



THE LAW SOCIETY
of SCOTLAND
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The Scottish Civil Courts Review

The Law Society of Scotland's Response

November 2010

INTRODUCTION

The Report of the Civil Courts Review chaired by the Rt Hon Lord Gill is an ambitious document and could potentially bring the greatest changes to the Civil Courts in Scotland for over a century. It identifies a number of structural and other weaknesses currently affecting the civil courts in Scotland, and makes recommendations designed to make radical improvements. If implemented, the report's recommendations will dramatically alter the delivery of civil justice in Scotland.

This response sets out the views of the Law Society of Scotland's Civil Justice Committee in relation to the report. The Committee welcome the report but is mindful that many of the current problems arise from the huge amount of judicial time which is spent dealing with Summary crime. The Committee would ideally like to see a split between Civil and Criminal business, within the Sheriff Court.

The Committee have not commented on every recommendation made in the report, nor has the Committee confined itself to the precise recommendations made in the report, recognising that the Scottish Ministers and Parliament may wish to consider some of the issues on a broader basis. In so far as the implementation of the recommendations requires legislation, it is important that there should be an opportunity to comment on any specific proposals which may emerge from the Scottish Ministers' consideration of the report. The Committee response follows the structure used by Lord Gill when he launched his review at the Signet Library on 30th September 2009.

GENERAL COMMENTS

Chapter 4:- Structure of the Civil Court System (Chapter 4)

Recommendation 1:-

- The Scottish Court Service should plan for the elimination of part-time judicial resources, which should be available for emergencies only.

The Committee's position

In the response to the Civil Courts Review Consultation Paper the Committee had no objection to the use of Temporary Judges in the Court of Session. In particular the Committee noted that the use of Temporary Judges and Part-time Sheriffs are now an established part of the fabric of the administration of justice and suggested that they should have an acknowledged role and not simply be regarded as providing cover for illness, holidays, etc.

The Review team have expressed a principled objection to the use of Part-time Sheriffs and Temporary Judges. Their position is that the use of Part-time Sheriffs and Temporary Judges should be reduced and restricted to cover for leave, illness and emergencies. Where they are appointed, they should not be practitioners. Temporary Judges should be drawn from the ranks of retired judges of the Court of Session or serving or retired Sheriffs or Sheriff principals. Part-time Sheriffs should be drawn from the ranks of retired Sheriffs or retired practitioners. The Review team accept that this may not be possible until the full complement of district judges is in place.

The Committee has no problem with the use of temporary judges in the Court of Session, however some practitioners have identified some problems with part-time Sheriffs. In particular it appears from the statistical information considered by the Review that part-time Sheriffs provided around 940 sitting days which amounted to nearly one fifth of the total. Unfortunately this has led to hearings in some cases being greatly delayed when attempts are made to re-schedule a part-heard case. There is also a concern from some members of the Committee that, due to lack of appropriate training, part-time Sheriffs may lack a core competency to properly adjudicate on some matters. This situation could be avoided if Sheriffs specialised and considered cases within their own area of expertise. The Committee recognise the current need for part-time Sheriffs. However, on the basis that there is a proposal to reform the current system, the Committee comments that the use of full time Sheriffs would be preferable.

Anecdotally it appears that a policy decision has already been taken to stop the use of part-time sheriffs and this has unfortunately led to a lack of judicial time in the civil courts.

Recommendation 2:-

- A system should be introduced whereby a number of Sheriffs in each Sheriffdom should be designed as specialists in particular areas of practice, including Solemn crime, general civil, personal injury, family and commercial.

The Committee's position:-

The Committee previously supported greater specialisation within Sheriffdoms and suggested that there is a particular need for specialists in administrative, environmental and planning law, as well as family, commercial and personal injury cases.

The Committee remain of the view that there should be specialisation within the judiciary. This recommendation could be introduced without primary legislation and at no great cost to the public purse. Such a system of specialisation has been successfully piloted in Glasgow Sheriff court.

In particular the Committee are keen for there to be an option of using a commercial court in each of the Sheriffdoms in Scotland.

Recommendation 3:-

- A national Sheriff Appeal court should be established, to hear summary criminal appeals and civil appeals from District Judges and Sheriffs.

The Committee's position:-

The Committee wish to distinguish between Civil and Criminal cases.

In relation to Criminal matters the Committee agree there should be a shrieval level of appeal for summary criminal matters. It should not be possible to appeal from the Justice of the Peace or Sheriff Court direct to the High Court in a Summary case. Solemn appeals should still go to the High Court but Summary appeals should go the National Sheriff Appeal court. The creation of a national Sheriff Court appeal court (with a bench of 3 Sheriffs chaired by a Sheriff Principal) would be proportionate in relation to criminal matters.

In relation to Civil matters the Committee previously argued that it should only be possible to appeal from a Sheriff directly to the Court of Session with leave of the Inner House. All other appeals from the Sheriff should be to the Sheriff Principal and from there only to the Court of Session on a point of law.

