

Scottish Civil Courts Review
Submission on behalf of Axiom Advocates

Introduction

1. The members of Axiom welcome the review of civil justice. We support the intention to make changes to court procedures in order to provide a more efficient means for disputes to be resolved. Since our members practise predominantly in the areas of commercial and public law, this submission focuses on those areas. We begin with our comments on the main issues raised by the consultation paper. At the end we respond to most of the questions it raises.

2. We entirely agree that it is essential that there should be an effective judicial system that enables people to enforce their rights. This is not to say that litigation will always be the most satisfactory way of resolving differences. Mediation and other forms of ADR have an important role too. It is important, however, that consensual processes of that kind are conducted against a background where a party who wishes to do so may insist on his or her rights under the law. That approach –which permits the effective vindication of rights where necessary– is also important to ensure compliance with the Human Rights Act 1998 and the European Convention on Human Rights and Fundamental Freedoms.

Choice of forum

3. Often parties have a choice as to the court in which they litigate. In recent years it has been apparent that increasingly the choice of commercial litigants is to litigate in London. Despite the higher costs involved there, commercial parties are anxious to achieve the quickest possible determination of their dispute and to be able to make a full recovery of their expenses. It is unfortunate that, despite always having retained its own laws and legal system and now having a devolved government, Scotland does not provide a

forum for determining disputes that all Scottish businesses find attractive or even satisfactory.

Case management

4. The general experience of our members is that many of the problems and shortcomings of the litigation process exist in both the sheriff court and the Court of Session. They are reduced where there is a high degree of judicial case management. When the court requires a clear statement from parties at an early stage of what the issues are and then immediately moves to resolving them, the area of dispute is focused from the outset. Once the issues have been identified, the court can test the extent to which the parties intend to insist on them. That can require production of witness statements, affidavits, expert reports, and detailed notes of argument, or the holding of meetings between experts. These may indicate that in many areas there is no dispute in fact or law and mean that it is impossible for a party to claim that an issue is relevant merely as a stalling tactic or negotiating counter. The corollary of having a greater role for judicial control of proceedings is the requirement that there are specialist judges.

5. It appears to us that there is no reason why judicial case management should be limited to commercial cases. Our members do not, in general, practise in the fields of personal injury work or family/child disputes. It may be that other considerations apply in those fields. The Chapter 43 procedure in personal injuries is, however, so far as we are aware, regarded as a success, and it may be worth considering how far analogous rules can appropriately be adopted in other areas. We comment further on judicial review below.

6. Judicial control over the issues and how they are to be determined will, we think, go a considerable way to securing the necessary proportionality raised in the consultation paper. It means that the work to be undertaken is not wholly in the discretion of the parties. This can be supported by introduction of rules whereby parties will not be able to recover from the other side any expense which is considered to be unnecessary or disproportionate. In addition to assisting in relation to proportionality, it appears to us that

introducing a more effective degree of judicial control of the case is likely to result in cases being determined more speedily and at less cost.

Structure of the civil courts

7. We would suggest that the focus for reform should be directed at improving court procedures rather than determining in which court the parties must litigate. In the consultation paper the suggestion that the court might take control of deciding in which forum criminal proceedings are brought is rejected, on the basis that it is the Lord Advocate rather than the court that is in a position to know the full background to the case and give effect to policy decisions on how certain offences should be prosecuted. In our view the position in relation to civil proceedings is analogous. The pursuer is in the best position to take a view on the issues in the case and to determine where it should be raised.

8. We do not consider, however, that there should be no limits on the discretion of the pursuer or that there should be no consequences attached to a decision taken unreasonably. While there is a power at present to remit from one court to another, it is little used. It would be useful to strengthen the role of this power and to suggest that issues of proportionality and cost should play a part in the decision. The court should be able to make the transfer of its own accord. Even where a case is not transferred it should be open to a party against whom an award of expenses has been made to argue that the case should have been raised in a lower court and that all additional costs should be disallowed. The potential already exists to restrict awards of expenses, but it is not exercised to a great degree. If it was re-stated in the Rules of Court and there was express reference to the need to have regard to proportionality in determining whether the expense of the senior court was appropriate, this could encourage the power to be more widely exercised.

