RESPONSE BY THE COURT OF SESSION INNER HOUSE USERS' GROUP

to

SCOTTISH CIVIL JUSTICE COUNCIL, TARGETED CONSULTATION: ON CHANGES TO THE INNER HOUSE RULES

Introduction

The Inner House Users' Group was established by the Scottish Courts and Tribunals Service to provide a forum for dialogue and feedback between users of the Inner House and the Court. Its membership comprises solicitors and advocates with substantial experience of practice in the Inner House. It is chaired by Lord Pentland, the Inner House administrative judge. Senior court officers, including the clerk to the First Division, attend meetings of the group.

The group welcomes the opportunity to respond to the targeted consultation. Before putting forward some specific comments in response to the proposed new rules, the group would make a general observation concerning the way in which the Inner House currently operates in practice. The group wishes to emphasise that the Inner House works well under its present arrangements and rules. There are no delays in the handling and disposal of Inner House business. Cases are pro-actively managed by the procedural judges and the Inner House clerks. Hearings are allocated promptly for dates that suit the parties and their chosen counsel. Most procedural hearings are now dealt with 'on the papers' without the need for the case to call. Substantive hearings are usually completed within two days. It is virtually unknown for a hearing on the Summar Roll not to be concluded within the allotted time. The Court issues its judgments expeditiously, almost always within a period of three months and frequently much earlier.

A further important feature of the current system is that urgent disposal in the Inner House is reserved for cases of exceptional and genuine urgency, such as those involving the welfare of children, some cases of *interim* interdict or cases where a commercial deadline is imminent. Substantive hearings in cases of this type are typically fixed on the Summar Roll (and sometimes on the Single Bills) at a very early date; the judgment of the court is then issued without delay.

None of these observations is intended to imply that there is no scope for improvement in regard to the details of the current rules with a view to promoting further efficiency or clarity. The group is not, however, persuaded that any fundamental change is required.

Having considered the draft rules, the group would make the following observations.

Chapter 38, Rule 38.2 – Reclaiming Days

Expenses

- New RCS 38.2(3) provides (replicating, substantially, current RCS 38.2(2)):

  "*Where an interlocutor which reserves or does not dispose of the question of expenses is the subject of a reclaiming motion, any party who seeks an order for expenses before the disposal of the reclaiming motion must apply by motion to the Lord Ordinary for such an order within 14 days of the date of enrolment of that reclaiming motion.*"

- One member of the group has experience of a judge refusing to deal with a motion for an additional fee within 14 days of the enrolment of a reclaiming motion on the basis that the wording of the Rule only applies to "an order for expenses" rather than an uplift.

- It would be preferable for all issues relating to expenses to be dealt with at the same time. The group would suggest including words after "an order for expenses" such as "(including any additional fee)".

Time limits for appeals against procedural orders

- Under the existing rules an interlocutor disposing of the whole subject matter or merits of the cause may be reclaimed within 21 days without the leave of the Lord Ordinary (RCS 38.2(1)).

- Interlocutors listed in RCS 38(5) may be reclaimed without leave within 14 days.

- Other interlocutors may be reclaimed within 14 days if leave is granted (RCS 38.2(6)).

- Under the proposed new rule (RCS 38.2(4) the period for reclaiming against interlocutors not listed in RCS 38.2(2) will be 7 days rather than 14. These are broadly procedural decisions. The rationale put forward in the consultation paper for allowing only 7 days in such cases is to discourage unmeritorious appeals (para 13).

- The group has the following comments to make on this proposed change:-

  - The existing 14 day period already represents, in practical terms, a very tight deadline.

  - The change may in some cases increase costs, especially in light of the proposal that grounds of appeal should be lodged along with the reclaiming motion. Agents may take the view that it is necessary to incur the costs of preparing all the necessary documents immediately, even though a final decision on whether to mark a reclaiming motion has not been made.

