

McGrigors

SCOTTISH CIVIL COURTS REVIEW

A CONSULTATION PAPER

RESPONSE BY McGRIGORS, SOLICITORS

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1 MCGRIGORS

1.1 Description of firm

McGrigors is a UK practice of solicitors with offices in Aberdeen, Belfast, Edinburgh, the Falkland Islands, Glasgow, London and Manchester. In Scottish terms, McGrigors is one of the largest firms in the country. It has a litigation practice in its Edinburgh, Glasgow, Manchester and London offices.

The firm has three solicitor advocates in Scotland (one of whom who is a QC). One of our litigation partners is a temporary sheriff.

1.2 Nature of Business

The core practice areas for McGrigors are Banking, Corporate, Construction, Dispute Resolution, IP/IT, Employment and Pensions, Projects, Real Estate and Tax Litigation. As such, the majority of our clients are business entities or individuals engaged in business. We rarely act for private individuals.

Our litigation practice focuses on a number of areas, primarily in a commercial context including:

- Contractual disputes
- Corporate Litigation
- Property litigation
- Health and Safety
- Judicial review
- Intellectual property
- Product Liability
- Reparation/Negligence

- Administrative Law
- Planning

1.3 **Courts**

We have a primarily civil practice although we do act for clients in statutory prosecutions, including health and safety work in particular.

We act for clients in the House of Lords, the Court of Session and all Sheriff Courts (primarily Glasgow Sheriff court). We do some summary cause and small claims work but this forms a very small element of our practice.

We appear for clients in other forums including employment tribunals, Fatal Accident Inquiries, arbitrations and mediations.

We do not have a Legal Aid practice although our clients do occasionally have litigations where the other party is in receipt of Legal Aid.

2 **CIVIL COURTS REVIEW**

2.1 **Approach**

We welcome the broad approach taken by the review and the depth to which many areas have been explored. Having discussed our approach in our response with a member of the panel, rather than answering the questions individually, we seek to address the following main issues:

- What are the primary factors that discourage “effective” litigation in the Scottish Courts?
- What good features exist in the current system?
- What changes contemplated in the consultation paper would we wish to see in the current system?
- What changes contemplated in the consultation paper would we not welcome?

In this way, we hope that most of the areas in the consultation paper on which we are in position to comment will be addressed.

2.2 **Priorities**

We are of the opinion that the priority of the Scottish Courts service should be the provision of an effective, efficient and attractive dispute resolution service. The courts should not necessarily be seen as a place of last resort.

3 **WHAT ARE THE PRIMARY FACTORS THAT DISCOURAGE “EFFECTIVE” LITIGATION IN THE SCOTTISH COURTS?**

3.1 **Delay**

One of the most fundamental problems facing our clients in the current system is the inherent delay within civil litigation. This is particularly the case within the Court of Session although there is also some unwelcome delay within the Sheriff Courts.

3.1.1 Court of Session

It is our common experience that if a case is litigated through the Court of Session, there are a number of critical stages where there can be unacceptable delay. They include:

- The difficulty in obtaining a date for a substantive diet, be that proof, proof before answer or debate. In particular, when seeking a diet of proof which is in excess of a couple of days, a date may not be available for a number of months, sometimes in excess of a year. We fixed a four week proof in February this year for June 2009. This was due to court, not counsel, availability. The action is an important Intellectual Property case.
- We have had experience of attending at court for a proof or debate (often which was fixed many months previously) with clients and witnesses only for the hearing to be discharged due to the unavailability of a judge. The hearing will then be reallocated for a new date which in itself may be many months hence. (See comments on personal injury actions later). This has recently happened with a seven day debate in a multi-million pound action. The debate was delayed by six months with the consequential problems felt by the four parties involved.
- If a hearing is proceeding, it is not unusual for it to start late in the day, sometimes by some hours, as the judge appointed to hear the matter is hearing criminal business.
- If a decision is reclaimed, there can often be an inordinate delay in having a date fixed in the Inner House. Delays are often longer than a year and 18 months is not unheard of. This can cause significant problems and also affects appeals from the Sheriff Court.
- It is often left to parties to fix a diet with the court. There is currently no penalty enforced if one party chooses to delay this stage, often resulting in frustration and difficulties if the other parties wish to expedite matters. We are currently acting for the defenders in a personal injury matter where the summons were signetted in January 2008 and the action is continuing ten years later. Much of that delay is because of the pursuer's unwillingness to fix dates for further hearings.
- We have experienced long and sometimes unacceptable delay in having opinions written. This is not always the case but is not exceptional. On one occasion we have waited 21 months after submissions for a written opinion.

