

**A response on behalf of Maclay Murray & Spens LLP
to the Scottish Civil Courts Review Consultation Paper**

We welcome the opportunity to comment on the issues raised in the consultation paper on the Scottish Civil Courts Review.

We are a large, Scottish-headquartered, commercial law firm. We have 73 partners, 268 solicitors and 65 trainees, the majority of whom work in Scotland. Our Scottish litigation practice covers three offices (in Edinburgh, Glasgow and Aberdeen) and four specialised departments (intellectual property, construction and engineering, commercial litigation and family law), employing almost 50 staff. Our litigation work typically arises out of the Scottish business community, and we do no legal aid work.

In a globalising world, the Scottish legal profession increasingly faces competition from abroad. That includes our courts. If they are not perceived as modern, efficient and user-friendly—and sometimes they are not—disputes with a Scottish connection will be resolved elsewhere. We encourage our solicitors to face up to competition by being excellent at what they do. The Scottish courts must do the same. Our judiciary must be allowed to specialise, particularly in the commercial sphere. Court rules and procedures must be modernised and simplified where possible to encourage judicial dispute resolution that is as streamlined and as responsive to the needs of litigants as it can be.

Scotland should aim to have a civil court system that is attractive to the commercial world. The health of our legal system depends upon it.

This submission is made on behalf of the firm, but individual solicitors have been free to make their own comments if they so wished. On certain issues, there was a healthy difference of opinion amongst our solicitors, which we have tried to reflect in the detailed answers which follow.

CHAPTER 1: INTRODUCTION

1. **SHOULD THE CIVIL JUSTICE SYSTEM BE DESIGNED TO ENCOURAGE EARLY RESOLUTION OF DISPUTES, PREFERABLY WITHOUT RESORT TO THE COURTS? IF SO, WHAT WOULD BE THE KEY FEATURES OF SUCH A SYSTEM?**

The civil justice system should focus on the satisfactory resolution of disputes that are referred to it.

In most instances, client satisfaction will be more likely if the dispute is resolved early and without the courts. The system should encourage resolution of disputes as quickly as is reasonably possible taking into account the nature of the dispute, the parties involved, the amount at stake and the wider importance of the matter. It is our experience that settlement is more likely to be discussed and agreed when parties meet face to face. Such opportunities should be part of the procedural framework. The system might even require the parties to demonstrate that they have made a bona fide attempt to resolve their dispute before they are allowed to use its resources.

However, it should be recognised that a satisfactory outcome may well require the careful and considered decision of a court. It is important that the court system should not be perceived to discourage its own use.

2. **DO YOU AGREE THAT THE PRINCIPLES AND ASSUMPTIONS DISCUSSED IN PARAGRAPHS 1.11 TO 1.14 ARE A SOUND BASIS FOR THE DEVELOPMENT**

OF THE REVIEW'S RECOMMENDATIONS? SHOULD THEY BE SUPPLEMENTED BY OTHER FACTORS?

We agree that disputes referred to the civil justice system should be resolved proportionately, and that judicial and other public resources should be allocated according to the importance of the dispute to the parties and to society.

We very strongly consider that proportionality cannot mean “justice on the cheap”. The viability of Scotland’s economy and its independent legal system depends on a high quality court service. Businesses need confidence in the court system if they are to litigate in Scotland. For as long as there is a perception that the English courts offer a higher quality service, dispute resolution work will drift to England. The Scottish courts must be at least as good in order to compete.

CHAPTER 2: ACCESS TO JUSTICE

1. **WHAT CONTRIBUTION CAN PUBLIC LEGAL EDUCATION MAKE TO IMPROVING ACCESS TO JUSTICE?**

It would be likely to improve access to justice. An understanding of legal concepts would be likely to demystify the law. It may therefore encourage earlier resolution of disputes by giving people the ability realistically to assess the strength or weakness of their own legal positions. It may also empower them to represent themselves in appropriate cases, removing the cost barrier of professional representation. It may also lower the cost of professional representation by reducing the amount of work required of the representative.

However, satisfactory resolution of disputes, particularly complicated ones, is a specialised task and is likely always to require professional representation beyond a certain level.

2. **ARE THERE ANY PARTICULAR GEOGRAPHICAL OR SUBJECT AREAS IN WHICH THERE ARE GAPS IN PROVISION IN RELATION TO CIVIL LEGAL ADVICE OR REPRESENTATION? IF SO, WHERE?**

Greater clarity is needed on the availability of legal aid to fund, in appropriate cases (a) representation at mediations; and (b) mediators' fees.

3. **TO WHAT EXTENT IS IT (A) DESIRABLE OR (B) FEASIBLE TO DESIGN COURT PROCEDURES WITH A VIEW TO ENABLING LITIGANTS TO TAKE PART IN THE PROCESS WITHOUT LEGAL REPRESENTATION?**

We have experience of acting against party litigants. Such actions are invariably more complicated, time consuming and expensive for our clients. This is often due to the pursuit by party litigants of hopeless lines of argument, often incoherently or inarticulately expressed. Judges are (rightly) concerned to ensure that party litigants are not disadvantaged by their lack of professional training. However, in our experience, this almost always leads to a substantial relaxation for party litigants of procedural rules which are intended to give the court process some discipline and rigour. Usually, the additional expense incurred by the opponents of party litigants as a result will not be recovered.

It is an interesting question whether these problems can in part be attributed to unnecessary formality and technicality in court procedures, which are difficult for lay people to understand. We consider that there is a case for simplifying the language associated with court proceedings, and the procedures themselves, as much as possible. A guide for the non-professional litigant might also be made available explaining the expectations of litigants at various stages of procedure. However, it is generally the case that the rules and practices exist for good reason: to make the resolution of disputes a manageable exercise. There is a limit to the extent to which these can be understood by lay people. They are not procedural mumbo-jumbo designed to protect the job-security of lawyers and keep the public out, but necessary tools-of-the-trade to keep the courts functioning. No-one expects hospital patients to be able to conduct their own surgery.

The courts could be more user-friendly. For example, calling lists should be readily available at an obvious place in the court room and a judge's name should always be shown on or around the bench.

4. **WHAT CONTRIBUTION, IF ANY, CAN (A) "SELF-HELP" SERVICES FOR PARTY LITIGANTS AND (B) COURT BASED ADVICE SERVICES MAKE TO IMPROVING ACCESS TO JUSTICE?**

Both of these could reduce the amount of court time spent by judges having, in effect, to explain court procedures and legal concepts to party litigants. Those of our respondents

with experience of the existing court-based advice service though that it was excellent and could be expanded. The great benefit of self-help or advice services is that they allow non-professional litigants who are in good faith to obtain the guidance necessary to assist them. That should allow the courts to take a stronger line with non-professional litigants whose conduct (whether intentionally or otherwise) is disruptive to the efficient running of the courts.

5. **ARE THERE ANY OTHER ISSUES WHICH IMPACT ON ACCESS TO JUSTICE IN SCOTLAND WHICH THE REVIEW SHOULD CONSIDER?**

Some in our firm take the view that alternative dispute resolution—mediation in particular—should be a staple ingredient of any modern civil justice system. One of those in favour of mediation has suggested that consideration be given to the creation of a state-funded College of Mediators for parties unable to fund mediation themselves. Those with sufficient means should remain free to choose their own mediator. The College would, however, be a “safety net” available to those able to demonstrate a reasonable need for the state-funded resource.

Others within the firm take the view that mediation should remain in its present form, as a privately-funded method of dispute resolution that the parties are free to choose if they wish, and that it should not in any way be an obstacle to access to the courts.

