

RESPONSE TO THE CIVIL COURTS REVIEW BY SIMON DI ROLLO QC

Chapter 1

Question 1

It should be clearly understood that the civil court system is not simply a structure by which disputes are resolved. Rather it is **the** means by which civil rights and obligations are secured and enforced. There is considerable room for improvement in relation to the current arrangements. The process of this review is a real opportunity to make significant and lasting reform. However, it would be a grave mistake to place even greater impediments to the use of the civil courts than exist already. On the contrary, it is to be hoped that access to civil justice will be improved significantly as a result of this review

The key features of the civil justice system should be that it is

1. Just;
2. Fair;
3. Accessible;
4. Inexpensive;
5. Efficient;
6. Quick.

Question 2

The principles and assumptions discussed in paragraphs 1.11 and 1.14 are reasonable.

Question 3

The rules in relation to fair notice and the powers to compel witnesses, or potential witnesses, to submit to precognition in advance of the proof or trial. Scotland is one of the few jurisdictions in the world where, as a general rule, a party has no right to interview in advance of the proof or trial a witness to be called by the other side or another person identified as a

potential witness. At the very least the powers provided in commercial cases at OCR 40.12 (3) or RC 47.12 (2) to require affidavits and expert reports should be available as a generality.

Chapter 2

1. Increasing the amount of information available to the public about the legal system could make a significant contribution to improving access to justice. Improving the school curriculum and enhancing work experience programmes may assist. Improvements in media coverage of legal issues would also be helpful.
2. Not able to comment
3. (a) It is desirable that court procedures be simplified and de-mystified with a view to allowing litigants to participate without legal representation; (b) previous attempts to design processes to allow parties to represent themselves have not always succeeded but just because such a worthwhile goal is difficult to attain does not mean that efforts should not be made to attain it.
4. Not able to comment
5. The consultation paper seems to cover the issues
6. It may be that there are better methods for dealing with certain types of low value claims such as debt, consumer and housing cases whether within or out with the existing court structure. The existing small claims procedure has many useful elements and it may be possible to build on what is there already. In the personal injuries field there is absolutely no justification whatsoever for setting up a body similar to the Personal Injuries Assessment Board. Personal injuries litigation is one of the few areas of the current civil system where ordinary litigants have reasonable access to specialist legal advice and to the courts. Care needs to be taken to ensure that any reform does not mean the creation of unnecessary, expensive, ineffectual and bureaucratic structures.

Chapter 3

1. I am unable to give detailed information about this matter.
2. In general the cost of litigation acts as a deterrent. The deterrent effect becomes more acute as a case approaches the trial stage. This effect is not necessarily a bad thing in all cases. It encourages the wrongdoer to pay up and it encourages parties to

compromise. On the other hand the deterrent can and often does result in miscarriages of justice.

3. Yes. The civil courts are a vital public service that should be subsidised by the tax payer in the interest of the common good. It would be a serious mistake to place even more impediments to access to the civil courts.
4. The basic principles are sound but there needs to be re-adjustment so that the successful litigant can make a judicial recovery that reflects the true cost incurred in bringing the case.
5. The principles are sound but no doubt the process could be made less complex, more transparent and consistent. It is essential that the auditor is independent, impartial and has security of tenure.
6. The limits of financial eligibility for legal advice and assistance and legal aid do impede access to justice to a significant extent. It is not just financial eligibility that is a problem. Although it has been asserted that the cab-rank rule applies to legal aid work, many advocates decline to conduct legal aid cases. Taking a legal aid case is not an attractive proposition. There is uncertainty as to what amount will be paid for the work. There is endless unnecessary administrative hassle. Legal aid is now on the fringe of mainstream litigation in the Court of Session – it having been replaced by speculative work. This does not reflect well on those that are responsible for the legal aid system. Reform and streamlining of the legal aid system is long overdue. It is important that where legal aid is granted a case is properly funded and those responsible for the case are entrusted to conduct it appropriately. Proper safeguards could be built into the system to ensure this without increasing the overall cost to the tax payer. It would however be unrealistic to think that there will be a major change in the availability of public money to finance civil litigation. But the provision of more public funds would not necessarily solve the problem of access. The provision of a blank cheque to litigants can result in abuse where the normal constraints of economics do not apply.
7. There are well known areas of unmet legal need in relation to housing, debt and social security.
8. Speculative fee arrangements have made a major contribution to improving access to justice. But use of this method of funding is not without its drawbacks. The main concern is that successful litigants finance unsuccessful cases with a percentage of their damages. Why should a litigant that is bound to succeed pay over a percentage of his or her damages where there is little or no risk to the lawyer conducting the case? The other difficulty is that there are a substantial number of cases that should be brought in the interests of justice but which; understandably, lawyers will be unwilling to conduct on a speculative basis. Further, the existence of a speculative fee arrangement can give the lawyer an interest in the outcome of the litigation and thus has the potential to

create a conflict between lawyer and client when a compromise is offered by the other side.