3.1.2 Sheriff Court

While the problems faced in the Sheriff court are not as acute as in the Court of Session, delays are experienced which create problems for clients.

The reasons for delay in the Sheriff court include:

- The lack of availability of court time to hear civil business. This is particularly the case in smaller courts but is not a problem exclusive to them.
- Even if diets are due to take longer than one day, they are often only allocated one day. This means that diets are often part heard over a number of weeks or months.
- A significant proportion of Sheriff's civil time is spent on small claims and summary cause business. Owing to the higher percentage of party litigants in these courts, ordinary business with party litigants can take far longer than actions where both parties have legal representatives, despite the lower value of the claims.

3.1.3 Consequences

As a result, clients face a number of difficulties including:

- an increase in cost as matters have to be revisited due to delays or part heard hearings;
- the obvious waste in expenditure if hearings are delayed or put back to different dates;
- a lack of certainty as to when a dispute may be resolved which can often have a considerable impact on the commerciality of proceeding with an action; and
- the problems that may arise in instructing counsel who have not been previously engaged in (often complex) litigation so that an earlier date may be secured for a hearing.

We are aware of a number of large commercial clients who would not choose to litigate in Scotland as a result of these problems.

3.2 Costs

3.2.1 Award of expenses

We are concerned that the level of recoverable expenses on success very rarely approaches the expenditure incurred by clients. We normally advise clients to expect a recovery level in the region of 50-60%.

This means that there is a relatively low level at which it can easily become uneconomic to litigate. If, for example, a matter were to proceed through the sheriff court relating to a sum in the region of £10-20,000, it is not unusual to expect expenses to far exceed that, much of which would not be recoverable even if successful.

The recoverability of expenses has an overly influential factor in decisions in relation to settlement. This is particularly the case in personal injury cases where often the dispute relates to quantum as opposed to liability. We are frequently in the position of having to advise clients to settle cases at levels which we think are excessive because the risk of incurring irrevocable expenses (even with the protection of a tender) is too great. For example, we may consider a claim for £50,000 to be realistically valued at £10,000. To protect their position, the client lodges a tender for £12,000. The other party seeks settlement at £15,000. The client may well settle at £15,000 to avoid the risk of expenses in a claim they consider worth no more than £10,000.

We are also concerned about the restrictions of taxation as regards the number of solicitors whose costs can be recovered. While we are not of the opinion that the auditor should automatically allow costs to be recovered for all solicitors who attend at court (as this in itself may result in inequity as litigants have different resources at their disposal), there are cases where due to the complexity of the action, there is merit in having more than one solicitor attending (for example the partner and main assistant acting). This concern also applies in Sheriff court actions where one of our solicitor advocates is in attendance qua counsel. The limits of recoverability in these circumstances can cause, in our opinion, an inequity which may be seen as anti-competitive if the other party instructs counsel.

We would not be supportive of summary assessment of costs as in England. Judges are not experts in costs and the ensuing issues that may arise does, in our experience, increase costs.

3.2.2 Court costs

At its current level, court costs do not discourage commercial clients from litigating in the Scottish courts. However, if court dues were to increase significantly, we are of the opinion that commercial clients may be discouraged from using the Scottish courts.

3.2.3 Legal Aid

We concur with the comments made in paragraph 3.32 of the paper in relation to the inequality of arms when a litigant has legal aid and the other party does not.

3.3 Specialisation

3.3.1 Civil/Criminal

We are of the opinion that litigation can be adversely affected by the lack of a specialised judiciary. This is particularly the case in the Sheriff Court. However, it may become an increasing problem in the Court of Session as (in line with the rest of the legal profession) the practices of those who become Senators become increasingly specialised.

We have encountered a number of problems as a result of the lack of specialisation (in the broadest sense) on the bench. While it is by no means always the case that those judges who come from a criminal practice have difficulties with hearing civil matters, we have on a number of occasions experienced problems due to a lack of appreciation and experience of civil practice and procedure on the bench.

These problems do result in decisions that are perhaps not as robust as we would wish. This in turn will lead to a greater number of appeals than may otherwise be the case. In some instances, we are of the opinion that injustice has been done where a civil matter has not been properly considered but the value of the claim does not justify the cost of an appeal.

3.3.2 Specialisation within Civil

It is almost self evident that the greater the experience of the judge of the issues before them, then the more focused the hearing will be. We are aware of clients who have experience of litigating in England who expect the same level of specialisation in the Scottish courts. However, we understand that with our small jurisdiction, increasing specialisation may not be possible.

3.4 **Prioritisation**

There are a number of distinct areas of work dealt with by the courts. In our experience, the prioritisation of two of these areas contribute significantly to the problems of delay narrated above. They are crime and personal injury.