Having had the opportunity of further discussing the issues, the view of the majority of the Committee is that there should be a presumption that an appeal will go from an individual Sheriff to the Sheriff Principal. There are however Committee members who think that an appeal should still be possible directly to the Court of Session.

The Committee does not favour a national Sheriff Appeal Court for civil cases. The current system of appeals to a Sheriff Principal is effective.

Recommendation 4:-

- The privative jurisdiction of the Sheriff Court should be increased from its current level of £5,000 to £150,000.

The review team highlights the importance of not seeing this recommendation in isolation. It goes hand in hand with the introduction of specialist Sheriffs and a system of active case management.

The Committee's Position

The Committee is very keen to retain the Court of Session as a court of first instance for suitable cases. The Court of Session is a centre of excellence, which is well respected for both the high level of judicial expertise and the guidance which it provides to the lower courts, both as a court of first instance and as an appellate court.

The Committee recognises the principle identified by the review group that, following the introduction of district judges there would be a real benefit in some less complicated cases being dealt with by in the Sheriff Court. Court of Session judges should act as “gate keepers” and use active case management to ensure that cases are considered at the correct level. In order to achieve this Judges, Sheriffs and District Judges should all have powers to refer cases both up to a higher court and down to a lower court.

The Committee has considered opinion from solicitors who use the various commercial courts. The introduction of commercial courts to the Sheriff courts has worked well however there are still a large number of cases which should be decided in the Court of Session.

The Committee is keen to retain personal injury work in the Court of Session for suitable cases of value and complexity where there is an established successful procedure that minimises the use of judges but where there is a body of experienced judges available if required to resolve matters of law and/or procedure coupled with the right to jury trial.. The Committee are concerned that there may be a lack of statistical evidence in the information considered by the Review team and in particular there is a fear that calculations may have been made using the sum sued for which, on many occasions bears no resemblance to the value of the case.

The equivalent of Chapter 43 Rules have recently been introduced in the Sheriff Court. The Committee are mindful of the desire to achieve proportionality and the Committee are keen to see how this affects the progress of Personal Injury cases in the Sheriff court. In particular it would be a worthwhile exercise to compare the time spent in reaching settlement in Sheriff Court cases with cases raised in the Court of Session.

The Committee has considered the opinion of a large number of personal injury lawyers from both for pursuer’s and defender’s firms. They have looked at cases based on the average figures for solatium in conjunction with the median wage loss.

Taking account of these views and of those who deal with other types of litigation, including commercial actions, the Committee consider that an appropriate threshold for Civil cases in the Court of Session would be not less than £20,000 and not more than £50, 000. i.e. The privative jurisdiction of the Sheriff Court should be increased from the current £5,000 to at least £20,000 but should not be more than £50,000.

One of the current difficulties in the Sheriff Court is that not enough court time is allocated for a proof until the court is convinced that the proof will proceed. In a large number of Sheriffdoms it is impossible to have more than one day allocated for the first diet of proof. The Committee is pleased to note the current discussion on the Sheriff Court Rules Council about sanction for the employment of counsel in the Sheriff court including both advocates and solicitor advocates with civil rights of audience.

Finally, cost is a major factor for parties in the decision on where to litigate. It is the experience of many members of the Committee that it is more expensive to litigate in the Court of Session rather than in the Sheriff Court. If the government is keen to promote

behavioural change (which the Committee support) and to increase the usage of the Sheriff Court then consideration should be given to the resurrection of a civil costs review and more significantly an increase in the proportion of recoverable expenses in the Sheriff Court.

Recommendation 5:-

- A specialist personal injury court should be created, based in Edinburgh Sheriff Court but with jurisdiction throughout Scotland. Pursuers will thus have choice between local access to justice or the advantages of a Sheriff Court with all Scotland jurisdiction.

The Committee's Position

The Committee is not persuaded there is a rationale for the introduction of a national Personal Injury Sheriff Court in Edinburgh or any other single location.

The Committee still favours specialisation for Sheriffs in each Sheriffdom. Much depends on the privative level of the Sheriff Court. If appropriate specialists are employed and the threshold were to be set between £20,000 and £50,000 there is no need for a national court.

It is not clear if the intention is that a Personal Injury Court in Edinburgh would have the option of jury trials. The Committee are broadly happy with the current provision of jury trials in the Court of Session and the majority of the Committee favour the retention of Civil Jury Trials. If the Sheriff Court privative jurisdiction is set within the range suggested by the Committee then more complicated personal injury cases would go to the Court of Session. There would appear to be an unnecessary duplication in creating a national specialist Personal Injury court.

Recommendation 6:-

- A new judicial office should be created, that of District Judge. A District Judge would sit in the Sheriff Court and hear summary criminal business and civil claims of modest value.

The thinking of the Review team is:-

“In accordance with our principle that business should be dealt with at the appropriate level of the court hierarchy, we consider that a new judicial office should be created. This, we believe, will promote the development of specialisation at shrieval level, while maintaining, where practicable, the principal of access to local justice.

The review team believe that the creation of a third tier will lessen the impact of summary crime on ordinary civil business and provide a better service in lower value cases.”