9. Yes. Increased use of insurance – perhaps compulsory insurance in certain situations could make a really significant contribution to improving access to justice.
10. It is difficult to be sure but one would have thought that this has real potential to improve access to litigants. Public funds could be used to purchase insurance in appropriate cases. There is no good reason not to permit the recovery of such a premium as a necessary incident of litigation.

Chapter 4

1. Yes.
2. Such a designation should not be permanent. It is important that judges and sheriffs continue to have experience of both civil and criminal work.
3. No. The loss of flexibility and the difficulty of allocation of resources such as clerks and accommodation are the main disadvantages.
4. Specialisation is useful when it comes to procedures to be used, but any judge or sheriff worth his or her salt should be capable of presiding in civil and criminal cases and transferring from one to the other relatively easily. If they are incapable of doing this then they are unsuitable for the office of sheriff or judge.
5. In the Court of Session the key factors are the value and importance of the case to the client and the availability of experienced and able judges to try the case. The administrative back up in the Court of Session is significantly superior to that found in the Sheriff Court. The ability to instruct an advocate without requiring sanction to recover that expense is another reason for using the Court of Session. Cases involving counsel should be and usually are better prepared and presented. In the Sheriff Court the ability to raise an action locally and keep track of it locally remains an important advantage. Cases usually come to proof much more quickly in the Sheriff Court, but it can be difficult to allocate a sufficient number of days to hear the case in one go.
6. The answer to this question depends upon what structure one is going to be left with as a result of the review.
7. Probably not. If the civil court system was being designed from scratch then it might make sense to have one court with perhaps two or three levels based in say five or six centres. But Scotland is a complicated country socially and geographically. The fact that

there are 42 places to raise an action as well as a centrally located Supreme Court does have certain benefits. One wonders whether there is a need for all of the Sheriff Courts. Some rationalisation is probably required.

8. The main issue here is whether the most experienced and able judges are going to be presiding over first instance work. It would be absolutely disastrous if first instance work was taken away from the best judges. Important civil cases should be tried at first instance by judges of the highest quality. Those currently appointed to the Court of Session bench have at least a quarter of a century of experience in all areas of litigation. It is difficult to understand what advantage would be gained by restricting such expertise to appellate work. Further, appellate judges should gain experience of sitting at first instance in challenging cases.
9. The privative jurisdiction of the sheriff court should be set at a higher level than currently unless there is some feature of the case justifying its being brought in the Supreme Court.
10. Yes.
11. Improvements to the summary cause (including small claims) procedure could make a significant difference to the access to justice issue. A lower tier court might assist in this area.
12. This is worthy of serious consideration.
13. Both. Scotland is geographically challenging. If local Sheriff Courts are to be retained for crime then why not for civil matters? On the other hand one would have thought that some rationalisation would be advantageous.
14. Unable to comment.
15. There is a specific problem relating to cases which do not contain a public law or administrative element but which are in reality private law disputes. Consideration should be given to allowing the Sheriff Court jurisdiction to deal with these types of disputes which often involve a member or members of unincorporated associations. Some power of reduction beyond *ope exceptionis* would have to be conferred on the Sheriff.
16. Unable to comment.
17. No.
18. Unable to comment
19. The Sheriff Court should not become the primary court of first instance in the sense suggested in the consultation paper.
20. The appeal system should be rationalised to some extent. Generally speaking appeals even of final interlocutors should require leave, which if refused, special leave from the appellate court. There should generally be only one level of appeal within Scotland. Appeal to the House of Lords (or its successor) should be abolished. Instead an

equivalent level of court should be established in Scotland comprising principally of Scots lawyers but with the ability to second judges of suitable calibre from other jurisdictions. Appeal to such a third level court should only be allowed in exceptional cases with leave from the second tier court failing which special leave from it.

21. The office of Sheriff Principal should be retained or at least there should be an appellate level of Sheriff to deal with appeals from first instance Sheriff Court work.
22. Yes.
23. Yes. Only in exceptional cases should an appeal to a third level be possible. In summary cases and small claims appeals to any level should only be allowed in exceptional circumstances. Exceptional cases are those cases that raise an important point of law or matter of significant public interest.
24. The use of Part-time judges and sheriffs allows (1) flexibility and (2) a probationary period for those that aspire to judicial office. The disadvantage is that important judicial functions should be carried by those and only those that are recognised by a rigorous and transparent appointments procedure to be qualified to carry out such duties full time. There has been an excessive use of part time sheriffs and temporary judges in recent years. A part-time sheriff or temporary judge should not be permitted to sit for more than a statutory maximum of days per year (with some flexibility allowed for a case overrunning).