- The decision to reclaim against any interlocutor, including a procedural one, is usually sensitive and complex, involving input from clients, agents and counsel. The group considers that a period of 7 days will often not allow sufficient time to take instructions from the client, instruct counsel, consider counsel's advice, and prepare all the necessary documentation.

- The group suggests that there should be no reduction in the 14 day timescale for reclaiming against procedural decisions.

Chapter 38, Rule 38.3 – Leave to Reclaim

Commercial Actions

- Under the existing rules, all interlocutors issued by a Commercial Judge, other than a final interlocutor, can be reclaimed only if leave is granted within 14 days: RCS 38.3(6).

- This is an important principle in the context of Commercial Actions. A party may wish to debate a discrete part of the case. The Commercial Judge may allow the debate, but knowing that, if the party is not successful, the action can still proceed expeditiously to proof.

- Under the proposed new rules, there is no distinction between Commercial Actions and Ordinary Actions. The unsuccessful party can delay matters by reclaiming the outcome of an unsuccessful debate.

- This would amount to a significant change to the ethos of the Commercial Court. It would impair the ability of the Commercial Judges to manage cases effectively and efficiently.

- The group suggests that no change should be made to the rules governing the need to obtain leave to reclaim in the Commercial Court.

Chapter 38, Rule 38.5 – Method of reclaiming

Reclaiming Print

- Under the existing rules (RCS 38.5(2) and (2)(a)) when a party seeks to reclaim they must lodge a "reclaiming print in the form of a record which shall contain – the whole pleadings and interlocutors in the cause … and … the opinion of the Lord Ordinary".

- Under the proposed new rule (RCS 38.5) the term "reclaiming print" and the requirement to lodge one are removed. The group has the following comments to make on this proposed change:-

    - There appears to be a conflict in the drafting of the new rules as the term "reclaiming print" remains in some of the proposed new rules, see for example: 38.22(1)(a), 38.22(2); the form of timetable set out in the schedule at paras 3 and 4; and the explanatory note. The group also notes that reference to an "appeal print" is retained in chapter 40. The group questions if the removal of "reclaiming print" was perhaps a drafting error.

    - In any event, the reclaiming print is considered to be a very useful compendium of the core material the court and parties use for the purposes of the reclaiming motion. It appears from the current drafting of the new rule that everything contained in a reclaiming print is still required, but simply not contained in the document well-known to parties and the court.

    - The group considers that a requirement to lodge a copy of the pleadings and interlocutors when enrolling the reclaiming motion (new RCS 38.5(2)(a)) is liable to lead to confusion and uncertainty. The pleadings will already be in process.

    - The group questions if there is a need to have the "reclaiming print" or (under the new rule) the pleadings, interlocutor and opinion of the Lord Ordinary produced at the stage of lodging a reclaiming motion. This requirement adds to the cost and time involved in enrolling a reclaiming motion.

    - The group's view is that the reclaiming print should be retained, but that it is not required at the stage of enrolling the reclaiming motion and could be lodged later in conformity with an issued timetable.

Grounds of appeal

- A key element of the proposals is to require grounds of appeal to be lodged at the same time as enrolling the motion for review (new RCS 38.5(2)(d)). It is not clear how this is to operate on those occasions where a motion for review must be marked immediately (i.e. where the Lord Ordinary has not yet written on the matter). Under the current rules grounds of appeal are the first timetabled event (RCS 38.13(2)(a)). The group has the following comments to make on this change:-

    - It appears from the consultation paper that much of what is suggested by way of reform in this context and in others is intended to promote expedition in the disposal of reclaiming motions. As already explained, the reality of matters in the Inner House is that there are no significant delays; business

proceeds at a fast and efficient pace for both court users and the court's administration. The Inner House consistently meets all the realistic aims set by the court's programming board for the disposal of cases and in many cases exceeds them by some margin.

- The grounds of appeal are a key document; they form the basis of the challenge to the first-instance judgment. Parties are not usually permitted to advance arguments that extend beyond the grounds of appeal. Consequently, it is vital to ensure that the grounds are fully and accurately stated from the outset. The requirement to lodge grounds of appeal at the time of enrolling the reclaiming motion (in some cases within 7 days and potentially without the benefit of the Lord Ordinary's opinion) will pose significant challenges for practitioners.