6. **IS THERE A CASE FOR A NEW METHOD OF DEALING WITH LOW VALUE CASES? IF SO, SHOULD THIS BE WITHIN THE EXISTING COURT STRUCTURE OR SEPARATE FROM IT? WHAT KIND OF CASES WOULD BE SUITABLE FOR SUCH TREATMENT?**

Two procedures currently exist for low value cases – small claim and summary cause. There is little obvious justification for having two sets of procedural rules for cases worth £0 - £3,000, and £3,001 to £5,000. If there is to be reform, it should not be in the form of yet another set of procedural rules. It should take the form of consolidated and streamlined procedure.

Sheriffs are senior lawyers with very significant qualifications and experience. Some of the civil work they are presently expected to deal with is straightforward and repetitive. It must therefore be in question whether it is a sensible use of resources to have such cases conducted before sheriffs. Many cases could adequately be dealt with by a less qualified and more junior judiciary, trained to deal with particular categories of case. There might be a presumption that claims worth less than a particular amount (say, £5,000) should be dealt with by the “junior” judiciary, with an opt-in to a senior court if there were other factors of complexity or importance. It would also be important to preserve the ability to appeal from the “junior” court.

It may be possible to treat the entire body of cases currently handled by summary cause or small claims procedure in this way. One exception concerns the recovery of possession of commercial property. This is usually the exception, rather than the rule, in heritable recovery courts, which generally focus heavily on the recovery of possession of local authority housing. Although a significant degree of expertise is built up in those courts on the rules applicable to residential tenancies, the same cannot be said of the different considerations that can apply to commercial properties. That anomaly justifies the transfer of commercial property cases to the more “senior” court or, perhaps, the commercial procedure in that court.

CHAPTER 3: THE COST AND FUNDING OF LITIGATION

1. **WHAT, IF ANY, INFORMATION CAN YOU GIVE THE REVIEW ABOUT LEVELS OF LEGAL EXPENSES IN LITIGATION, AND HOW SUCH EXPENSES COMPARE WITH SUMS AWARDED BY THE COURT OR SETTLEMENT FIGURES?**

The cost of litigation is completely dependent on the case. There cannot always be a correlation between the value of the claim and the expenses incurred in pursuing or defending it. Litigation is inevitably expensive, because its adversarial nature means that each party will invest resources in attempting to find a weakness in the other's case, which in turn means that each will invest resources in attempting to diminish any perceived weakness. There are exceptions, where the parties are willing to work to focus precisely on the issue that is really in dispute between them. If the parties are genuinely willing to do that, and are represented by efficient solicitors, they ought to be capable of limiting their expenditure to the key issues. Not all clients wish to do that, however, and not all solicitors are efficient. As a very general rule, it will not be cost-effective to litigate in a defended action over sums of less than £5,000. If the action raises anything other than the simplest issues of fact or law, that sum will be significantly higher.

We estimate that the judicial expenses rules allow a successful litigant to recover only around 40 to 60% of the costs of litigating from their opponent.

2. **TO WHAT EXTENT DOES THE COST OF LITIGATING DETER PEOPLE FROM PURSUING OR DEFENDING CASES IN COURT?**

The up-front cost can be a serious deterrent for those with limited resources (such as individuals or small businesses). The low level of cost which parties can expect to recover as judicial expenses is a deterrent for better-funded parties. The decline in litigation is at least in part attributable to cost. Further, debtors sometimes fail to pay smaller debts because they know their creditors are unwilling to incur the cost of pursuing them through the courts.

3. **DOES THE CURRENT SYSTEM OF LEVYING COURT FEES AFFECT ACCESS TO JUSTICE? IF SO, HOW AND IN WHAT KINDS OF CASES?**

Not in our experience.

4. **ARE THE CURRENT RULES FOR RECOVERY OF JUDICIAL EXPENSES SATISFACTORY?**

No. In our practice area, of commercial litigation, judicial expenses are generally low compared to the costs incurred by the clients, so that even successful litigants can be left substantially out of pocket. We estimate that a client successful in litigation can generally expect to recover between 40% and 60% of costs incurred.

It may be queried whether the distinction between agent and client, and party and party, expenses is realistically justifiable. To function effectively in litigation, clients will require significant amounts of guidance and advice, and the client will regard that advice as having been a cost incurred only because he was involved in litigating against that opponent. For a case to be put to the court in an acceptable manner, it will generally be necessary to carry out work of an "agent and client" nature. Clients do not understand why this cost should not be met by an unsuccessful opponent.

It may also be queried whether recoverable expenses must always be assessed in such a detailed manner. There is a need to instruct a law accountant for all but the simplest cases; they are frequently very busy, with the result that the process is delayed for months; the need to produce a detailed account is time consuming and expensive (often involving

significant solicitors' fees in addition to the law accountants' fees); and the detailed analysis is repeated at the stage of points of objection. The effect is that it is rarely practicable to seek enforcement of interim awards of expenses, whilst doing so might actually improve access to justice by more efficiently allocating the cost of litigation to the party acting "unjustly".

It is not uncommon for awards of expenses to be satisfied only months or years after the conclusion of the main litigation. In one recent patent case handled by this firm the preparation of the account took approximately 5 months and the solicitor's fees (which had to be restricted substantially in sympathy with the client!) were a considerable sum just for assistance preparing the account.

The rules governing the recovery of expenses often do not recognise the reality of running large commercial cases. For illustrative purposes, we cite two examples. Firstly, the rules of taxation are not designed to cater for cases where a team of lawyers may be involved. It is quite common to have a partner, an assistant (sometimes more than one) and a trainee working consistently on one case. Secondly, they allow charges based on the number of pages of a precognition or a letter. This is not a meaningful way to measure the work which has gone into the document concerned, which may for example be a condensed summary of some very technical points which has taken a huge amount of time to distil into that format.

In some cases, the parties' solicitors will be able reasonably to estimate the likely cost of a particular step of procedure. One solution might be to ask them to state that estimate to the court in advance. The court would then be authorised, after the procedure has been concluded, summarily to award expenses of a specified sum at or around the parties' estimate. There would be an option for the parties to use the more complicated and detailed taxation process if they disagreed. However, in many cases the summary assessment may be acceptable to both parties.

5. **ARE THE CURRENT ARRANGEMENTS FOR THE TAXATION OF JUDICIAL ACCOUNTS OF EXPENSES SATISFACTORY?**

No: see answer above.

6. **TO WHAT EXTENT AND IN WHAT RESPECTS DOES THE AVAILABILITY OF LEGAL ADVICE AND ASSISTANCE AND LEGAL AID AFFECT ACCESS TO JUSTICE.**

We do not do legal aid work.

7. **ARE THERE SPECIFIC AREAS IN WHICH YOU BELIEVE THERE IS A PARTICULAR PROBLEM IN OBTAINING FUNDING FOR LITIGATION?**

Yes. We consider that there is a serious "middle income trap", affecting those whose moderate income or savings places them outside the legal aid regime. For such individuals, the financial risk involved in litigating is a substantial disincentive against using the courts. A similar problem affects small businesses. Such parties sometimes have legal expenses insurance, but that is very much the exception.

8. **WHAT IMPACT HAVE SPECULATIVE FEE ARRANGEMENTS HAD ON ACCESS TO JUSTICE?**

We have no comment.

9. **SHOULD LEGAL EXPENSES INSURANCE, INCLUDING “BEFORE THE EVENT” AND “AFTER THE EVENT” INSURANCE, HAVE A GREATER ROLE TO PLAY IN THE FUNDING OF LITIGATION IN SCOTLAND?**

Yes. We can see a strong case for the encouragement of “before the event” legal expenses insurance. It could substantially improve access to justice for small businesses and individuals affected by the “middle income trap”. It could be a standard feature of home insurance policies, although there would be a risk that insurers would seek to direct all insurance-funded litigation through a small group of the insurers’ preferred solicitors, potentially limiting competition.