The District Judge would deal with summary crime and all civil cases with a value of £5,000 or less.

The Committee's Position

The Committee favours the creation of a third tier; however all Personal Injury cases, regardless of their value, should be excluded from the jurisdiction of the District Judge in order that they might benefit from the specialist case flow management system in the Sheriff Court.

Landlord and tenant cases, should be referred to the District Judge.

The Committee considers that there should be a flexible power of remit to allow cases to be "pushed up" from a District Judge to a Sheriff and to allow cases to be "pulled up" by a Sheriff.

The Committee proposes that in civil cases the District Judge should operate an inquisitorial court which would allow individuals to appear without legal representation. It is envisaged that parties should always have the right to legal representation in relation to criminal cases and family cases.

The Committee suggests that information on an appropriate remuneration package could be drawn by making a comparison with the package available to a Tribunal Judge and that in addition valuable information on salaries can be obtained from the Society's Annual Cost of Time Survey.

In the Committee's view there are clear advantages in the possibility of a career path from the position of District Judge to that of Sheriff.

The Committee is mindful that the introduction of a third tier of justice creates particular problems and that a "big bang" may be required. The Committee suggest that consideration should be given to recruiting and training career judges at an early stage of a new lawyer's career.

Chapter 5 – a new case management model:-

Recommendation 7:-

- A docket system should be introduced in the Court of Session and Sheriff Court. A case would be allocated to a particular Judge or Sheriff, who would deal with all hearings in that case.

The Committee's Position

The Committee agree that caseflow or timetable management works well in all routine cases. There is a judicial override if parties do not comply with steps in the timetable. Cases can progress with little or no judicial input, thus saving resources. The Committee also accepts that bespoke case management by a Judge or Sheriff may be of real benefit in more

complicated cases in specialised areas.

The Committee agree that a docket system should be introduced in the Court of Session and the Sheriff Courts. This would work particularly well if there is a split between civil and criminal as well as the introduction of specialist Sheriffs. There is evidence that the docket system is already being used to allow judicial case management in some sheriff courts. It is recognised that this may be problematic in smaller courts.

The Committee recognise the difficulty of operating the docket system when many of the judges and Sheriffs are working on a part time basis however, as previously stated the Committee suggest that there should be a reduction in the number of part-time positions.

Case Flow works well for personal injury cases and is being introduced to the Sheriff Court.

Case management also works well in the commercial court. In particular the commercial court covering Inverness, Dingwall and Skye is extremely effective and notwithstanding the large geographical area covered deals with business with a combination of round the table meetings and conference calls.

The Committee also suggest that Family cases benefit from judicial case management. In particular in relation to child welfare hearings. It is envisaged that there may require to be concurrent jurisdiction between the Sheriff and the District Judge. The committee feel it would not be appropriate to allocate the case according to the sum sued for. There may be cases in which substantial sums are involved parties are in agreement on the division, and a District Judge would be suitable to decide a minor issue which remains in dispute.

Recommendation 8 (linked to Recommendation 7):-

- With certain exceptions, all actions should be subject to judicial case management. A case management hearing should be fixed shortly after Defences are lodged. It would normally take place by means of a telephone conference call. The report makes detailed provision for the matters to be dealt with at the case management hearing, such as the exchange of information and the focusing of issues by parties' representatives. The main exception would be personal injury actions, for which special caseflow management provisions have already been made.

The Committee's Position

The Committee agrees that timetabled case flow is appropriate for personal injury cases and that case management is appropriate for other cases. It is understood that consideration has already been given to this suggestion by the Sheriff Court Rules Council. There should be judicial discretion at the outset about what type of case management should be employed and judges/Sheriffs should be required to undertake training in case management.

Recommendation 9:-

- In the Sheriff Court, actions will be transferred to a court in which a Sheriff with the relevant specialism is resident. Procedural business will be conducted by email, telephone, video-conferencing or in writing.

The Committee's position:-

The Committee endorse this recommendations and indeed this is what the Committee envisaged in the suggestion that specialist Sheriffs operate within Sheriffdoms. The Committee agrees that there should be increased use of IT and that communication should take place by email.

In their original submission to the Review the Committee made a suggestion that greater consistency and cost savings could be achieved if there was a single centre for the warranting of all Sheriff Court Writs, except where urgent orders are sought before service. The Committee still think that there are advantages in creating such a single warranting centre. If the action is undefended the centre would issue the decree.

In the event that an action is defended the case could then be sent to a Sheriff court within the relevant Sheriffdom where it could be allocated to a particular Sheriff, taking account of specialisation in Recommendation 2 above.

Recommendation 10:-

- District Judges will have jurisdiction to hear housing actions, actions for payment of £5,000 or less and referrals and appeals from children's hearings.

The Committee's Position

The Committee agree that district judges should have jurisdiction to hear housing actions, and actions for payment up to £5000 with some exceptions, such as personal injury cases.

The Committee are accordingly happy for the district judge to have jurisdiction in family actions subject to there being an option of a proper remit procedure. The Committee agree that the jurisdiction should be concurrent with that of a Sheriff.