Chapter 5

1. Yes. The principles outlined in the Consultation Paper relative to the various jurisdictions mentioned provide a useful starting point. Fairness, equality of arms, proportionality, speed and fair notice are all important. It is also important that the parties are required to identify and focus the issues in dispute between them. Parties (and more importantly their representatives) should be required to restrict the scope of the litigation to that which is truly in dispute and should be penalised if they fail to do so.
2. Mediation is a useful method of dispute resolution but it is not necessarily superior to any other. As pointed out in the answer to question 1 chapter 1 the use of the civil justice system is not restricted to the resolution of disputes. Rather it is the means of enforcement of obligations and rights. In many cases (debt recovery and many personal injuries cases for example) there is in reality absolutely no need for a third party to be actively involved in assisting the parties to resolve the dispute. The court provides a deadline by which parties achieve a resolution for themselves and ensures that the

debtor or wrongdoer pays up by the ever present threat of decree being pronounced. Superimposing a requirement to mediate in such cases would add an additional layer of unnecessary expense. The rule proposed for mediation (and other forms of dispute resolution) by the Sheriff Court Rules Council would be acceptable. The court should facilitate mediation and other forms of dispute resolution by a rule in such terms. On the other hand there are certain types of dispute in the family law field such as those involving contact and residence where mediation should be the main method of dispute resolution.

3. See answer 2.
4. Yes. Judicial Review, actions of declarator, suspension, reduction of documents and court decrees, presumption of death, proving the tenor, divorce, nullity of marriage, parentage and non-parentage etc.
5. Unable to comment
6. Unable to make specific comment but the possibilities are no doubt endless.
7. See 8 below.
8. Most cases, if not all, would benefit from some form of case-flow management. The basic requirement should be a timetable provided by the court when the action commences which can only be departed from on cause shown. Parties should be required to spell out their respective positions in the clearest possible terms at the earliest possible stage. Disclosure of evidence by both parties, including the requirement to submit to precognition should be required. Judicial case management has proved useful for example in commercial cases, but it is resource hungry. Methods are being developed that allow economical case management but it is unnecessary in many cases. It should be used where the procedure requires to be tailored to the individual case or where the nature of the particular dispute is such that it is necessary.

Chapter 6

1. Unable to comment.
2. Unable to comment.
3. Unable to comment.
4. Improving gate-keeping powers (and bringing the Sheriff Court into line with the Court of Session) would be a good idea. In relation to appeals, parties should be required to obtain leave and (if refused) special leave to appeal.
5. It would be helpful if there was a single body responsible for making rules in civil cases. The time and effort required to make rules should not be underestimated and

consideration should be given to devoting more resources to this important activity. Those involved are part-time and often unpaid. Consideration should be given to providing some full time involvement.

6. As far as is possible.
7. It is unclear whether such a laudable objective can be achieved given the need to tailor procedure to specialist areas. In essence an initiating document should (1) Identify the court in which the action is brought; (2) Identify the parties to the action; (3) Identify precisely what the court is being asked to do (4) Justify clearly and concisely why the court is being asked to grant the remedy sought. Simplification and unification of the terminology in all court documents and forms is long overdue.
8. The use of abbreviated forms has assisted in the personal injuries field because verbose, rubber stamp and redundant pleading has been dispensed with. However, sometimes the pleadings do not make it possible to identify the true issue between the parties and there remains a problem of fair notice for both sides. Abbreviated pleadings should be the norm with the possibility of greater specification upon cause shown. Parties should be assisted to identify the true issue between them. Enhanced powers of investigating and in particular discovering what the other side's witnesses are going to say should be permitted.
9. A defender should be able to apply for summary dismissal (corresponding to summary decree).
10. No. Continuity is necessary and judicial boredom is a real hazard to justice.
11. No. Procedural business all too often interferes with substantive business. There is considerable scope for improving the handling of procedural business.
12. Yes. Hearings should be time limited and the court should have an opportunity of determining the timetable.
13. There should be more use of written argument but it would be wrong to prescribe written argument as the standard method of submission.
14. Provision requires to be made to require a witness or potential to submit to precognition.
15. The position in Scotland has been improved by the reforms in England and Wales since most experts called here comply (or at least claim to comply) with the standards required there. The use of court appointed experts is unattractive to parties. It is necessary to justify the use of an expert to recover his or her expenses. It is doubtful whether any further sanction upon the use of experts is required.
16. Yes. Provided the defender has had an opportunity of investigating the case and fair notice of the pursuer's position then the pursuer should be entitled to give an ultimatum that if payment is not made there will be a penalty such as enhancing the

expenses that should be paid. The defender should be allowed a reasonable time to consider any such ultimatum.

17. Yes. Civil juries perform an important role. There are certain types of dispute such as cases against the police or defamation actions which juries are ideally suited to determine.
18. There should be an entitlement to obtain written reasons for decisions in all cases. The format of Sheriff Court judgements is useful and should be retained.
19. Yes. Detailed proposals are necessary before making further comment.
20. Unable to comment.
21. Unable to comment.
22. Unable to comment.
23. Yes.
24. The procedure should be operated so that at the first order stage a petitioner requires to satisfy the court that the application for review has merit. Thereafter both a procedural hearing and a first hearing should be fixed. The procedural hearing should be used to ensure that the time allocated for the first hearing is spent productively. More use should be made of written submission and very strict time limits placed upon oral submission. The same judge should be allocated throughout. Ideally, the procedure should take no more than six weeks and certainly no more than three months from start to finish. Imposing time limits within which to bring a judicial review is not necessary.

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