CHAPTER 4: STRUCTURE AND JURISDICTION OF THE CIVIL COURTS

1. **DO YOU AGREE THAT THE CONDUCT OF THE CIVIL BUSINESS OF THE COURTS IS ADVERSELY AFFECTED BY THE PRESSURE OF CRIMINAL BUSINESS?**

Yes. It can be difficult to get a hearing on a reasonable timescale, and hearings are sometimes cancelled at short notice due to a lack of judicial resources. The priority given to criminal business is assumed to compound these problems. There is also the lesser problem of delay in the commencement of a hearing because the judge has been allocated first to other business.

This has a very serious impact on the reputation of the justice system in the eyes of clients. They may be put to very significant expense in attending court and in paying advisers (and perhaps witnesses) to attend court, only to see that expense wasted. The impression they are left with is that the system does not take the resolution of their dispute seriously.

2. **SHOULD (A) SOME JUDGES OF THE SUPREME COURTS AND (B) SOME SHERIFFS BE DESIGNATED TO DEAL WITH CIVIL BUSINESS?**

(a) Yes.

(b) Yes.

We consider increased specialisation of the judiciary to be essential, as we discuss in more detail below. Solicitors and advocates are increasingly specialising in response to client demand, and this makes it unrealistic for judges to continue as generalists. For example, a lawyer with a predominantly criminal practice is unlikely to be as swift and assured in handling civil cases on becoming a judge as a lawyer with a civil background.

There is a concern, particularly in relation to sheriff courts which do not have any specialist commercial court, that the previous experience of the judge is simply not taken into account in deciding whether or not a case should be allocated to him or her. For certain clients and certain cases, that means there is an unacceptable risk in raising an action in the sheriff court, that the case will be referred to a sheriff without appropriate expertise.

3. **SHOULD THE SHERIFF COURTS BE SEPARATED INTO CIVIL AND CRIMINAL DIVISIONS? WHAT WOULD BE THE ADVANTAGES AND DISADVANTAGES OF SUCH A SEPARATION?**

If the judges themselves are to be allocated solely to criminal or civil business (which we consider to be essential), it would make sense for the administrative divisions of the courts to be divided accordingly.

4. **SHOULD THERE BE A GREATER DEGREE OF SPECIALISATION WITHIN THE CIVIL COURTS IN SCOTLAND? IF SO, IN WHAT TYPES OF CASE AND IN WHICH COURTS?**

Yes.

We regularly run cases before the commercial and intellectual property judges in the Court of Session, and the commercial sheriffs in certain sheriff courts. It is essential to the credibility of the Scottish courts in the eyes of clients that specialist courts of these types be retained, and ideally improved. It is essential for their success that they be staffed by dedicated judges with relevant expertise and an interest in the field. This has not always obviously been the case. They must be supported by properly resourced administrative staff. It has to be recognised that, in the commercial field, the Scottish courts are in competition with courts in other jurisdictions or arbitral courts. Any perceived lack of quality will result

in a decline in business and, as a consequence, a lack of up-to-date jurisprudence and a brain-drain of practitioners.

We understand that a very large and successful Scottish-based global financial institution has a policy of avoiding the Scottish Courts as a forum for litigation. We understand this is because they consider the Scottish courts to be antiquated, slow and lacking the necessary commercial expertise. If this perception exists (we have heard it expressed often enough), it must be addressed to restore commercial confidence in our courts.

There are many extremely capable and dedicated judges and sheriffs in Scotland. They must be given the opportunity to flourish. Allowing them to specialise in particular fields is part of that process. They should be given sufficient time and resources to develop their specialisms. The potential benefits of this are easy to see: swifter court hearings, quicker judgments, more satisfied litigants and an enhanced national and international reputation for the Scottish courts.

For some of our solicitors, the commercial court in Glasgow Sheriff Court is proving to be an excellent forum for litigation. The confident and pro-active case management by the commercial sheriffs, including a willingness to express early indications of their views and to be flexible in their use of procedure, helps the parties cut rapidly through to the key issues in dispute. In their view, it has been more successful in this than the commercial court in the Court of Session. Clients have been impressed with the speed and efficiency with which their disputes have been resolved.

The Scottish courts should strive, through building a reputation for excellence, to attract litigation from Scotland and abroad.

5. **WHAT ARE THE KEY FACTORS WHICH INFLUENCE THE DECISION TO RAISE AN ACTION IN EITHER THE COURT OF SESSION OR THE SHERIFF COURT WHERE JURISDICTION IS CONCURRENT?**

(Please note that the following are not listed in any order of importance.)

1. Geographical location – can the solicitors readily attend the court for hearings?
2. Complexity of dispute compared against judicial expertise. Traditionally, that has often meant that complicated or valuable cases are raised in the Court of Session, and that is still the case for our Edinburgh-based solicitors. Our Glasgow-based solicitors have been impressed by the commercial procedure in Glasgow sheriff court and are increasingly prepared to raise complex or valuable commercial actions there.
3. The availability or otherwise of specialised procedures (e.g., commercial procedure).
4. Whether or not parties are likely to instruct counsel. If so, that would be a factor in favour of using the Court of Session given the physical proximity of counsel to that court.
5. The likely speed of the litigation.
6. Whether the action is likely to be defended. If it is not, one is less likely to be influenced by the factors above.

6. **IN WHAT, IF ANY, TYPES OF CASE SHOULD (A) THE COURT OF SESSION (B) THE SHERIFF COURT HAVE EXCLUSIVE JURISDICTION?**

The rules separating the jurisdictions of the Court of Session and Sheriff Court are in many instances fragmented, the result of historical accident and difficult to justify. It would be sensible to recast the rules in a single place and to simplify them. The dividing line would

have to be carefully considered in the detail, but in general terms, the Court of Session should focus on cases of importance and complexity. We envisage that most intellectual property, construction and commercial cases of value would remain within the jurisdiction of the Court of Session, but this need not be a matter of exclusive jurisdiction. Exclusive Court of Session jurisdiction might remain, though, for certain matters which are invariably complicated, such as insurance business transfer schemes and actions for the infringement or revocation of patents etc.

7. **SHOULD THE JURISDICTION OF THE COURT OF SESSION AND THE SHERIFF COURT BE UNIFIED TO CREATE A SINGLE CIVIL COURT?**

This is a very broad question, and the answer will very much lie in the detail. However, we do see potential benefits in removing some of the technical distinctions of jurisdiction between the Court of Session and the Sheriff Court (as we noted in our previous answer). For example, it seems odd that the Court of Session may grant declarators of heritable right, and decrees reducing heritable rights, but cannot grant a decree of ejection following on from them (see, e.g., *Beriston Limited v Dumbarton Motor Boat and Sailing Club* 2007 SLT 227.) We agree that, in general, actions of ejection need not clutter up the Court of Session, but it seems unfortunate that the court can never grant such a decree as an adjunct in an appropriate case.

One solution might therefore be to unify the jurisdiction of the courts, but for cases to be referred to different levels within the structure according to appropriate factors. These factors would probably relate to the value or complexity of the case, perhaps with a presumption that certain definable categories of case be allocated to a 'senior' judge equivalent to a Court of Session judge (e.g., high value commercial, construction or intellectual property actions.)

8. **SHOULD THE COURT OF SESSION BECOME A COURT OF APPEAL ONLY OR SHOULD IT RETAIN A FIRST INSTANCE JURISDICTION? IF SO, FOR WHAT TYPES OF ACTION AND WHY?**

The Court of Session must retain at least some of its first instance jurisdiction. This is of critical importance for significant or complex cases, particularly in the commercial sphere. For the justice system to be credible and respected by commercial clients, it is essential that the judges have sufficient expertise to demonstrate an understanding of the commercial context out of which the disputes arise, and of the law applicable to them. Although that expertise exists in certain sheriffs, it is more readily available in the Court of Session and, as we have noted elsewhere, there is no guarantee that a case raised in the sheriff court will be heard by a sheriff with relevant expertise. It would be unacceptable for commercial cases to be forced into the sheriff court without a clear guarantee of the expertise and ability of the sheriffs who would be made available to hear them.

