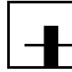

RESPONSE BY SHEPHERD AND WEDDERBURN LLP

to

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

This response is submitted by Shepherd and Wedderburn LLP. Shepherd and Wedderburn is the largest Scottish-headquartered UK law firm, with offices in Edinburgh, Glasgow, Aberdeen, London and Dublin. Our lawyers practice across a wide range of dispute resolution fora, from the Court of Session, Sheriff Court and the Lands Tribunal for Scotland, through to adjudication, arbitration and mediation. Through the pandemic S+W has conducted many hearings in different fora remotely.

While we have responded to the specific questions posed below, we thought it might assist if we set out the context for those answers.

The wholesale adoption of telephone and video technology for court hearings was forced upon the legal profession, the public, third parties and the court service as a result of the unprecedented legal restrictions imposed as a result of the COVID-19 pandemic. The adoption of remote hearings, and indeed all aspects of the court process, was not the result of a considered and carefully assessed analysis, but was instead an emergency measure. While we recognise that the legal profession and the court service have in the main adapted very well to these emergency measures, that does not mean that those emergency measures are suitable in the longer term.

There are many lessons learned during the pandemic which could be part of a review of how civil justice is administered in Scotland. We have in mind:

- The lodging and exchange of documents between the parties;
- Preparation for hearings and in particular the use of “bundles” to create a single file of all papers necessary for the hearing;
- The process for disclosure of documents, and the use of online review platforms by any Commissioner appointed and/or the parties;
- Protocols for taking evidence from witnesses, and in particular rules around where remote witnesses should be located and how that location should be managed;

These comments focus on process, and we do not comment on whether it is right or wrong for a hearing to be heard remotely. The courts, and particularly the Commercial Court, have routinely made use of new technology to allow cases to be heard efficiently, and our experience during the pandemic is that it is possible for any case to be dealt with entirely remotely. However the reality is that the wholesale use of these technologies does not necessarily make the process more efficient.

Accordingly we consider that the questions posed by the Consultative Committee, and the approach taken in the proposed rules, is too narrow in scope. It is too blunt an instrument to approach the question by saying that all cases, with limited exceptions, should be online. It is equally inappropriate to take the opposite approach and say that all cases should be dealt with in person.

Ideally the court should be flexible in its approach to the hearing of cases. Other factors, beyond those listed in the proposed draft rules, should be considered. These might include:

- The location of the parties – it may be that parties in a Court of Session matter are all represented by counsel or solicitor advocates and practical convenience dictates that an in person, or at least a hybrid, hearing would be appropriate.

- Equality of arms – If the Sheriff is in Wick, one party is represented by a solicitor based in Wick, and the other by a solicitor represented in Glasgow, then an online hearing might appropriate (rather than requiring an in person hearing or attempting a hybrid hearing).
- Minimising travel – environmental concerns may be more powerful than the desire to have an in person hearing.
- The volume of documentation – organising and reviewing documents on screen, remotely, can be more efficient than doing so in person.
- The purpose of the hearing - an online hearing may be more appropriate for short procedural business, which may be both more time efficient as well as mitigating environmental concerns around travel, whereas a trial, evidential or substantive hearing may (subject to the court being flexible in its approach) be better suited to an in person hearing.
- Cost will be an issue for some parties and solicitors, in particular relating to IT equipment and accommodating remote hearings.
- If there are party litigants an online proof might pose a particular challenge, given the work required to coordinate, in particular, witnesses.

In summary the proposed approach is too rigid and is unlikely to result in an effective use of the court's resources. Instead the Council should think again about the wider issues mentioned in this response. We would support an approach that sees parties nominate an approach to the case at the outset of any case, and if the parties are not agreed then the court would rule on that at the first procedural hearing.

This suggestion is made acknowledging that it appears to be almost universally accepted that remote hearings are suitable for and work well for procedural hearings.

We have seen a copy of the response by the Lord President's Consultative Committee on Commercial Actions, and agree with the observations made therein.

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

Our answer is no, given the observations above.

- Would you make any additions or deletions and if so why?

If the rules are to be amended as proposed, we propose that substantive hearings on Petitions for Judicial Review, particularly on planning matters, be added to the list.

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

Our answer is no, given the observations above.

- Would you make any additions or deletions and if so why?

We concur with the observations of the Lord President's Consultative Committee that commercial actions should not be on the list.

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.

As explained above, the mode of hearing the substantive hearing in a matter is something that could be determined at the first procedural hearing.

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

Yes – while the wishes of the parties should be taken into consideration, the court should have regard to not just the interests of the parties but also the wider factors mentioned above.

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

No.

Our comments on the proposed changes to the Court of Session Rules apply equally to the proposed changes to the Ordinary Cause Rules in the Sheriff Court.

15 November 2020

Shepherd and Wedderburn LLP