Recommendation 11:-

- There should be a single new set of rules for cases of £5,000 or less (called "the Simplified Procedure"). The new rules should be based on a problem solving or interventionist approach in which the court should identify the issues and specify what it wishes to see or hear by way of evidence or argument. The rules should be written in plain English and drafted for party litigants rather than legal practitioners.

The Committee's Position

The court process in relation to lower value claims, should be designed to accommodate party litigants. If greater use were to be made of pre- action protocols, then there would be clear instructions for all on what requires to be produced within a timescale which would be clear and without discretion.

The Committee suggest that the majority of parties have computers with calendars, access to the internet via broadband, etc which would indicate that present procedures are anything but user-friendly. However, it must also be recognised that even smaller claims can involve complex legal matters which cannot readily be resolved by simplified forms and "user-friendly" language. All litigants should have access to and be encouraged to take legal advice either through solicitors; agencies providing advice such as the CAB; or in-house court schemes. The provision of appropriate advice can result in early settlement or avoidance of claims with the resulting saving in administrative and judicial time.

It is recognised that certain types of claim are not appropriate for self-representation such as personal injury. Elaine Samuels's research (1998) on personal injury cases and Small Claims Procedure concluded that personal injury actions were not suitable for Small Claims Procedure due to the imbalance between pursuer and defender built into the Procedure.

The Committee had previously supported the removal of personal injury cases from the Small Claims Procedure and was pleased to see that implemented in January 2008. Equality of arms must be at the heart of the Civil Justice System and on that basis certain areas of law, at whatever level or value, will require the involvement of a solicitor. The experience of the Irish Personal Injuries Assessment Board (PIA B) is that a body of claimants still opt for legal representation, even though the costs are not recovered.

The Committee agrees that there should be one set of rules for all cases, with the exception of Personal Injury Cases, in which the sum sued for is £5000 or less. Personal injury cases should be dealt with by a specialist Sheriff under Ordinary Rules.

Recommendation 12:-

- The Scottish Government should develop and extend in-court advice services, including services offering specialist help in housing matters, as part of a broader strategy to improve and co-ordinate the provision of publicly funded civil legal advice and advice generally.

The Committee's position:-

In relation to the general provision of legal advice by solicitors, the gradual erosion of the provision of legal advice and assistance has resulted in an absence of publicly funded legal advice in certain areas of work in some areas of Scotland. The reason for the decline of the provision of legal help is the poor funding available. The Committee believes that access to legal advice from qualified lawyers should be a desired objective of the Civil Justice System.

The Committee agrees that a face to face meeting with an incourt advisor is of benefit to party litigants. If face to face meeting cannot be achieved then email may still provide a benefit. The Committee would welcome the further resourcing of incourt advisers.

As previously discussed the Committee think it unlikely that the court of the District Judge will be a lawyer free zone. In particular commercial and institutional litigants will continue to instruct solicitors irrespective of the possibility of recovering that cost from the other party. They can make a significant recovery of part of the cost through the tax and VAT systems. Assistance to party litigants may also come from Mackenzie friends.

Chapter 6 – Information Technology:-

Recommendation 13:-

- The Report supports the increased use of IT and makes detailed recommendations including; the use of email as a way of communicating with the court and the judiciary; video and telephone conferencing; and the digital recording of evidence.

The Committee's position:-

It is acknowledged by the EU Commission as a powerful weapon in its march towards ready access to justice throughout the Union and in consequence there are dozens of studies and pilot schemes which can help Scotland find the e-solution best suited for our system. If sufficient resources can be deployed there are a number of areas where the use of related communication technology and computerised systems can dramatically improve access both by practitioners and the public. The simplest example is the basic telephone conference used in Glasgow Sheriff Commercial Court, whilst at the other end of the spectrum is the total paperless “e-filing” solution of the New York State Bankruptcy Court.

There are a number of commercial e-filing products available and Scottish Courts Administration have participated with the Society in presentations of such e-solutions in the past. E-filing could also facilitate the creation of central unified document handling such as a payment action processing unit which only allocates cases to individual courts if the claim is disputed. The English courts operate money claim on-line and a sophisticated computerised system has been working in Austria for a number of years.

The public can be assisted by computerised access to “smart systems”, available on-line but perhaps also from terminals in the foyer of the court which can be interrogated like “20 Questions” to direct and inform the user. This is used in some US courts to help enquirers seeking advice on Land Registry or Probate to help them obtain the correct forms or find the appropriate offices of the court. Rural communities could benefit from access to Sheriffs and Judges via video links set up either in local courts or other public locations. This may be one way in which certain specialised aspects of the Justice System could be centralised in larger regional courts without parties and agents travelling long distances for every hearing or application.

The Committee agree that there should be more encouragement for the use of IT and suggest that a date should be set by which time e-communication would be an option in all cases.

Chapter 7 – Mediation and other forms of dispute resolution:-

Recommendation 14:-

- The report recognises the value of ADR, and makes proposals such as a free mediation service for claims under the new simplified procedure.