It might be argued that the parties' interests would be sufficiently protected by the ability to appeal to the Court of Session. However, in cases raising important issues of law, or complicated issues of fact, there is a greater chance of a high quality appeal court ruling if the case has been handled and analysed at first instance by a judge with appropriate experience. It is important to remember that the facts will only be led before the first instance court. Further, any damage to the reputation of the judicial system resulting from an inadequate first instance decision might not be undone by a successful appeal.

We consider that it ought to be possible to limit the amount of personal injury litigation in the Court of Session, but that complex cases or cases raising important issues of law from that field should still be capable of being handled at the first instance stage by a judge of the seniority of a Court of Session judge.

9. **IF THE CURRENT STRUCTURE OF THE COURTS IS RETAINED, AT WHAT LEVEL SHOULD THE PRIVATIVE JURISDICTION OF THE SHERIFF COURT BE SET?**

This is ultimately rather arbitrary, but we consider that it would be justifiable to require actions seeking payment of £50,000 or less to be raised in the Sheriff Court. This would, however, only be acceptable if combined with the ability to raise lower value claims in the Court of Session if there are other factors of importance which justify it (such as the complexity of the relevant facts or law, or the wider significance of the case).

10. **ARE THE CURRENT POWERS TO TRANSFER CASES BETWEEN SHERIFF COURTS AND BETWEEN THE COURT OF SESSION AND THE SHERIFF COURT SATISFACTORY?**

These powers are not often used, in our experience. This may demonstrate that the parties are generally content with the court selected by the pursuer, or alternatively that the prospects of succeeding with an application for remit are low. It can be difficult to make submissions to a sheriff to the effect that he or she (or a colleague) is not sufficiently capable to decide the case.

It is becoming more common for cases to be transferred to the commercial court in Glasgow sheriff court, typically from other courts close to Glasgow. The willingness of parties to submit to the jurisdiction of the specialist court is noteworthy and suggests that the specialism of the court may be a more important factor than its geographical location.

11. **GIVEN THE RANGE IN VALUE AND COMPLEXITY OF CIVIL BUSINESSES IN THE SHERIFF COURT, SHOULD THERE BE A TIER OF CIVIL COURT BELOW THE LEVEL OF THE SHERIFF COURT?**

This is worthy of consideration. As we noted above, it is difficult to see the justification for sheriffs, given their seniority and experience, hearing some of the very straightforward and low value claims that can arise under the small claims and summary cause procedures. It may be sensible for these procedures to be unified, simplified and delegated to a lower judicial tier.

12. **ALTERNATIVELY, SHOULD THERE BE ANOTHER LEVEL OF JUDICIARY WITHIN THE SHERIFF COURT TO DEAL WITH “THIRD TIER BUSINESS”?**

We do not think it matters particularly whether the third tier of judiciary is part of the sheriff court, or below it. The important point is that sheriffs should not be handling the very simplest cases.

There ought to be a power to remit cases from one tier to another, and that may be simpler if the tiers were administratively part of the same organisation.

13. **DOES THE CURRENT DIVISION OF THE SHERIFF COURT INTO DISTINCT GEOGRAPHICAL JURISDICTIONS PRESENT DIFFICULTIES OR DOES IT HAVE ADVANTAGES?**

One advantage is that it can help ensure a link between a local community and its justice system.

However, one disadvantage is that many clients will choose to instruct lawyers in the main cities, perhaps for reasons of expertise, and they are often remote from the courts which have jurisdiction. The result is a significant increase in cost for clients, and a rather ridiculous caravan of lawyers travelling to the out-lying court. This may be justifiable where the opponent is local, or the case raises local issues, but it is not always so. The increasing

willingness of parties to submit to the jurisdiction of the specialist commercial court in Glasgow sheriff court does suggest that they favour specialist expertise in the judiciary over geographical convenience.

14. **ARE THE CURRENT ARRANGEMENTS FOR DEALING WITH UNDEFENDED ACTIONS SATISFACTORY?**

Yes.

15. **ARE THE CURRENT ARRANGEMENTS FOR THE DISPOSAL OF CASES RAISING ISSUES OF PUBLIC OR ADMINISTRATIVE LAW SATISFACTORY?**

No. There is no good reason why so much of this work is reserved to the Court of Session. Robust procedures and specialist judges should be available outside of the Court of Session to deal with this growing area of litigation.

16. **ARE THERE TYPES OF BUSINESS IN THE SHERIFF COURT WHICH COULD MORE EFFICIENTLY OR APPROPRIATELY BE DEALT WITH BY ADMINISTRATIVE RATHER THAN JUDICIAL PROCESS? FOR EXAMPLE, ARE THE CURRENT ARRANGEMENTS FOR THE DISPOSAL OF COMMISSARY BUSINESS SATISFACTORY?**

We have no comment.

17. **IS THERE A CASE FOR A NATIONAL SHERIFF COURT WHICH COULD ALLOW CASES TO BE RAISED AT SHERIFF COURT LEVEL ANYWHERE IN SCOTLAND? IF SO, WHAT APPEAL ARRANGEMENTS SHOULD THERE BE?**

This could be attractive for cases which involve city-based solicitors but which, for jurisdictional reasons, presently have to be raised in a remote sheriff court. However, the attraction is based on the assumption that the system would always work to the convenience of the solicitor. Such a system could be open to abuse, with actions deliberately being raised in inconvenient locations for a tactical advantage. We see more potential advantage in all sheriff court actions being raised at a central location and allocated to a particular court only once it becomes clear that a hearing will be required. The location of the hearing could be determined primarily according to the convenience of the parties, with the current jurisdictional rules being downgraded to guidance to be applied in the event of dispute. On this model, the sheriff court would have an “all-Scotland” jurisdiction with the geographical location being a matter of convenience.

We consider that the option of an appeal to the sheriff principal has its benefits as an alternative to an appeal to the Inner House of the Court of Session, in terms of speed, simplicity and lack of expense. We would like to see this option preserved.

18. **IS THERE A CASE FOR ALL SHERIFFS TO HAVE AN ALL-SCOTLAND JURISDICTION?**

Yes. One can come across cases which present difficulty in allocating jurisdiction to one sheriff court or another. This is an unnecessary obstacle. In the modern era, it should be sufficient to establish that the courts of Scotland have jurisdiction, without having to conduct a similar assessment between, say, the sheriffdoms of North Strathclyde and Glasgow.

19. **IF THE SHERIFF COURT BECOMES THE PRIMARY COURT OF FIRST INSTANCE, SHOULD THERE BE A POWER OF TRANSFER FROM THE COURT OF SESSION TO THE SHERIFF COURT AND A POWER FOR THE SHERIFF TO**

SEEK THE LEAVE OF THE COURT OF SESSION TO TRANSFER A CASE THERE? IF SO, WHAT FACTORS SHOULD BE TAKEN INTO ACCOUNT?

We do not consider that removing the first instance jurisdiction of the Court of Session is acceptable, for commercial clients.

We do see advantages, however, in a general power for the transfer of cases between different levels of the judicial system.

20. **ARE THE EXISTING APPEAL ARRANGEMENTS SATISFACTORY?**

From a purely administrative point of view, it is extremely helpful to have the option of an appeal from a sheriff to the Court of Session or to the Sheriff Principal. The waiting times for hearings in the Inner House are such that an appeal to the Sheriff Principal is an attractive alternative. There are also a number of appeals which raise matters which need not be referred to a court of the seniority of the Inner House. Finally, appeals to the Sheriff Principal are regularly conducted by solicitors who could not appear in the Inner House, and this ability is clearly welcomed by solicitors and clients.