- The need to lodge grounds of appeal along with the reclaiming motion could result in grounds being either less well focussed and longer or even simply skeletal. This would be undesirable. It may result in more motions for permission to amend grounds of appeal once parties have had time to develop a more considered approach to them.

- The group can see no disadvantage in grounds of appeal remaining a timetabled item not required to be lodged along with the reclaiming motion.

Answers to Grounds of appeal

- The group notes that the requirement to lodge answers to grounds of appeal has been removed in the new draft rules. The group agrees that the need for answers can be dispensed with and removed from the timetabled events, but notes that they remain listed in the schedule/timetable (Form 38.14) at para 2.

Estimate of duration

- The proposal (new RCS 38.5(2)(e)) is for an estimate of the likely duration of the hearing to determine the reclaiming motion to be lodged when the motion for review is enrolled. The current rule (RCS 38.18(2)(d)) provides that the estimates should be lodged as the last of the timetabled events.

- The utility of providing an estimate before knowing the extent to which points are accepted by the respondent or whether the respondent intends to cross appeal may be questioned.

- While new RCS 38.5(4)(a) allows the respondent to lodge an estimate of the likely duration of the hearing, there is no obligation on the respondent to do so. It is thought

that this may give rise to uncertainty in practice about what exactly the respondent is expected to do.

- The group has the following further comments to make on this proposed change:-

  - The current estimates for the length of a Summar Roll are the final timetabled event lodged just before the Procedural Hearing. This has proved sensible and pragmatic. Lodging the estimate at the stage when the reclaiming motion is enrolled is thought to be less useful.

  - Requiring the estimate to be lodged just before the Procedural Hearing means that by that point parties have everything they need to form a realistic view of the time required for a Summar Roll hearing. Lodging an estimate at an earlier stage will not add to the speed or efficiency of the reclaiming motion and may result in a less efficient system with parties potentially over or under estimating the time needed because the real issues in the case are not yet clear.

Chapter 38, Rule 38.6 – Allocation of reclaiming motion to fast track procedure

- In considering this aspect of matters the group would reiterate that the Inner House currently operates very efficiently. There are no significant delays in the timetabling and disposal of business. Cases are closely managed by the procedural judges with the support of experienced clerks.

- As a result of this, early disposal of cases in the Inner House is rarely considered to be necessary or appropriate.

- New RCS 38.6(5) provides that cases must be appointed to the fast track procedure unless the procedural judge, on cause shown, otherwise directs. This appears to run counter to the Targeted Consultation, which suggests that the fast track procedure will be used "rarely" (paragraph 18).

- As the draft rules currently stand, it appears that the only circumstances in which standard procedure would be followed is when a motion for fast track procedure is refused and the procedural judge appoints the reclaiming motion to the standard procedure. This does not appear to make sense.

- The group notes that new RCS 38.5(2(f) requires the reclaimer to lodge at the same time as enrolling a reclaiming motion "a statement that the reclaimer wishes the reclaiming motion to proceed under the standard or the fast track procedure" and new RCS 38.6(1) requires, where the reclaimer seeks allocation of a reclaiming motion to the fast track procedure, the reclaimer to include in the reclaiming motion the words "and for allocation to the fast track procedure". The group is uncertain why both are required.

- In the group's view, fast track procedure should be reserved for exceptional cases which involve real urgency, such as some motions for interim interdict and cases involving the safety and welfare of children. This would be in line with current practice in the Inner House whereby early disposal is infrequently granted because it is rarely necessary.

Chapter 38, Rule 38.14 – Timetable in standard procedure

- The timetable to be issued by the Court under the proposed new rule would allocate "a diet for a hearing on the Summar Roll" (RCS 38.14(1)(c)). This would represent a significant departure from the current practice under which the diet is allocated at the procedural hearing.