9. The alternative is that there be only one court or that all actions be raised centrally with an application to be made to determine where the action should proceed. This would entail a further stage of procedure. If the parties are not in agreement, it will be necessary for them to prepare and lodge material with

the court. It is likely that there would be oral or written submissions. We think it is inevitable that this would entail both additional expense and an element of delay. In addition, commercial parties would be reluctant to litigate cases of importance in Scotland if they were unable to select the court in which the case would be heard. The likely consequence is that they would choose instead to litigate in London. It is surely undesirable that a situation should be allowed to develop (or worsen) in which Scottish businesses are unwilling to litigate in courts in Scotland.

10. The abolition of the two-tier civil court structure would, unless all cases of certain types are sent to a central court, result in loss of expertise. The consultation paper recognises that delivery of access to justice requires that potential litigants have access to legal advice. Some types of case arise frequently. If these were distributed among all the new courts, there would still be a reasonable throughput of these cases in each court; legal representatives in the locality would be able to develop and maintain expertise in these areas. But this is not so in many areas of commercial and public law. Commercial law includes matters such as intellectual property disputes, procurement issues, competition law and EU law. If these kinds of cases were dissipated among all local courts, the volume in most localities would be unlikely to be sufficient to permit practitioners to specialise in these fields. That would impact on the availability of advice and representation in them. The same considerations apply to the judiciary: in particular, it is simply not realistic to imagine that the level of specialised knowledge and expertise available in the Court of Session is available in every sheriff court.

11. We therefore suggest that it is appropriate to maintain both the sheriff courts and the Court of Session; and that the issue of choice of courts is one that is best left to the parties with sanctions in expenses if the choice is improperly made.

The judiciary

12. In suggesting that greater judicial intervention and case management would be desirable, we recognise that this places a burden on the judiciary. In

order for such a system to work, judges would need time to prepare for hearings and time to write judgments. This raises an issue of resources. From the experience of this kind of approach in England, however, it is apparent that very much less time is taken up on hearings in court and that the overall process is quicker. That clearly saves resources.

13. The review also raises other fundamental issues about the judiciary. First of all, we set out the main problems that we identify. We then look at how the judiciary could best be structured to resolve these. At present the main problems appear to be these:

- (i) Criminal business takes precedence over civil business, so that even in the (rare) event that a case is allocated for debate or proof before a judge who has no preliminary civil business, the start of the hearing may well be delayed significantly by the judge's need to attend to bail appeals, deferred sentences or other matters.
- (ii) The real doubt about how much of a court day will in reality be available for a debate or proof means that providing reliable estimates of the number of days required is very difficult, and it is almost always necessary to err on the side of generosity, to allow for time likely to be lost; clearly this creates a vicious circle, where the system of allocating diets for hearings becomes less and less robust.
- (iii) The consequence is that some hearings finish early, leaving an odd day or two of judicial time that cannot always be occupied with hearing other cases; more commonly hearings overrun, with the result that there is substantial delay before a continued hearing can be arranged.
- (iv) Although there are nominally specialist judges in a number of areas of practice, with the exception of the commercial court, there is no guarantee that a case will be allocated to a judge who has any relevant experience of the area of law involved. It is hardly reasonable to expect a judge whose main experience has been in criminal law or in personal injuries to be immediately familiar with competition law or intellectual property. While the notion is that a

judge is sufficiently instructed by counsel's submissions to be able to resolve any case brought before him or her, it is obvious that there are great inefficiencies involved in the need to begin those submissions at square one rather than being able to take a certain experience of and familiarity with the basic statutory or common-law background for granted. These inefficiencies come at great cost in time and therefore in resources generally. At a time when solicitors have long specialised in particular areas of practice and counsel are increasingly doing the same, it does not seem to make sense to maintain a principle that all judges should deal with all kinds of business whether civil or criminal.