The option of an appeal to the Sheriff Principal and then to the Inner House can be abused as a delaying tactic, for example by party litigants. However, we do not consider that this would be addressed by removing the Sheriff Principal as a step in the appeal process.

The delay involved in an appeal to the Inner House is unacceptable, and must be addressed.

21. **SHOULD THE OFFICE OF SHERIFF PRINCIPAL BE RETAINED OR SHOULD AN ALTERNATIVE OFFICE BE CREATED? SHOULD THAT OFFICE BE JUDICIAL OR ADMINISTRATIVE OR BOTH?**

As we have noted above, we (and our clients) value the ability to appeal to the sheriff principal as an alternative to appealing to the Inner House of the Court of Session, and would like to see it retained.

22. **SHOULD THE MAJORITY OF STATUTORY APPEALS CONTINUE TO BE DEALT WITH BY THE INNER HOUSE OF THE COURT OF SESSION?**

We have no particular comment, but consider that there may be scope for straightforward appeals to be handled by a single judge in the Court of Session.

23. **SHOULD THERE BE A LIMIT TO THE NUMBER OF LEVELS OF APPEAL THROUGH WHICH AN ACTION CAN PROGRESS? IF SO, HOW MANY LEVELS WOULD BE APPROPRIATE? WHAT PROVISION, IF ANY, SHOULD BE MADE FOR EXCEPTIONAL CASES AND HOW SHOULD THESE BE DEFINED?**

We do not see any reason to impose an arbitrary numerical limit on the number of levels of appeal. In our experience, the availability of an appeal is rarely abused (except by party litigants). It would be unusual, for example, for a party advised by a solicitor and counsel to appeal to the Inner House or (in particular) the House of Lords without a sensible reason for doing so. We consider this could be addressed by requiring party litigants to apply for leave to appeal in all cases.

24. **WHAT ARE THE ADVANTAGES AND DISADVANTAGES OF RELIANCE ON TEMPORARY JUDGES AND PART-TIME SHERIFFS?**

There is something odd about the regularity with which “temporary” judges are used. They should in principle be used when, as a result of unusual or unexpected circumstances, there

is a shortage of full time judges. Put another way, a sufficient number of full time judges should be appointed to handle, on a reasonable timescale, the normal caseload of the court.

Clients may have the impression that a temporary judge is in some sense not as good as a full time judge. Further, the more that senior members of the bar are used as temporary judges, the greater the chance that a conflict of interest will arise which prevents them acting either as senior counsel or as a temporary judge.

We can see that the system of temporary judiciary has the benefit that it allows prospective members of the judiciary an opportunity to experience the role and decide whether or not they would be likely to enjoy a full time appointment.

CHAPTER 5: PRINCIPLES FOR REFORM TO CIVIL PROCEDURE AND KEY PROCEDURAL ISSUES

1. SHOULD THE RULES OF CIVIL PROCEDURE HAVE AN OVERRIDING OBJECTIVE OR STATEMENT OF PHILOSOPHY AND, IF SO, WHAT SHOULD THE MAIN ELEMENTS OF THAT OVERRIDING OBJECTIVE OR STATEMENT OF PHILOSOPHY BE?

Yes. We consider that it would be helpful to have an overriding objective, incorporated into the rules. This should focus on the principle of proportionality, having regard to the amount of money involved, the importance of the case and the complexity of the issues. We do not consider that it should necessarily be an objective of the courts to “ensure that the parties are on an equal footing” or to take into account “the financial position of each party”. These may be factors which, due to issues of confidentiality, it may not be appropriate for the court to inquire into, and due to issues of practicality, it can do little about.

The statement of philosophy should also recognise two other key principles:

(a) that the courts should, where possible, assist the parties to find their own solution to all or part of their dispute; and

(b) that published judicial decisions are fundamental to the development and utility of the law.

The remainder of the court rules should be drafted with the overriding objective in mind. This would be of particular importance for rules which involve a substantial amount of judicial discretion, e.g., the power to dispense with compliance with the rules.

2. SHOULD THE COURT (A) ENCOURAGE, (B) REQUIRE OR (C) IN SOME OTHER WAY FACILITATE THE USE OF MEDIATION OR OTHER METHODS OF DISPUTE RESOLUTION?

The courts should certainly not be an obstacle to alternative means of dispute resolution. For example, they should generally be prepared to sist proceedings to allow that to be done.

We consider that it would be contrary to the spirit of alternative dispute resolution were the courts to have the power to require the parties to use it. Mediation, in particular, is based on the parties’ consent. Forcing the parties to use it might simply result in unnecessary delay and expense. The parties should, subject to proper conduct, be free to choose to litigate their dispute if they wish.

Nor do we consider that it is appropriate for the courts to make awards of expenses based on a party’s refusal of an offer to mediate. The decision to mediate will require the parties to incur potentially significant and unrecoverable expense. There may be factors which influence a decision whether or not to mediate, the reasonableness of which the court is not in a position to assess (e.g., the parties’ inter-relationship with one another, or the fact that the expense of mediation may leave the party with insufficient resources to litigate if the mediation is unsuccessful). Ultimately, an award of expenses against a party for refusing to mediate is a form of compulsion to mediate, which is inconsistent with the consensual basis of the process.

That said, there is some support within our firm for the court rules to facilitate mediation. Those in support of this view point to the fact that, in their experience, client satisfaction with mediations tends to be high. One problem perceived by the supporters of mediation is that a suggestion to mediate a dispute is sometimes considered to be a sign of weakness. It can therefore be difficult to get mediations underway. That deadlock might be broken, they suggest, if the court rules obliged the parties to certify that they have at least considered

mediation. Pre-trial meetings under the Court of Session personal injury rules have been successful in bringing about earlier settlements. This might be extended to all actions by a requirement for the parties to certify, at some stage after defences have been lodged, that they have met to discuss the possibility of settlement and have considered the possibility of using alternative dispute resolution to resolve all or part of their dispute. To be meaningful, such a meeting would have to be attended by those with control over the dispute. Even if the meeting is not successful in resolving the whole dispute, it might well allow the dispute to be significantly narrowed by the identification of key issues—saving future court time. The court should not be entitled to pry into the conduct of the parties at the meeting, and its role should be confined to monitoring that the parties have certified that the meeting has taken place. The court might also, through judicial case-management, suggest key issues that the parties might wish to address.

However, others in our firm report client dissatisfaction with mediation, and consider that any compulsion for prospective (or actual) litigants to consider mediation would merely cause resentment. They point to the fact that mediation can be a very expensive and time-consuming exercise, and therefore deflect resources from the means of dispute resolution that parties themselves may prefer (the courts). Those holding this view see no reason why one form of dispute resolution (mediation) should be elevated above any other.

3. **IF SO, HOW SHOULD THIS BE DONE AND AT WHAT POINT OR POINTS IN THE PROGRESS OF A DISPUTE?**

We have suggested above that consideration of mediation might be most successful once parties' positions have been clarified after defences have been lodged. It should not be a prerequisite of raising proceedings, when it is likely merely to be seen as an obstacle to "getting on with serving a Summons". Indeed, although there is support for mediation amongst many of our solicitors, some consider that the court rules should not deal with it at all, and that it should remain purely a matter for the parties' choice.

4. **ARE THERE PARTICULAR KINDS OF DISPUTES IN WHICH THE USE OF MEDIATION OR OTHER METHODS OF DISPUTE RESOLUTION IS NOT APPROPRIATE AND IN WHICH A JUDICIAL DETERMINATION IS ESSENTIAL? PLEASE SPECIFY.**

Any dispute will always remain the property of the parties, and they must remain free to resolve it as they choose (whether through mediation or otherwise).

