF OF THOMPSONS SOLICITORS SCOTLAND TO THE CONSULTATION PAPER ON RULES COVERING THE MODE OF ATTENDANCE AT COURT HEARINGS ISSUED BY THE SCOTTISH CIVIL JUSTICE COUNCIL IN SEPTEMBER 2021

1. Thompsons Solicitors welcome the opportunity to respond to this consultation paper.

Executive Summary

2. Thompsons wish to thank the Scottish Court Service for the extraordinary efforts undertaken to facilitate the continuation of civil court business during the last eighteen months. We recognise that there have been significant beneficial developments in the way that some court business has been conducted and we support the retention of many of those procedures. However, we are concerned that the proposed rules in relation to in-person hearings will dilute the fundamental principle of access to justice and it turn damage the deserved reputation of the Scottish legal system as a forum of fairness, equality and openness, where those who seek their day in Court can have it.

   We will refer in this response to the case of Robert McArthur & others v Timberbush Tours & Another [2021] CSOH 75, in which we represented the Pursuers. A remote Proof was heard in the Court of Session on 25th May 2021. We will consider a number of observations as to the impact that method of hearing had on the conduct of the Proof and the experience of the Pursuers.

Question 1 – For the categories of case listed as suitable for an in-person hearing: o Do you think the general presumption given is appropriate? And o Would you make any additions or deletions and if so why?

3. Thompsons do not consider the general presumption to be appropriate. The default position should be that a hearing is in-person unless of a nature that is purely procedural. In particular, all substantive and/or contentious hearings should be in -person. We agree with and adopt the comment made by the Faculty of Advocates in its response to the present consultation:

> "[We do] not see how a remote hearing can be an improvement on an in-person hearing. At best, a remote hearing may occasionally be as good as an in-person hearing." Para 18(i)

4. Our Solicitor Advocates and solicitors have appeared in a wide range of remote hearings, including proofs in the Court of Session and the Sheriff Court. In our experience, the challenges involved in conducting substantive hearings remotely far outweigh the perceived benefits. Those challenges have included technological failings, communication problems and procedural unfairness.

5. As regards technological failings, there have been countless occasions where submissions or examination of witnesses has been ineffective due to buffering, loss of video, loss of sound and even complete loss of connection. These are

frequent, rather than rare occurrences. Delays have occurred where lay witnesses have struggled to understand how to access the online hearing. Where technological problems arise, they have had an inevitable impact on the effectiveness of advocacy. Counsel have had to repeat submissions because of dropped or slow connections. Sometimes it is not appreciated by the speaker that their connection is slow or otherwise inadequate. Moreover, there is a presumption that parties will have access to the appropriate technology and be able to use it. This can be a significant issue for older witnesses, both lay and expert.

6. Communication between parties is inevitably hampered during remote hearings. Some agents have used separate applications such as WhatsApp or Teams to communicate with counsel during remote hearings, with mixed success. Important messages are often missed because counsel is focussing on delivering submissions. It is impossible to effectively replicate the "tug of the gown" remotely. Communication between opponents is also unduly hampered. In-person hearings offer significant opportunities for discussions between parties about cases and often help to lay the groundwork for eventual resolution of disputes.

7. The potential for procedural unfairness also makes remote hearings unsuitable for most if not all substantive hearings. Where lay witnesses are involved, there are obvious risks that variable quality of connection will result in variable quality of evidence. So far as possible, lay witnesses should give evidence in the same environment under the same conditions as all other witnesses in the case. The best way to ensure parties and witnesses are treated fairly is to have the evidence heard in-person in court.

8. All Proofs have potential issues of credibility, and issues of reliability arise in virtually all proofs. Thompsons Solicitors adopt paragraph 23 of the response from the Faculty of Advocates:

> "As drafted, this rule would result in disputes as to whether an issue of credibility was likely to be "*significant*" or not. On the current wording, a significant issue of reliability would not be sufficient to justify an in-person hearing. There will be cases in which a party may not wish to identify in advance of the proof diet precisely what the credibility issues are, since to forewarn the other party or witness will blunt the challenge at proof. It also should be recognised that a number of judges have questioned whether issues of credibility and reliability are harder for them to assess where the evidence is taken remotely so the premise behind this draft rule is not supported by recent judicial experience [see One Blackfriars Ltd (In Liquidation) 2021 EWHC 684, paras 20-22]. Faculty does not support a distinction being drawn between proofs without significant credibility issues and proofs raising significant credibility issues."