The Committee's position:-

The Committee were adamant in their response to the Civil Courts Review that mediation and other forms of extra-judicial dispute resolution should be voluntary.

The Committee also recognise that there are cases which readily lend themselves to mediation.

The Committee is of the view that there is no enthusiasm for and no case has been made out for compulsory mediation.

The Committee agree that a free mediation service should be provided for claims under the new simplified procedure. Such a service would only be successful if it is funded and publicised by the Scottish Court Service and is effectively free to the users.

The Committee envisage that any judge dealing with these cases should highlight the availability of mediation services.

Chapter 8 – Facilitating settlement:-

Recommendation 15:-

- Pre-action protocols in relation to personal injury and industrial disease become compulsory.
- The protocol should apply to all categories of PI claims.
- The protocol should apply to all values of PI claim.
- A protocol for clinical negligence should be designed and introduced.
- A protocol for family action should be designed and introduced.

The Committee's Position

The Committee were very involved in the creation of the current voluntary protocols which also include professional negligence (excluding clinical). These have worked well. The

Committee agree that in order for further use to be made of the protocols they need to be made compulsory and accompanied with an expenses sanction for flagrant non compliance (but not simply for a minor failure).

The Committee do not envisage that at this stage the use of compulsory protocols could be extended to clinical negligence

Recommendation 16:-

- Either party should be able to make a formal offer in settlement of a claim. This will come without a penalty in expenses should the sum awarded be equal to or greater than the sum offered.
- The usual rule will apply to failure to beat a defender's offer.
- In the case of a pursuer's offer not being beaten the defender will be liable to pay an uplift of 50% on the fee element of expenses on a party/party basis from the date of the pursuer's offer, but that the court should have a discretion to award a higher or lower percentage uplift.
- Either party should be able to make the formal offer pre-litigation.

The Committee's Position

The Committee are in favour of the reintroduction of a system of pursuers' offers. There ought however to be a satisfactory way of dealing with the consequences of a refusal to accept the offer. The benefit of failing to beat the Tender, such as recoverability of a success fee, should be payable to the pursuer directly rather than the pursuer's agents.

The Committee think that pursuer's offers will require primary legislation, however it supports the introduction of Rules which would have the same result as pursuer's offers. In order for Rules to operate effectively the Rules would need to be accompanied by appropriate uplifts and additional fees. The Committee agree that both parties should be able to put in an offer letter which would then impact on an additional fee.

Care will require to be taken to ensure that the fee structure is not organised so that there is a potential conflict of interest between solicitors and their clients as to whether or not an offer should be accepted.

Chapter 9 – Enhancing the court's case management powers:-

Recommendation 17:-

- The guiding principle of the Rules of Court should be that their purpose is to provide parties with a just resolution of their dispute in accordance with their substantive rights, in a fair manner and with due regard to economy, proportionality and the efficient use of the resources of the parties and of the court.

The Committee's Position

The Committee agree that the guiding principle of the Rules of Court should be to provide parties with a just resolution of their dispute.

Recommendation 18:-

- The court makes recommendations for enhancing the court's case management powers, including early disclosure of documents, greater use of witness statements in place of oral testimony, abbreviated written pleadings and the appropriate use of expert evidence.
 - (i) Disclosure of documents. It is recommended that as part of the case management functions a Judge, Sheriff or District Judge should be entitled to order the disclosure of the existence and nature of documents relating to the action together with authority to recover documents either generally or specifically; and order the lodging of these documents.
 - (ii) The advance intimation and lodging of witness statements is particularly helpful in the case of expert evidence.
 - (iii) Brevity in pleadings should be encouraged.
 - (iv) Expert's evidence, including joint experts.

There is a recommendation that in personal injury cases of £5,000 or less that the medical evidenced should be restricted to the GP and treating consultant, subject to the court's discretion.

The Committee's position:-

The present system seems satisfactory with early or wider disclosure restricted to special rules such as personal injury. There is a significant cost factor in the "front loading" of preparation and such a burden must be laid on the litigant in a fair and proportionate manner. This is achieved by the present system.

In general, the court should not control the use of expert and other evidence. In an adversarial system the parties must remain in control of their own evidential needs.

The Committee are in favour of abbreviated pleadings which nonetheless give sufficient notice to parties.

The Sheriff should consider whether or not a case is suitable for case management. It should also be possible for parties to apply to enter a case management system.

Case flow is not only suitable for personal injury cases. It can be used for other cases by mutual agreement. Obligations of disclosure, which are often present in case flow, mean that a case is more likely to settle.

The Committee does not favour the English system where a very large amount of time is spent on refining witness statements and on discovery.

Much might be achieved by the introduction of specialist Sheriffs. The exchange of expert witness evidence may be helpful.

The Committee would however be opposed to witness statements taking precedence over oral evidence.

Recommendation 19:-

- Either party should be able to ask the court to dispose of a case summarily if the other party has no real prospect of success and there is no other compelling reason why the case should proceed.

The Committee's Position

The Committee agree that either party should be able to ask the court to dispose of a case summarily if the other party has no real prospect of success and there is no other compelling reason why the case should proceed.