However, our legal system depends for its health on a flow of well-reasoned judicial precedents which reflect the modern world. There is probably a shortage of such decisions, and our legal system is in jeopardy as a result.

Our legal system will be healthier if a judicial decision is an attractive option for the parties. Judicial decisions are rarely attractive under present rules, particularly if a time-consuming and expensive proof of all issues (both central and peripheral to the case) has to take place first. The court rules should therefore encourage the speedy preparation of cases for decisions on the key issues. High quality judicial case-management is essential to this.

5. **WHAT FORM SHOULD MEDIATION OR OTHER METHODS OF DISPUTE RESOLUTION TAKE AND HOW SHOULD THIS BE FUNDED?**

In general, the current model, under which private mediators are paid a fee for their services, works well. The parties' investment of time and money in the process, and their freedom to choose their mediator, ensures that they are "bought in" to the process and this is a factor in its success.

As we noted above, one contributor to our response has suggested the creation of a small College of Mediators as a “safety net” resource for those otherwise unable to fund mediation (see our answer at chapter 2, question 5).

We do not consider that the courts should supervise the mediation process, except perhaps in the manner we suggest in our answer to question 2 above.

6. **IN WHAT RESPECTS CAN MODERN COMMUNICATIONS AND INFORMATION TECHNOLOGY BE HARNESSSED TO IMPROVE ACCESS TO THE CIVIL COURTS?**

It ought to be possible for steps of process to be intimated and lodged electronically. This might ultimately (in some, if not all, cases) permit the courts’ administrative offices to dispense with paper processes. It would also allow the straightforward electronic transmission of processes. This might be particularly important if the idea is adopted of a centralised administrative office: it would be unacceptable for the parties to attend a local court, with the process left behind at the central office (or worse, lost in transit).

It should also be possible for productions to be lodged electronically. This would require reform to allow electronic copies (i.e., scanned documents) to be certified electronically as true copies.

Solicitors and counsel should also be given read-only, on-line access to court processes. This would be of great value and would save the time involved in attending court to borrow or check paper processes.

Communication from the courts could also be conducted electronically. This is already done to some extent by the commercial clerks at the Court of Session, and by the commercial sheriffs in Glasgow Sheriff Court.

It should also be possible for procedural hearings to be conducted by telephone or video-conferencing facilities. This could save a substantial amount of time, as solicitors will not have to wait around unproductively. It should also increase the chances of such hearings being conducted by the principal solicitor responsible for the file. One reason why options hearings have not had the case management impact that might originally have been expected is that economics generally require options hearings to be covered by junior solicitors, trainees or local agents rather than the principal solicitor responsible for the file. Even in the Court of Session commercial procedure, in which the principal solicitor and counsel handling the case are supposed to appear at preliminary hearings, substitute solicitors and counsel are often involved. The result is that the hearings have little of the case management benefit they are meant to have. Improved timetabling and more creative use of communications technology should address these problems.

7. **TO WHAT EXTENT SHOULD THE COURT CONTROL THE CONDUCT AND PACE OF LITIGATION?**

It should encourage the prompt and proportionate use of resources but not to the point that it overrides parties’ interests. For commercial actions, there should however continue to be judicial case management from an early stage, and this should be introduced for intellectual property actions.

We make certain comments below in relation to speeding up proofs.

8. **WHAT TYPES OF CASE WOULD BENEFIT FROM (A) JUDICIAL CASE MANAGEMENT AND WHAT TYPES OF CASE WOULD BENEFIT FROM (B) CASE-FLOW MANAGEMENT?**

It is clear that commercial actions benefit from the judicial case management model available in the Court of Session and certain sheriff courts. This should continue.

There is a lesser form of judicial case management for intellectual property actions under Chapter 55 of the Rules of the Court of Session, with a procedural hearing after the record closes. We consider that it would be helpful to increase the amount of case management in IP actions to a level similar to that available for commercial actions generally.

We consider that the case-flow management of personal injury actions in the Court of Session has been successful, especially given the requirement of a pre-trial meeting. The meeting does seem to reduce the number of cases which settle only immediately prior to the proof. We do not consider that case-flow management would be appropriate for commercial litigation.

CHAPTER 6: WORKING METHODS OF THE CIVIL COURTS

1. **WHAT ARE THE ADVANTAGES AND DISADVANTAGES OF PRE-ACTION PROTOCOLS?**

Advantages – the spirit of pre-action protocols is generally to ensure as much pre-action ventilation of the issues as possible. If the parties, and their solicitors, buy in to that spirit, a very substantial part of the issues can be clarified in advance of litigation. This can significantly improve the chances of a prompt settlement, and can reduce court time and the cost of litigation by narrowing the issues in dispute. Protocol correspondence works best when the parties move beyond mere assertion and positioning and into proper reasoning of their positions.

Disadvantages – a pre-action protocol cannot in itself overcome an ingrained habit that the action need not be fully investigated or ventilated until the proof. Nor is protocol correspondence always an adequate substitute for proper pleadings, in the way that is envisaged (for example) by the Court of Session Commercial Actions Practice Note. Good quality pre-action correspondence can be expensive, since it requires more investigation, more advice to the clients and more work in preparation. It remains unclear the extent to which these additional up-front costs can be recovered as judicial expenses. The additional, up-front cost in complying with a pre-action protocol can act as a further disincentive to litigation, especially in relatively low value claims, and unscrupulous debtors may take advantage of this to avoid paying debts they know to be due.

There is a difference of view within our firm on pre-action protocols. Some find them very helpful and consider that they reduce the amount of unnecessary litigation. Others consider that protocols have excessively discouraged litigation away from the Commercial Court in the Court of Session in favour of alternative venues (such as the Commercial Court in Glasgow Sheriff Court). Those who dislike the protocols also point to the significant cost involved in complying with their terms, and the uncertainty over the recoverability of that cost in the event of success. Finally, in some cases, an undue amount of time and effort has been diverted from the merits of the action by argument over whether or not the protocol has been complied with.

2. **SHOULD THERE BE A GREATER USE OF PRE-ACTION PROTOCOLS? IF SO, IN WHAT COURTS AND FOR WHAT TYPES OF ACTION?**

As we noted above, there is a difference of view within our firm on this issue. Those in favour of protocols would like to see them used for all types of action, with the exception of cases where an urgent remedy, such as an interim interdict, is required.

3. **SHOULD COMPLIANCE WITH PRE-ACTION PROTOCOLS BE VOLUNTARY OR COMPULSORY?**

Those in our firm in favour of protocols consider that they should be compulsory, except when there are circumstances (such as urgency) which justify a departure from the normal position.

4. **SHOULD THERE BE A GREATER REQUIREMENT FOR LEAVE TO BRING OR TO TAKE STEPS IN PROCEEDINGS? IF SO, AT WHAT POINTS IN PROCEEDINGS AND WHAT CRITERIA SHOULD THE COURT APPLY IN DECIDING WHETHER LEAVE SHOULD BE GRANTED?**

We can see a case for greater control of party litigants. We have had a case in which a party litigant opponent, during an appeal to the Sheriff Principal, made clear that he had no criticism of the Sheriff's decision. That was fatal to his appeal, but did not stop him from appealing again to the Court of Session. It would have been helpful for him to have had to

justify his appeal, possibly by a requirement that he apply for leave. Such a requirement should be imposed on all party litigants. The test should be based on there being a sensible prospect of success.

We have also heard anecdotally that party litigants have abused the right to reclaim without leave against a Lord Ordinary's refusal to sist an action (rule 38.3(4)(g)), by repeatedly enrolling motions to sist and reclaiming against each refusal. There ought at the very least to be some means of control over such abuse.