- (v) Opinions are often issued long after the hearing has been completed. There are many examples of cases in which an opinion has not been issued for more than a year after the hearing concluded. This is clearly not acceptable in terms of access to justice, one of whose core components is resolution of disputes within a reasonable period of time. This (taken together with other factors leading to delay) has also had the effect that some more sophisticated litigants, such as major public companies, have decided where possible not to litigate in Scotland but to raise proceedings in London. In England the judges are expected to adhere to relatively short timescales for production of their judgments.
- (vi) Substantial delays are often encountered in obtaining dates for an appeal. This is particularly unfortunate where, as for instance in commercial actions, it has sometimes been possible to make swift progress in the Outer House, only for this to be brought to a standstill while parties wait for dates for an appeal.

14. In our view these issues, which are of course touched on in the consultation paper, point towards the following conclusions:

- (i) There should be specialist judges, not merely as between civil and criminal work, but ideally going beyond that. While, owing to the different volume of business the English model could not be

transposed faithfully to Scotland, nonetheless we think it worth considering whether it might make sense, as in England, to have specialist divisions of the court concerned (e.g.) with public law and with construction and technology.

- (ii) The courts administration needs to develop a much more robust system for allocating judicial time. Once it is clear that an allocation of a two-day hearing means two days from 1000 to 1600, it should be possible to improve the quality of estimates.
- (iii) We think there is much to be said for limiting the length of most hearings (an issue that can be dealt with in the course of case management), so that each party has a set time to present the case, and the hearing is completed within that time. It has to be recognized that this may not be realistic where witnesses, or at least substantial numbers of witnesses are involved. But for debates it seems to us that there is no reason why this system should not work. Greater use of written skeleton arguments (which is, we think, anyway increasing) makes it feasible to operate with fixed time limits, provide each party has had an opportunity to consider the other's argument in advance.
- (iv) A system of this kind can only work if judges are allowed time to prepare for a hearing by reading the skeleton arguments, key documents and authorities. We think it is important that judges should be allocated time for preparation, as well as time for writing judgments.
- (v) It is vital that the Inner House should have (as the Court of Appeal does) a robust procedure for expediting appeals in matters of public importance. Early disposal of reclaiming motions is no substitute for this, since significant time lags can still occur.

Judicial review

15. Judicial review would, we think, benefit both from case management and from the suggestions for improving the efficiency of the court system mentioned above. The procedure is meant to be flexible and meant to be swift. Speed can only be achieved if business can be allocated in a way more

satisfactory than the present. Flexibility is important but requires judicial control to keep proceedings on track. The current rules are clearly in need of modernization.

16. First and foremost, the rules on title and interest need to be clarified. We favour widening the class of people entitled to seek judicial review. At present it is still unclear whether in Scotland (unlike England) important challenges to executive policy can be maintained by interest groups or would fall at the hurdle of title and interest to sue. (A recent example is the challenge by Greenpeace in England to inadequate consultation on the role of nuclear power in government energy policy: *R (Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin). Would this have been possible in Scotland?) If title is to be extended beyond established interest groups, some consideration may need to be given to making available protective costs orders.

17. Second, the rules need to be reviewed in detail. The fact that Answers need not be lodged as a matter of course and that, if they are, they can be lodged just before the first hearing leads, we think, to the waste of a good deal of time in preparing to meet lines of argument that may not eventuate at all. It also makes it very difficult to assess what length of hearing is likely to be needed.

18. Judicial case management could produce substantial benefits. At present the procedures in Chapter 58 of the Rules of the Court of Session provide considerable flexibility but little or no management of the case. If there was to be a hearing shortly after the period of notice had expired, in order to identify the issues raised in a petition, arrangements could be made at the earliest stage to determine the necessary procedure. The recent case of *Somerville v The Scottish Ministers* is an illustration of the problems that arise when the issues are not defined at the outset and instead the pleadings are adjusted over an extended period. The result is that the issues appear to be changing regularly. This makes it impossible to determine which issues are logically

prior and may be susceptible of early resolution. It also means that it is difficult to determine what procedural steps are appropriate.