9. We referred previously to the case of Robert McArthur & Others This case involved the death of a young man due to an accident at work. We asked his family for their thoughts on the experience of a remote hearing and their response is illuminating : the Pursuers felt denied the formality and finality of their

day in Court, during which they could represent their son and seek justice for him; the informality of their surroundings on the day lessened their sense of respect for the process and felt disrespectful to their son; the sense of support from solicitors and counsel was diluted by not being in the same place and by the additional distraction and worry about the technology working. In short, the whole experience for this bereaved family was unduly stressful, disrespectful of their loss and their deceased son and not what they should rightly expect from the legal system.

10. Given that we find the general presumption untenable, we do not have any additions or deletions to make.

Question 2 – For the categories of case listed as suitable for attendance at a hearing by electronic means (both video or telephone attendance):
o Do you think the general presumption given is appropriate? And
o Would you make any additions or deletions and if so why?

11. Thompsons Solicitors see no justification for holding even procedural hearings by telephone attendance.

12. We do not consider the general presumption given is appropriate for the same reasons given in response to Question 1 and similarly we have no additions nor deletions to make.

Question 3 – The parties can apply to change the mode of attendance if their circumstances warrant a departure from the general presumption:
o Do you think lodging a motion is the right way to do that? Please explain your answer.

13. Thompsons Solicitors agree that a motion is the appropriate way to alter the mode of attendance.

14. Thompsons Solicitors do not agree with proposed Rule 35B.4(4) that a motion to change the mode of attendance should be determined without a hearing, except where the motion is not opposed by any other party and a judge is content with what parties propose. Where such motion is opposed then the matter should be determined after parties have made submissions.

Question 4 – The courts can change the mode of attendance if circumstances warrant a different choice to the general presumption:
o Do you agree that the court should have the final say? Please explain your answer.

15. Thompsons Solicitors consider that the court should only have a role in determining mode of attendance where parties make motion to alter the default mode of appearance.

16. In the interests of Justice, we consider that it would be most appropriate for the Pursuer to make a choice, and if the Defenders did not agree to this, they would have the opportunity to oppose the motion, and thereafter it would be passed to the Court to consider.

17. Arguably electronic hearings may be an option to fall back on if both parties agree this is appropriate, and the respective agents can take time to explain to the pursuers and defenders the pros and cons, and an informed decision can be made.

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

18. Our civil courts have a centuries old tradition of open justice in that, save in exceptional circumstances, a court room should be accessible by all and any to ensure that justice can be 'seen' to be done. Remote hearings have precluded that fundamental principle from being met and whilst technology may well be capable of providing that access, it is our view that open doors to an open courtroom is a tenet of our legal system we should maintain at all costs.

19. There is inextricably linked to the open justice principle the question of access to justice which is perhaps a wider-ranging and more nebulous concept than simply having access to a physical Court room. The Court itself has a formality and presence which demands respect and as a result there are numerous consequences : evidence may be given with greater thought and precision; credibility is in sharper focus; legal teams can communicate immediately and clearly ; judges can intervene more effectively; the injured, bereaved and wronged can tell their story in a dignified manner in a place they look to for justice.

20. Remote hearings require all parties to have access to a remote 'device' of some sort, reliable broadband and a basic understanding, at least, of how to navigate the on-line world. It must be accepted that the inevitable disparity in access to these criteria throughout the population will lead to an inequality of arms in the justice system. It is most likely that it will be the Pursuers in personal injury cases who are most disadvantaged. Defenders are more likely to be well-funded institutions with the resources to support their defence. Many Pursuers will not be so well resourced, either financially or with the technical knowhow to present their case as well as they can. It is difficult to see how this imbalance can be addressed were remote Proofs to remain.

21. Whilst solicitors and counsel have, and will continue to hone their skills in navigating the technological systems which have been made available, the majority of Pursuers and witnesses will only ever have to do so once. The pressure on the witness to deal with technology (which is often unreliable) is too great a distraction at a moment that could be pivotal in their lives. The legal profession can and should continue to utilise the technology for procedural matters as there can be no argument that there has been considerable time saved and other efficiency savings made over the last 18 months

    Witnesses, Evidence and Core Bundles

22. In advance of proofs which are currently proceeding through Webex, a huge amount of preparation is required which had not been the case for in person proofs.