More radical proposals might include (a) the parties having to certify that they have met to consider settlement or alternative dispute resolution (see our answer to question 2 in chapter 5, which we would highlight was not agreed by all contributors to our firm's response); and (b) the parties having to demonstrate a certain level of preparation before a proof diet is fixed.

5. **ARE THE CURRENT ARRANGEMENTS FOR MAKING THE RULES OF CIVIL PROCEDURE SATISFACTORY? PLEASE GIVE REASONS FOR YOUR VIEWS.**

We have no comment.

6. **SHOULD THERE BE A SINGLE SET OF RULES OF CIVIL PROCEDURE IN BOTH THE COURT OF SESSION AND THE SHERIFF COURT?**

We think that some streamlining and codification would be sensible. There are differences between the procedures which are difficult to justify objectively. For example, is there any good reason why motions should be so different procedurally in the Court of Session and Sheriff Court? Is there any good reason for the differences in the initiating writs (why the difference, for example, in terminology between "conclusions" and "craves", and between "initial writs" and "summonses")?

It should be possible to produce a code of civil procedure which applies to all disputes. Some rules will be unnecessary for simple cases, but they could be expressly disappplied from categories of case for which they are inappropriate. Additional rules may be required for specific types of cases e.g. patent cases.

One advantage of this would be the build up of a single body of jurisprudence on procedure that would be relevant to all courts. Another would be an improvement in the overall comprehensibility of the rules of civil procedure. It is a bizarre feature of our legal education that law students leave university with virtually no exposure to the procedural rules of our supreme court.

7. **SHOULD THERE BE A SINGLE INITIATING DOCUMENT FOR (A) ALL TYPES OF ACTION AND/OR (B) AT ALL LEVELS OF THE COURT STRUCTURE? IF SO, WHAT FORMAT SHOULD THAT DOCUMENT TAKE?**

There is certainly scope for simplifying the range of initiating documents. There is little justification (that we can see) for the differences that exist between a Court of Session summons and a Sheriff Court initial writ.

There are certain core elements that the document must have: a precise description of the orders sought; a summary of the version of the facts on which the application is based; and a statement of the legal propositions justifying the grant of the orders.

8. **TO WHAT EXTENT SHOULD A SYSTEM OF ABBREVIATED PLEADINGS BE INTRODUCED?**

There is a difference of view within our firm on this issue.

Those in favour of formal written pleadings agree that pedantic and technical objections to pleadings can be obstructive to the efficient administration of justice.

However, in their view, poorly drafted pleadings can be even more obstructive. Properly drafted pleadings can greatly simplify the resolution of disputes by focusing the relevant issues clearly and in a single document. They remove uncertainty about issues in dispute, and provide the framework for irrelevant actions to be dismissed, saving the considerable time and effort involved in preparing for a proof. Arguments which are criticised as pedantic can often be of significance in this sense.

It is not uncommon in the sheriff court to come across pleadings which verge on the incoherent. The supporters of traditional written pleadings consider that this problem may be rendered worse if the rules of pleading were to be slackened. Nor is it necessarily a step forward (in their view) for parties' positions to be set out partly in their pleadings and partly in pre-action protocol correspondence. For example, positions may be differently stated in different letters, it may be more difficult to piece together an opponent's case and there may be greater scope for getting irrelevant cases through to proof. On an anecdotal level, it seems to us that sheriffs tend to be more reluctant to dismiss cases at debate than judges in the Court of Session, and that this might be based on the lower standard of written pleading in the Sheriff Court. Sheriffs appear to be less confident that the pleadings set out the whole story.

In our experience, in commercial actions, parties rarely take advantage of the ability to use abbreviated pleading. Some of our respondents consider this to be due to nothing more than inherent conservatism; but others consider that it reflects recognition of the assistance that proper pleadings provide in the concise and coherent presentation of a case in a single document.

Those who favour the use of abbreviated pleadings consider that formal written pleadings have an excessive influence over the entire procedure of a case. For example, no proof will be fixed until the Record has closed. This can result in long delays while dilatory defenders or indeed pursuers repeatedly apply for extensions to the adjustment period. The length of time that this process takes suggests (in their view) that pleadings are much, much too slow in bringing out the important aspects of a case.

Experience of construction industry adjudications tends to suggest that parties are capable of giving fair notice of their arguments despite the absence of formal pleadings. Moreover, they are capable of doing so under very tight time limits. It may be that a combination of a stricter timetable (e.g., with dates for proofs or debates being fixed at an earlier stage) and less rigid rules of pleading, parties' minds would be focused earlier on the key issues. This is what happens in other systems (for example, England) which are regarded generally as an attractive forum for commercial disputes.

It is very often the case that the points at issue can be focused more effectively in, for example, tables, spreadsheets and schedules, than in traditional articles of condescendence and answers.

9. ARE THE CURRENT ARRANGEMENTS FOR SUMMARY DISPOSAL SATISFACTORY?

Broadly, yes. We consider, however, that the ability of a pursuer, but not a defender, to seek summary decree is unbalanced. By the time an action is raised, a pursuer has had far more time properly to formulate their case than a defender, yet is not exposed to the same risk of early disposal. The defender may, for example, be called upon to lodge affidavits to establish that he has a defence. There is no question of a pursuer having to do the same to establish that he has a case. We can see no justification for that difference in treatment.

10. **SHOULD ROUTINE PROCEDURAL MATTERS IN BOTH THE COURT OF SESSION AND THE SHERIFF COURT BE DEALT WITH BY JUDGES (PERHAPS AT A MORE JUNIOR LEVEL) DESIGNATED FOR THAT PURPOSE?**

Yes, assuming suitable office-holders can be found and are willing to do it. There is a potential tension here, however, with the judicial case management model used for commercial cases in the Court of Session and sheriff courts (which we have argued above must be retained).

11. **ARE THE CURRENT ARRANGEMENTS FOR DEALING WITH ROUTINE PROCEDURAL BUSINESS SATISFACTORY?**

No. There is considerable scope for reducing the wastage of time. Procedural business often involves travel and waiting time which is out of all proportion to the issues being addressed. The cumulative cost of time wasted through waiting time, for example, at a traditional, procedural civil court in the sheriff court must run to many thousands of pounds. This should be addressed by improved diarising of hearings, increased use of telephone or video conferencing and expenses penalties for parties who are unprepared for such hearings without reasonable excuse. Careful consideration is required to identify those matters in respect of which a hearing is actually necessary.

12. **SHOULD THE COURT HAVE A GREATER DEGREE OF INPUT IN ALLOCATING THE LENGTH OF TIME TO BE SET ASIDE FOR A HEARING? SHOULD HEARINGS BE TIME LIMITED OR CONDUCTED BY REFERENCE TO A TIMETABLE DETERMINED BY THE COURT?**

Possibly: the duration of any given hearing depends almost as much on the judge as on the other participants. However, the duration of hearings is often unpredictable, and issues may arise (or disappear) after the hearing has been fixed but before it takes place. Written skeleton arguments could help – if they are properly done.

Under the judicial case-management model, judges ought from an early stage to have had the opportunity to familiarise themselves with the papers. There is clearly scope for judges with that degree of involvement to have a helpful influence the length of time allocated to the case.

We also consider that proofs often take far longer than they ought to. Hearings on evidence can be very laborious. It would be helpful if the rules did more to encourage that process to be speeded up, e.g., beforehand, by the agreement of uncontroversial evidence and the earlier disclosure of evidence, and during the proof, by the judges being encouraged to be more interventionist to move matters along.