19. The present regime of *mora* seems to us to be undesirably vague. The English courts appear to manage well with a fixed time limit on petitions for judicial review, and it seems to us that this may well be appropriate. A dispensing power could be made available for use in exceptional circumstances only. We would favour attempting to deal with the issue of unmeritorious petitions within the framework of judicial case management. If it is understood that at an early stage each petition will be subject to judicial scrutiny, while this may not amount formally to a requirement for leave to proceed, in practice it comes close to that in effect.

ADR

20. We recognise that ADR has an important role to play in resolving disputes between parties. Our members have acted as mediators and represented parties in mediation. ADR is an option which is discussed by solicitors and/or counsel with clients in most commercial cases. It is important, however, to recognise its limitations. Mediation does not seek to achieve the 'right' solution. The experience of those that have participated in mediation and mediation training is that the outcome will depend on the personalities of the parties involved and the extent to which they wish to reach agreement or wish to continue the dispute. While the use of ADR may enable parties to bring a dispute to an end, this is not the sole function of litigation. The courts are there to vindicate the rights of parties according to law. Ultimately, if parties cannot resolve a matter by agreement they are entitled to insist on their rights. This is often a valuable safeguard to people who would be in a weak position if the matter was purely one of negotiating a settlement.

21. Because mediation does not perform the same function as litigation it cannot always take its place and cannot be regarded as a substitute. A further important consideration is that if mediation is to work it must be consensual. To compel mediation would, in effect, be trying to force parties to agree. Where parties are in dispute, relationships can often be fractured. A critical

foundation for the procedure of mediation is that the parties have agreed to use it to try and settle their differences. This may be the only agreement between the parties that there is. In our view the proper role for mediation is as an alternative to litigation where the parties are agreeable to it.

Miscellaneous

22. The key aim of the review, which we support, is to improve access to justice. That suggests to us that this is a good opportunity to introduce a number of other reforms. One of these is in terminology. Although some obscurities (such as *induciae*) have been removed in recent years, there is a good deal to be said for replacing obscure and arcane language with terminology that is much clearer to the public at large. Some obvious examples are: commission and diligence; summar roll; single bill; reclaiming motion. The same approach might usefully be applied to the traditional formalities of court pleadings (conclusions; condescence; 'humbly sheweth'; 'according to justice etc', 'assoilzied', 'absolvitor' and so forth). We favour an immediate rewriting of court procedures and rules so that they are in language readily intelligible to the general public.

Answers to questions

Chapter 1

1. We think this is only one aspect of the role that the civil justice system ought to play –see paragraphs 2, 20-21 above.
2. We broadly agree with the principles set out; we also refer to the points made earlier in this submission.
3. We have raised these above.

Chapter 2

We do not wish to comment on this chapter.

Chapter 3

Our comments on expenses are above.

Chapter 4

1. Yes.
2. Yes.
3. Yes –this seems appropriate, on the same basis as set out for the Court of Session above.
4. Yes –see paragraph 14 above.
5. These are likely to be availability of specialised knowledge and speed of disposal.
6. We do not see any particular problems with the present division; the real issue, as we have explained above, seems to us to be rather current inefficiencies in the working of the court system.
7. No –see paragraphs 7-11 above.
8. No –see paragraphs 7-11 above.
9. We think some time is needed to draw conclusions from the recent change in the level of privative jurisdiction and would therefore not yet recommend any further change.
10. No –see paragraphs 7-11 above.
- 11-13. We are not in a position to express a view on this.
14. We are not aware of particular difficulties in this respect.
15. No –see paragraphs 15-18 above.
16. We think this is likely, but leave the issue for those with more direct experience of these processes.
- 17-18. It is not clear what advantages this would offer.
19. We do not favour this, for the reasons set out in paragraphs 7-11 above.
- 20-21, 23. We think there is room for improving on the current appeal arrangements. One issue that seems to us worth serious consideration is making provision for leave to appeal, which could do much to filter out appeals that have no realistic prospect of success or are clearly no more than delaying tactics. We do, however, think that leave provisions (including the existing ones in the Rules of Court) would benefit from closer scrutiny: there may be an issue under article 6 of ECHR if the same judge decides an issue against a litigant and also refuses leave to appeal, and there is no fallback provision for that litigant to seek leave directly from the higher court. If