Recommendation 20:-

- There are recommendations for efficient management of court time, such as requiring parties to agree a Timetable for presenting evidence and the greater use of written arguments.

The Committee's Position

The Committee think that where possible the court should adopt a flexible approach. There are many circumstances where the hearing of expert evidence "back to back" is of assistance. There may also be a case for written arguments which could be supplemented by questions from the court.

Current problems exist in predicting the time needed to present an argument.

The Committee questions whether reading an argument to the court, which has already been submitted in full, is the best use of court time. If judges have time to read papers in advance they can simply question the pleaders. If the judges have no reading time then they require to be addressed on all legal arguments which inevitably uses more court time.

Recommendation 21:-

- The court should have a general power to impose sanctions for failure to comply with Rules of Court. An extensive list of sanctions is proposed, including granting Decree against the defaulting party, dismissing the case or making Orders in relation to expenses.

The Committee's Position

The Committee agree that the Court should have a general power to impose sanctions for failure to comply with Rules of Court.

Recommendation 22:-

- The court should have power to find all those with rights of audience (solicitors, advocates, etc) personally liable for expenses occasioned by their own fault or where guilty of an abuse of process.

The Committee's position

The Committee agree with the recommendation.

Recommendation 23:-

- The report recommends enhanced powers for the court to make Orders restricting the ability to litigate of parties who persist in conduct amounting to an abuse of process.

“The report recommends that the civil courts should have powers similar to those in England and Wales in relation to Civil Restraint Orders which would provide for a graduated system of Orders regulating the behaviour of parties who persist in conduct which amounts to an abuse of process. In considering whether or not to impose a Civil Restraint Order, we recommend that the court should be entitled to take into account proceedings in other jurisdictions.”

The Committee's position:-

The Committee agrees that the court needs more power to deal with vexatious litigants, recognising that legislation dealing with vexatious litigants is a constitutional and human rights issue as well as raising questions of access to justice.

Judgments

Recommendation 24:-

- Recommendations include an on-line register of cases in which judgment has been outstanding for more than three months; The Judge should be required to provide an explanation for delay.

The Committee agree that Scottish courts should be able to provide an on-line register of cases in which judgement has been outstanding for more than three months. The current system does not provide judges with sufficient writing time, but that should be improved by the implementation of the Review team's recommendation, modified as suggested in this response.

Chapter 11 – Access to justice for party litigants:-

Recommendation 25:-

- There are recommendations for the promotion of public legal education; improved on-line provision of information for members of the public the development of “advice services” and the right of lay-representatives (or McKenzie Friends) of party litigants.

The Committee's position:-

The Committee welcomes public legal education. The Committee believes that public legal education helps overcome hurdles which may impede access to the legal system and accordingly access to justice.

As stated above in regard to Recommendation 12, the gradual erosion of the provision of legal advice and assistance has resulted in the absence of publicly funded legal advice in some areas of Scotland. The Committee believes that access to legal advice from qualified lawyers should be a desired objective of the Civil Justice System.

The Committee welcomes the current in-court advice project and believes that the project initially started in Edinburgh Sheriff Court should be extended throughout all Sheriffdoms in Scotland. At present, unrepresented litigants, through the in-court advice schemes, can receive advice before their case calls in court. These initiatives clearly improve access to justice but require to work in conjunction with a properly funded legal advice scheme giving access to advice by solicitors. Although there are other in-court advisory schemes, the one in Edinburgh is free and should be the model for other such advisers.

The Committee has had the opportunity of further debating the issues and is supportive of the introduction of McKenzie Friends. The Committee agrees that there should be an automatic right to use a McKenzie Friend. However, it should be within the court's discretion to insist on a withdrawal of a McKenzie Friend if it determines that the position is being abused.

The Committee would be concerned if Mackenzie Friends were remunerated for their assistance. The Court of Session Rules Council has drafted a Rule on the basis that Mackenzie Friends will not be paid, which the Committee supports.

There is also a concern if Mackenzie friends provide assistance to a large number of unconnected party litigants. This should perhaps be monitored.

One option would be for an on-line register of all persons who appear as McKenzie Friends.

Chapter 12 – Judicial Review and public interest litigation:-

Recommendation 26:-

- The current law on title and interest to sue is overly restrictive and should be replaced by a single test, namely whether the petition has demonstrated a sufficient interest in the subject matter of the proceedings.

The Committee's Position-

The current system does allow motions to be made in relation to title and interest, as seen in the pleural plaques case, however the Committee were broadly in agreement that the current system is too restrictive.

There should be no need to aver a positive title and interest. It should be sufficient to aver that the Petitioner knows of no reason why he does not have title and interest.

Recommendation 27:-

- Petitions for judicial review should be brought promptly and, in any event, within a period of three months.

The Committee's Position-

The Committee consider that a three month time scale is too tight to exhaust all the administrative options. Six months would be a more manageable and appropriate period, particularly if the court had further discretion in the circumstances where it was just and equitable to allow a petition outwith the period.