13. **IN THE CONDUCT OF SUBSTANTIVE HEARINGS SHOULD THERE BE GREATER USE OF WRITTEN RATHER THAN ORAL ARGUMENTS?**

Yes, assuming that judges are given sufficient time to read them in advance. It could allow hearings to be significantly better focused, and therefore shorter.

14. **TO WHAT EXTENT SHOULD THERE BE AN EARLIER AND/OR WIDER DISCLOSURE OF EVIDENCE?**

If abbreviated pleadings are to be allowed, there is a case for requiring parties to produce documentary evidence, perhaps including affidavits, from an earlier stage to ensure that they give fair notice of their case to their opponent. Indeed, this might be a more efficient use of resources than the preparation of detailed pleadings that are merely based upon such evidence. It may assist in the earlier resolution of disputes, if parties are given such an opportunity to assess the strength of the case against them. It may even encourage parties to

be more realistic, from an earlier stage, about their own prospects of success. This approach would increase the front-loading of expense in litigation, and that would have to be reflected in a change to the rules for the recovery of judicial expenses, but should improve the chances of an early resolution.

In addition, matters could be speeded up by allowing commission and diligence to take place at an earlier stage than on or after the closing of the record.

The use of witness statements and affidavits for evidence-in-chief under the English procedure appears to work well and means that the trial is focused on cross examination. This approach could save a substantial amount of time in Scottish proofs, where there is a lamentable tendency for an inordinate amount of time to be spent leading uncontroversial evidence.

However, there is a risk that wider powers (or obligations) of disclosure could be abused, e.g. with disproportionately demanding requests for information or the over-supply of irrelevant material for tactical reasons. Such abuse would have to be strictly prevented, otherwise it would represent a further disincentive to litigate and therefore an obstacle to justice.

15. **TO WHAT EXTENT SHOULD THE COURT HAVE CONTROL OVER THE USE OF EXPERT AND OTHER EVIDENCE?**

There may be advantages to the court having some control. There may be instances where the parties are uncertain whether expert evidence is necessary, or desirable, and a decision on that from a judge might be helpful.

We think that it might be difficult to establish a system where a single expert is appointed as a matter of course, rather than each party instructing their own expert witness. There is often a need for solicitors to consult in some detail with expert witnesses to get their written reports into the appropriate state to be lodged in court. That would not be possible if the expert were appointed as a single expert. Some experts are excellent at setting out their reports in a format which is suitable for use in court without assistance, but many are not.

16. **SHOULD A SYSTEM OF PURSUERS' OFFERS BE INTRODUCED INTO THE CIVIL COURTS PROCEDURE? IF SO, WHAT FEATURES SHOULD SUCH A SYSTEM HAVE?**

Yes. It should operate in a similar manner to a defender's tender: if the tender is not accepted, but the pursuer is ultimately awarded more by the court, the defender should be liable for all expenses incurred in procedure subsequent to the date of the tender. The force of the tender might be enhanced by some refinements which could apply to both pursuer's and defender's tenders. For example, there might be a case for the expenses subsequent to a beaten tender to be awarded on the agent and client scale.

17. **SHOULD CIVIL JURY TRIALS BE RETAINED?**

We see no reason why not.

18. **SHOULD WRITTEN JUDGMENTS BE REQUIRED IN ALL CASES?**

No, but in most cases. In our experience, written judgments are always produced in the cases where they are required.

However, written judgments take far too long to be issued. We understand that this is because judges' schedules leave insufficient time for them to write their judgments. Judges should be given more time for writing judgments. It is a critical part of their job. In a

precedent-based legal system such as ours, judges' decisions must be carefully reasoned and not rushed.

19. **SHOULD THE COURTS HAVE GREATER POWERS TO IMPOSE SANCTIONS FOR NON-COMPLIANCE WITH COURT RULES OR WHERE A PARTY OR HIS REPRESENTATIVE HAS BEHAVED UNREASONABLY? IF SO, WHAT SHOULD THESE BE?**

Yes – dismissal should be seriously considered as an option (with sufficient controls where that would have implications for the prescription of a pursuer's claim). There might also be benefits in giving the court the power to specify, on a broad brush basis, the amount of expenses to be paid. At present, interim awards of expenses are rarely enforced because of the convoluted process involved in having an account drawn up and taxed. The cost of "unjust" litigation is therefore transferred only in an inefficient way to the party responsible for it.

20. **WHAT MEASURES SHOULD BE AVAILABLE TO THE COURT TO IDENTIFY AND MANAGE UNMERITORIOUS CAUSES OR APPEALS BROUGHT BY PARTY LITIGANTS.**

It should be necessary for a party litigant to obtain leave to appeal or to raise proceedings in the Court of Session or under Sheriff Court ordinary procedure. It should not be necessary for small claims or summary causes.

21. **IS THE CURRENT LEGISLATION ON VEXATIOUS LITIGANTS IN NEED OF REFORM AND, IF SO, HOW SHOULD THAT BE DONE?**

We have no particular comment.

22. **SHOULD A PERSON WITHOUT A RIGHT OF AUDIENCE BE ENTITLED TO ADDRESS THE COURT ON BEHALF OF A PARTY LITIGANT AND, IF SO, IN WHAT CIRCUMSTANCES.**

We can see that this might be helpful in some cases. It may well be that a party litigant could be substantially assisted by a more articulate, or less nervous, or more experienced representative. This might also benefit the court and the opposing party and their solicitor.

However, the court must retain the ability to make the decision on a case by case basis, and the power to revoke its decision if it sees fit. The overall test should be related to the likelihood of the representative's involvement assisting, or inhibiting, the ends of justice.

23. **WOULD IT BE DESIRABLE TO INTRODUCE SEPARATE PROCEDURES FOR MULTI-PARTY LITIGATION?**

Yes. From a policy perspective, introducing a multi-party procedure would, we believe, increase access to justice. There are also clear benefits from a practical point of view, for example, consistency in outcome of claims of a similar nature, reducing duplication of cases which can otherwise take up a considerable amount of court time and positioning Scotland as a forum of choice for litigation.

There is an increasing need for provision to be made for collective redress mechanisms, particularly in the field of competition law where a number of consumers and businesses are affected by the same unlawful activity. Private enforcement of competition law, of which multi-party actions are an important part, is currently being encouraged at both UK and EU level. The European Commission is to publish a White Paper on this issue in the coming weeks, and its consumer arm is considering the introduction of a collective redress system for consumers more generally. On the domestic front, the Office of Fair Trading (OFT)

published recommendations to Government in November 2007 as to the steps which (in its view) should be taken to improve the effectiveness of redress for those who have been harmed by breaches of competition law. These parallel initiatives all give consideration to the issue of multi-party actions and how they can best be organised and funded.

We recognise the importance of creating a system which provides access to redress and encourages compliance (for example, with competition law or health and safety rules) without developing a ‘culture of litigation’ with the perceived excesses of US class actions. We believe this to be achievable with the appropriate checks and balances, for example, by adopting an “opt-in” system or a system whereby judges have discretion to decide on a case-by-case basis how a particular ‘class’ of litigants should be determined or treated (for example, by way of a representative action on behalf of consumers/businesses at large, or on behalf of named parties only, or as individual actions).

There are clearly many issues to consider but in principle we support introducing procedures for multi-party actions. We think this is an opportunity for Scotland to mould its procedures to this developing area in order to be competitive and forward-looking, especially in the face of inevitable change in other jurisdictions. In developing a multi-party litigation strategy, we urge the Scottish Civil Courts Review to take competition litigation and the reports from the OFT and European Commission into account.

24. **IS THE RULE GOVERNING THE PROCEDURE TO BE FOLLOWED FOR JUDICIAL REVIEW SATISFACTORY?**

It is a welcome improvement that first orders can now be obtained without the expense of an appearance.

Magnus P Swanson
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For Maclay Murray & Spens LLP

31 March 2008