3.4.1 Crime

There is no doubt that the pressure of criminal business impinges on the time available in the courts for civil justice. As noted above, this means that cases may either be delayed or adjourned as a result of the need to prioritise criminal business which can cause substantial problems for the conduct of the civil business.

3.4.2 Personal Injury

We have a reasonable level of experience of personal injury work both before and after the introduction of the new Chapter 43 procedure in the Court of Session. When we were advisers to a large self insured client for their personal injury claims, we had a significant body of reparation actions to deal with.

In our experience, by far the majority of personal injury actions are now raised in the Court of Session, notwithstanding the level of the sum sued for. We are aware of actions raised for as little as £3,000 under the new procedure. Very often actions are raised for considerably more than the claim is worth. While some personal injury actions raise complex issues of liability and law, the majority of them are quite “routine” matters, with many common issues being considered. They are colloquially referred to as the “slip and trip” and “RTA” actions. Most attempts to resist a claim continuing through the Outer House are rejected.

While we appreciate that the majority of Chapter 43 actions do not take up as much judicial time as actions under the ordinary procedure, they still have a significant impact on the remainder of Court of Session business. They still require a large amount of administrative time. Personal Injury proofs still require to be allocated in the diary (albeit that they may subsequently settle). This means those dates are not available for other business. The impact of the volume of PI business is felt most acutely on Tuesday morning when proofs are being allocated. There is still a remnant of PI proofs that may not settle until that morning (if at all). If PI proofs proceed, they are given prioritisation over other business. As a result, it is not unheard of for solicitors to be waiting with clients, experts and witnesses for negotiations in what may be a low value PI claim to end either in settlement or proof before we can be told if they will have a judge for their proof. We do not consider this a good use of expensive judicial resources.

We are also concerned about defenders in personal injury actions being routinely exposed to Court of Session (as opposed in Sheriff Court) expenses in small value claims. We do not consider this equitable.

3.5 **Party Litigants**

We have some experience of litigation with party litigants. While we appreciate that for reasons of access to justice there may be a need to allow party litigants, we are concerned about the length of court time and judicial latitude that is given to party litigants. This can cause significant problems, delay and expense for legally represented litigants.

4 **WHAT GOOD FEATURES EXIST IN THE CURRENT SYSTEM?**

4.1 **Commercial Courts**

We have extensive experience of litigating in the Commercial Court in the Court of Session and Glasgow Sheriff Court. We have found a number of the elements of practice in these courts to be extremely beneficial. These include the following, observed to a lesser or greater degree in both of these commercial courts.

4.1.1 Case Management

Judicial case management is used in both commercial courts. If it is exercised properly, it can be an extremely effective and efficient means to manage and resolve disputes through the court. This can mean that the real dispute is focused on more quickly and effectively. Clients usually appreciate a more flexible, focused approach from the bench. In our opinion, judicial case management is more effective than case flow management as it allows active consideration at an early stage of the matters in hand and gives the judge the opportunity to direct the case effectively, provided he is given adequate powers to ensure that such directions are complied with. Case management is best viewed as an opportunity for the judge to assist and be involved in the case rather than direct it. The flexibility could also allow important severable issues in a case to be focused on and resolved prior to other issues, thereby potentially resolving the whole dispute.

While we are supportive of case management, we are also concerned to ensure that adequate training is given to those judges in the commercial court to ensure that the enhanced powers of direction are used appropriately.

We are of the opinion that it would prove a disincentive to many of our clients if this feature of the commercial court was removed.

4.1.2 Accessibility of Judicial Time and Resources

The allocation of a single, consistent arbiter results in less time wastage as the judge becomes acquainted with the points in dispute and they do not need to be rehearsed every time the matter calls.

We have found the Glasgow Commercial court practice of having telephone conference calls to deal with procedural matters to be very helpful in the allocation of resources in cases.

The increased use of email communication with both commercial courts for administrative and motion business has been very effective and reduces wasted waiting, administrative and legal costs.

4.1.3 Statement of Issues/Pre Action Protocol

We have found the majority of the initiatives adopted by the courts to promote early identification of the issues in dispute to be effective. It can be beneficial to have a full and frank exchange of issues before the matter proceeds to court (if at all). However, we would be concerned that the pre action protocols would not be overly burdensome so as to increase the pre action costs unnecessarily. Our experience of the procedure to date in the Commercial Court is that the costs have not been unduly burdensome. We are aware that others believe this procedure too burdensome but provided the protocol is not too prescriptive, it can assist in focusing issues.

We have also had some experience of exchange of witness statements in England and Scotland. On the whole, we are not of the opinion that these are of assistance. If statements are being prepared for exchange, they consume a lot of resources in their preparation and there is a concern that the result may be a “gloss” on the real evidence for presentational purposes.