Recommendation 28:-

- A requirement to obtain leave to proceed with an application for judicial review should be introduced. The test should be whether the petitioner had a real prospect of success.

The Committee's Position

A sift should be introduced to remove actions which appear to have no prospects of success. The Petitioner in these cases could appeal to a second sift.

Recommendation 29:-

- The court should have the power to make special Orders in relation to expenses in cases raising significant issues of public interest. This could include an Order made at the outset or during the course of proceedings to the effect that the petitioner would not be liable for the expenses of the action, even if unsuccessful, or that the expenses of the successful party will be capped at a particular amount.

The Committee's Position-

The Committee agree that this should be considered by the proposed Civil Justice Council.

Recommendation 30:-

- The report recommends that there should be a special procedure for dealing with multiple claims which give rise to common or similar issues of fact or law, for example, litigation arising out of a mass disaster or liability for defective products. Detailed recommendations are made regarding the features that such a procedure would have, including special funding arrangements for multi-party actions to be administered by the Scottish Legal Aid Board.
- 75% of respondents were in favour of the introduction of multi-party procedure.

The review recommends:-

- A certification procedure certifying an action as suitable for multi-party procedure.
- It will be for the court to decide whether the multi-party litigation is an opt-in or opt-out procedure by claimants.
- The procedure should be introduced only in the Court of Session.
- The court should have at its disposal a wide range of case management powers.

It was recommended that multi-party actions be funded through Legal Aid or undertaken on a speculative or no win, no fee basis.

If funded through Legal Aid, a special advisory Committee should be set up to assist the Scottish Legal Aid Board to assess whether the proposal proposed multi-party action would justify the expenditure of public funds.

The Committee's Position

The Committee do not agree that judicial discretion should be exercised to determine whether a multi-party litigation is an opt-in or opt-out (ie included unless they tell the court that they do not wish to be included) for claimants. The Committee consider that depriving an individual of the right to litigate requires primary legislation. This is an important question of access to justice.

Recommendation 31:-

- Recovery of expenses. The cost of litigation should form part of the remit of the proposed Civil Justice Council for Scotland; pending which the Scottish Government should set up a working group to look at the issue of expenses.

The Committee's Position:-

The Committee consider that the State has a public duty to make available a system for resolution of disputes and to assist people in achieving equality of arms. As such, a significant part of the cost of the provision of the courts should be borne by the State.

There is clear evidence that the judicial expenses recovered by a successful party by way of party/party expenses are likely to amount to approximately 60% of the agent/client expenses which the solicitor for the successful party would be entitled to charge his/her client. This is even less in commercial actions in the Court of Session. Successful parties resent paying a significant proportion of their costs when the court has upheld their position. The proportion of costs recovered is considerably higher in England than in Scotland.

There is a basic cost involved in any litigation, whatever its value, to cover investigation needed to raise or defend the claim and the time involved on progressing through the relevant procedural steps required.

Awards of judicial expenses are necessary to assist in achieving equality of arms and to balance pursuers against defenders who may have greater resources available to them, and vice versa. The existence of the power in the Court Rules for the court to award an additional fee in complex cases certainly assists in achieving such equality. Consideration should be given to an uplift on expenses being awarded in the event that a complex case settled at an early stage.

The principal that expenses should follow success should certainly be retained. The system should strive to bridge the gap between the level of expenses recovered on a party/party basis, and the actual cost of the case on a reasonable agent/client basis.

The current system of recoverability of judicial expenses is fairer than and is to be preferred to, the situation which exists in the USA, for example, where successful parties are generally not entitled to recover the cost of litigation from the unsuccessful party.

The Committee agree that there should be a thorough and robust review of the cost and funding of litigation. The Committee have already expressed a willingness to contribute to a Working Party set up by the Scottish Government and have participated in an exploratory meeting.

CONCLUSION

The Committee agree with many of the recommendations made in the Civil Justice Review with the reservations expressed above on pages 5 and 6 and, with those differences, urge the Scottish Government to implement the recommendations for reform including the establishment of a Civil Justice Council for Scotland. In particular the cost of litigation should form part of the remit of the Civil Justice Council.

ANNEX

The Society's Intellectual Property sub-committee have also considered the Review and their comments are contained in this annex.

Additional observations

It is welcome that in Chapter 4 of the Review there is considerable support for retaining the specialist Intellectual Property Judges and procedures in order to provide a quality service that is competitive with other jurisdictions. We are also strongly in favour of retaining the specialist Intellectual Property Judges in the Court of Session and building upon the significant specialist experience these Judges already have in this area. This will help to ensure that both Scottish and international businesses have an effective and reliable local means to resolve their IP disputes. Scottish businesses in particular should not require to go elsewhere, e.g. to the London Courts, to resolve their IP disputes. Also a centralised focused IP jurisdiction with specialised Judges (even if only quasi-specialised) is key in attracting IP disputes to the Court of Session.