provisions of this kind were introduced, we would envisage that they might be handled (largely) by way of written submission to the higher court.

22. Pressure on Inner House time is already to some extent relieved by use of the power to remit a statutory appeal to the Outer House. It is certainly worth considering whether some classes of appeal could routinely be allocated to the Outer House.

23. See 20.

24. We share the concerns expressed in paragraph 4.68 of the consultation paper. It does not seem to us that it is appropriate for 'temporary' judges to be used as a matter of routine, whether in the Inner or in the Outer House. So far as concerns the use of temporary judges who are also practising advocates, we think there can be a serious issue of perception about whether justice is seen to be done, when the same individual sometimes acts as an advocate and sometimes as a judge. We think the various reforms we have suggested, which should lead to more efficient use of resources, should do much to alleviate the pressure on making use of temporary judges. This would clearly be a good thing.

Chapter 5

1. We doubt whether this would be productive.

2. See above –paragraphs 2, 20-21.

3-4. See above.

5. A wide range of options is currently available. We see no reason why parties should not be entitled to agree on the option they regard as appropriate to their own case.

6. Some progress has already been made in allowing evidence to be taken by video link. In some cases technology such as Live Note has been employed. These are both to be welcomed, although the second has yet to be formally recognized in the Rules of Court. Beyond these court room improvements, we would favour more use of information technology in relation to fixing court hearings (many counsel, for instance, now use electronic diaries but the Keeper's office is not yet well equipped to allow hearings to be fixed by using them).

7-8. See above.

Chapter 6

1-3. The early focusing of issues is clearly helpful in promoting the efficient use of the resources both of parties and the court. Nonetheless we have reservations about very elaborate protocols (e.g. exchange of very detailed pre-litigation correspondence or even of expert reports): in many cases these are not realistic requirements. They may also raise problems for example (a) where a timebar may be about to expire; or (b) where one party wants to raise proceedings without giving notice (for example to prevent the other from raising proceedings first in another jurisdiction). We therefore think protocols need to be applied with a degree of flexibility. Our impression is that the commercial judges have managed to do this.

4. We think this is likely to be best dealt with as an aspect of judicial case management.

6. We cannot see any reason why, where the same types of action are in issue, the rules should differ.

8. A system of simplified or abbreviated pleadings should be introduced. Far too many cases involve massive pleadings. While it is important that parties should spell out the essential points on which they rely, current practices such as paraphrasing expert evidence at great length add nothing of substance and detract from clarity. Pleadings should also be in plain English (see paragraph 22 above). The formulaic nature of the existing system of pleadings is not helpful in focusing the true issues in a case. Formalities such as pleas-in-law could be jettisoned without any loss. All that is needed is clarity about what remedy is sought and on what grounds it is claimed or resisted.

10. We think this would probably be helpful in allowing the more efficient timetabling of substantive business –see above.

11. See 10.

12. Yes –see above.

13. Yes –see above.

14. We think this is likely to be best dealt with as an aspect of judicial case management. We would favour clarification of the rules (for instance, to the effect that there is no reason in principle why recovery of documents should not be sought before the record has closed).

15. See above.

18. We see no reason why *ex tempore* judgments should not be issued where the court is in a position to form a concluded view on the issues at the time of the hearing.

20. We think this is likely to be best dealt with as an aspect of judicial case management.

23. We agree that this is an important issue. The court currently has no well-established practice for dealing with 'class actions' or even for conjoining actions. It is desirable that it should have.

24. No –see above.