23. A large part of this relates to preparation of the core bundle of productions which takes several hours for the pursuer's agents to prepare. This firstly involves identifying all the productions, organising them and including hyperlinks in each production before uploading using Objective Connect.

24. The bundles then require to be printed, punched, put into a folder and sent to court. The need to print and send a bundle which has already been uploaded to Objective Connect seems excessive. This is very time consuming, costly, not environmentally friendly and also provides an opportunity for a GDPR breach if the papers go missing in the post. In terms of the Data Protection Act 2018, data collected must be proportionate and not excessive.

25. It would be preferable for papers to only be sent electronically , even when hearings are proceeding in-person.

26. Separate bundles then need to be sent to each witness, and further time is required to ensure there is no potential GDPR breach. It would be preferable if these could be sent by email through secure link, if hearings with witnesses require to proceed remotely.

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Question 6 – For the categories of case listed as suitable for an in-person hearing:
o Do you think the general presumption given is appropriate? And
o Would you make any additions or deletions and if so why?

27. Thompsons response above in relation to the Court of Session draft rules apply equally to the proposed sheriff court rules and we desire a uniform approach to both sets of rules.

Question 7 – For the categories of case listed as suitable for attendance at a hearing by electronic means (both video or telephone attendance):

o Do you think the general presumption given is appropriate? And
o Would you make any additions or deletions and if so why?

28. See Thompsons' response above.

Question 8 – The parties can apply to change the mode of attendance if their circumstances warrant a departure from the general presumption:
o Do you think lodging a motion is the right way to do that?
o Is there any need for an application form to accompany the motion (in similar terms to RCS)? Please explain your answers

29. See our response to question 3 above.

Question 9 – The courts can change the mode of attendance if circumstances warrant a different choice to the general presumption:
o Do you agree that the court should have the final say? Please explain your answer.

30. See our response to question 9 above.

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

31. See our response to question 5 above.

32. Further time is spent in the run up to virtual proof hearings preparing tracked list of witnesses. Each witness on the list of witnesses must be contacted and asked for details of where they intend to give evidence, whether they intend to take the oath or affirm and for their email address. Obtaining this information can be a time consuming process and requires to be done for every case listed for proof the following week, even when (at least with cases in ASPIC), only 1 will be able to proceed at a time.

33. Remote hearings present potential difficulties relating to technology and internet connections. Although the court helpfully offers a witness test on the Monday before any proof, this is a time consuming process as each witness for all of the multiple cases listed for proof requires to attend separately with an agent for both the pursuer and defender attending throughout. Not all witnesses are likely to be available at the time of the test and even when they are; issues can still arise during the hearing. Time could be saved if all hearings involving witnesses were held in person.

34. ASPIC currently only has capacity for 1 proof to proceed at a time via Webex. Despite this, there are usually multiple (between 10-20) cases listed for Proof each Tuesday. The court has now begun to identify a priority proof on the Tuesday or Wednesday prior. This will usually be a case which has previously bene discharged due to lack of court time. Other than that one case, the

cases listed are in no particular order and so agents require to prepare for their proofs to run, even if in reality there is no prospect of the court having availability for this. Requests for 2 proofs to run at once (with 1 being through Webex and the other in person, with social distancing) have been refused. This makes the week before proof dates more stressful for agents, particularly those with more than 1 case listed, and witnesses. This often then requires to be repeated when proofs are discharged and new dates allocated.

35. The lack of capacity for more than 1 proof to proceed through Webex also leads to additional expenses for both pursuer and defender firms through the late cancellation of expert witnesses. The court will not agree discharges in the week prior to proof due to lack of court time (even where it is agreed by both parties) and so parties often have to wait until after 10am on Tuesday for the proof to be discharged by the Sheriff, following appearance.

Conclusion

The proposed changes in the court rules are a challenge to some of the fundamental principles of our legal system. Should there be an overall will for that change, Thompsons would wish to see some sort of pilot scheme in operation for a reasonable period of time, to be subject to stringent review and a further consultation before any permanent change is made to the way our courts are accessed.