However, much more can be done. Whilst of course the Review had a wide remit dealing with civil litigation generally, we believe that it provides an opportunity to further improve the quality, competitiveness and attractiveness of the Court of Session such that it is viewed as a forum of excellence in which to resolve Intellectual Property disputes. This opportunity should not be missed as part of the wider reform exercise. This is especially the case because whilst Scotland has up until now been viewed as a reasonably competitive forum for IP disputes on inter alia a costs basis, this advantage is likely to be lost shortly as a result of the recent reforms to the Patents County Court (the 'PCC') in England. Therefore despite the satisfaction with the Intellectual Property Judges recorded at paragraph 60 in Chapter 4 of the Review there is still considerable scope, and we believe a real need, for improvement and review of the procedures available in Scotland to deal with intellectual property disputes.

The existing Intellectual Property rules in the Court of Session (Chapter 55) for Intellectual Property cases do assist with case management. However practitioners with considerable experience in dealing with IP disputes using these rules over the past 15 years believe that these rules would greatly benefit from being revised and revamped to ensure that Scotland can offer a top quality dispute resolution service that is quicker, cost effective and thus more competitive with other jurisdictions (and in particular with those available in England). Experience also demonstrates that often Scottish-based companies are of the view that the Scottish system is too slow and very out of date. We believe that the implementation of some of the general reforms recommended in the Review (related to improved earlier case management, use of witness statements, no requirement for examination in chief at Proof, summary decree for the defender, and a docket system) as applied to IP actions may go some way to address such criticisms. However they will not go far enough.

To provide properly for the needs of the Scottish business community and to make Scotland a truly attractive and competitive forum we believe that further reforms to the specific Intellectual Property rules and procedures are required. **We propose the following broad reforms be taken forward as part of the wider ongoing review.**

There should be 2 separate IP case procedures in the Court of Session: one for higher-value IP cases which has no damages/costs recoverability cap, and another for lower-value, less complex IP cases emulating the new PCC system brought into force in England on 1st October 2010.

1. *Larger value /more complex IP cases - Procedure*

1.1 The procedure for the higher-value more complex IP cases should be in accordance with RC 55 but should broadly adopt the case management provisions of the current Commercial Court Rules with much more judicial management from the beginning and strict timetabling set out right from the start of the action.

1.2. RC 55 should include jurisdiction over non statutory IP rights (which it does not do at the moment) such as passing off and breach of confidentiality.

1.3. RC 55 should be amended to allow the judge discretion to order a more streamlined procedure similar to the new PCC Rules - for example to allow for more focussing of the issues at the start, use of written pleadings and evidence so as to cut down the time needed at Proof.

2. *Smaller value /Less complex IP cases-Procedure*

This should be based on the new PCC Rules in England which it should be noted apply to all types of IP case and not just Patent cases-indeed the name of the PCC is to be changed to the Intellectual Property County Court in due course to reflect the true breadth of its jurisdiction. The main features are described below.

Case Management Conference

There will be the main Case Management Conference ("CMC") 2 to 4 weeks after close of pleadings. At that conference the judge will identify the issues and make relevant orders on timetabling etc. These are all discretionary. These can include disclosure, product/process descriptions, experiments, specification of further factual evidence, the need for any cross examination and further written arguments. However, the judge is to carry out a cost/benefit analysis in relation to whether to order any of these things.

Disclosure of course is notorious for racking up huge costs. At the CMC there will also be timetabling of the case moving forward to trial. The parties can agree to go to trial purely on the basis of written materials and have no oral witness evidence at all. A trial will be expected to take one to two days only. Other hearings will only be held if necessary and then if possible by phone or video conferencing. There will be no witness statements exchanged.

Transfers

There is provision for transfer applications where appropriate to the High Court. This could equally be to the separately created Court of Session jurisdiction over higher value cases as

above. A party has to apply for a transfer and whether that is granted will depend on the judge's assessment of whether a particular party can only afford to run the case in the PCC and therefore it is all about access to justice. The judge will also have to take into account whether the claim is appropriate to be decided in the PCC regarding its value, its complexity and the length of trial needed. It is possible for a party to withdraw its case if forced to go to the High Court and it cannot afford to do so. There will not necessarily be a costs order made against them for doing so.

Costs cap

Importantly the recoverable costs are capped at £50,000 in total for a first instance decision on liability and at £25,000 for any hearing on an enquiry as to profits/damages. There is also a scale of costs table which itemises costs for particular stages of the action, for example £2,500 for attendance at the CMC, £6,195 for the particulars of claim (equivalent to the Summons), £15,000 for preparation for and attendance at trial. There are only 3 circumstances in which the costs cap might not apply. These are (i) abuse of process, (ii) a certificate of contested patent validity is in issue (iii) there has been unreasonable behaviour in a pre-trial application.

Damages cap

The amount it is possible to claim by way of damages/profits is capped at £500,000. It is possible, however, to come to the PCC with a claim which is worth more than that and waive any difference over the £500,000, and we suggest that there should be similar provision in the Court of Session.

Conclusion

We understand that none of the foregoing would require primary legislation, but could be undertaken by the Court of Session itself. We believe however that the present review provides an exceptional opportunity for action to be taken in an area of significance not only to the courts and lawyers but also to Scottish businesses and other potential users of our system.



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