- When the timetable is issued under the proposed new rule, counsel's availability will frequently not be known. This is liable to give rise to considerable practical difficulty for agents and counsel. It is noted that the procedural judge can appoint the reclaiming motion for a hearing "on the date previously allocated or another date" (new RCS 38.19((2)(a)). This may mean the Court's diary will become cluttered up with allocations made at the stage when timetables are issued but which are then not used because diets are eventually re-fixed at the Procedural Hearing under reference to counsel's diary.

- The Rule does not provide for allocation on the Single Bills. Nor does RCS 39.19(2) provide for the appointment of the reclaiming motion to the Single Bills. Under current procedure this is sometimes done. The group considers that this option should be retained.

- The group has the following further comments to make on this change:-

    - Summar Roll hearings are often allocated to benches comprising judges with specialist experience in particular areas, such as tax, disciplinary cases involving professional bodies, planning etc. Reading-in time and writing time also have to be factored into the programming exercise. This type of planning will be more difficult if substantive hearings have to be allocated at an earlier stage than under the current system.

Chapter 38, Rule 38.15 – Notes of argument and 38.16 – Authorities

- The reason for extracting these Rules from the Practice Note is not explained.

- It is suggested that it is unnecessary to do so. They are prescriptive in a way that other Rules are not (e.g. Notes of Argument for hearings on the procedure roll).

- For instance, by stating as a Rule that "a note of argument must… consist of a numbered list of propositions" a degree of inflexibility that may be counterproductive is introduced.

- By way of example, it can often be helpful to include a brief "Background" section in a Note of Argument. A Note of Argument containing such a section would not comply with the proposed new Rule since it would not "consist of a numbered list of propositions".

- In relation to the List of Authorities, it is noted that, in terms of new RCS 38.19(2)(b), the procedural judge may require that the list of authorities does not exceed 10 cases. However, new RCS 38.16(2)(b) prescribes no more than 10 authorities unless the procedural judge allows more. These two rules appear to pull in different directions.

- The group has the following further comments to make on this change:-

    - It is not desirable for the rules to regulate these matters; rules are contained in subordinate legislation and are expected to remain in force for some time. These matters are better left for a practice note which can be more easily revised on the basis of experience.

    - The court is currently at a stage of post-pandemic evolution whereby parties and the court are still trying to find the right balance between written submissions and oral advocacy at substantive hearings. Putting such inherently practical issues as the content of notes of argument and number of authorities into a rule of court diminishes the ability to modify guidance quickly, in the light of experience. An example is the recent successful use of the practice note system to reduce the length of notes of argument following the return from WebEx to in-person Summar Roll hearings. In essence the group feels that more time should be allowed to pass so that the court and parties can evaluate the way in which practice is evolving in the Inner House.

    - Not all reclaiming motions fit a particular mould; too rigid a system contained in a rule of court may create additional work for the court and cost to parties with motions for dispensation.

  The group considers that a mandatory exchange of notes of argument in stages would represent a welcome improvement. It would mean that parties' written cases would be able to address the totality of the arguments advanced on all sides. This would help in distilling the issues that are genuinely in dispute. The proposed new rule (RCS 38.15(3)) permits this, but requires parties to agree. A tighter system involving mandatory exchange before finalising notes of argument would be preferable.

Chapter 38, Rule 38.22 – Lodging of appendices in reclaiming motion

- It is noted that this Rule refers to the "reclaiming print"; as already observed, that terminology is removed from RCS38.5(2).

- More generally, the specific rules on appendices do not appear to reflect practice, in terms of which parties, prior to the procedural hearing, try to agree a joint appendix and, if it is too large, a core bundle. This is a preferable approach.

- The group has the following further comments to make on this change:-

    - The group noted that "core bundles" are referred to in the practice note but have not been brought into the new draft rules. Core bundles are a particularly useful tool for parties and the court when dealing with large appendices (over 500 pages).

The group would be happy to engage further with the Council and to discuss any aspect of this response.

Lord Pentland
10 October, 2022