4.2 **Sheriff Principal Appeals**

We are supportive of the current system of Sheriff Principal appeals. Bearing in mind the excessive delays in having appeals heard in the Inner House, the speed of having such appeals heard is attractive to clients as is the relatively low cost (in comparison with the Inner House).

4.3 **Outer House business**

We are of the view that it is beneficial for the Outer House to have a first instance jurisdiction (subject to limitations noted below). There are matters which are legally complex and/or of high value which, in our opinion, merit the attention of the Senators at first instance.

5 **WHAT CHANGES CONTEMPLATED IN THE CONSULTATION PAPER WOULD WE WELCOME?**

5.1 **Reformed structure of the Sheriff Courts**

5.1.1 Civil Specialists

We are of the opinion that there would be an improvement in the disposal of justice in the Sheriff courts if some sheriffs were nominated as civil specialists. If the court's jurisdiction were to be expanded (see below), this would be critical in engendering greater confidence in proceedings in the Sheriff court for clients. It would also have the obvious effect of improving the efficiency of civil business if criminal business were no longer given priority for certain sheriffs.

We are conscious that the establishment of civil sheriffs may cause practical difficulties but we think there would be sufficient business for the courts to justify such a move.

As regards the Court of Session, we anticipate that there may be more practical problems in the allocation of resources were there to be a number of Senators restricted to civil business. That said, if this were a possibility, we would encourage any moves (even on a rotational basis) to have prioritised civil judges for commercial business (including Intellectual

Property) which would, in our opinion, considerably improve the efficiency and thereby effectiveness of civil business in the higher courts.

5.1.2 “Supercentres”

Bearing in mind the concern that resources should not be wasted, we are supportive of the establishment of civil justice “supercentres”, potentially within the current court accommodation. Such an innovation would have to be demonstrated as being more efficient both in terms of resources but also in terms of system quality and consistency.

We are not in a position to suggest where these should be situated geographically. However, we do not envisage that there would be any particular problems in relation to access to justice for our clients if there were, say, six centres for civil justice as opposed to the current forty nine. Indeed, we see an attraction in the reduction of civil centres with efficiencies of scale being introduced through focusing of resources on a limited number of centres together with improved technology links through email, conference calls etc.

The current employment tribunal system works by allocating cases to one of five centres and we understand this works well without any access to justice issues.

There are some areas of civil justice which may not be appropriate for civil centres for access to justice reasons. These would include family matters and small claims (subject to any reforms in that area – see below).

If civil centres were introduced it would appear consistent that the court’s jurisdiction extended to the whole of Scotland.

5.1.3 Third Tier

We are of the opinion that there would be merit in creating a third tier of adjudication for small claims. It would not be presided over by a sheriff but a legally qualified individual. This would allow matters to become less formally legal (and therefore more accessible) and potentially more cost effective for all concerned. It would also release a considerable amount of judicial time to be spent on other matters.

5.2 **Reformed Jurisdiction of the Court of Session/Sheriff Courts**

If there were to be specialised civil sheriffs, we think it would be appropriate to consider expanding the sheriff court jurisdiction both to provide sufficient quantities and quality of work to the new sheriffs and also to remove some of the pressure from Court of Session business.

We have noted the discussion of a “gatekeeper” system in the consultation paper. Provided sufficient rules were set down as regards where actions should be raised and there were sufficient powers of remit both up and down the judicial system, we do not think it would be necessary to have a “gatekeeper” for each and every action to enter into the judicial process. Consideration should therefore be given to reviewing the powers of remit, including allowing the court to do so ex proprio motu. However, if access to the Court of Session is to be restricted, there may be merit in an early judicial “sift” of papers to ensure they are in the correct forum. If the judge does not consider it appropriate, there could then be a hearing to consider the matter. There is some precedent for such consideration in relation to matters going into or being removed from the commercial court.

5.2.1 Value of Claim

As noted above, we believe that the Court of Session should retain a first instance jurisdiction. While we appreciate that not all actions are for financial sums, we think that a financial limit should be introduced. We think this should be set at a relatively high level. We would be concerned that cases may be over-inflated in order to get into the Court of Session but this may be a matter to be considered at the civil sift.

5.2.2 Personal Injury

We do not believe that personal injury actions require per se to be in the Court of Session. We are aware that the Sheriff court are introducing an equivalent procedure to the Rule 43 procedure and we hope that this encourages use of the Sheriff court. If the Sheriff court judiciary were to become more specialised and civil justice centres introduced, we see no reason why personal injury actions would still require the resources (administrative and judicial) of our most expensive court. While clearly there will be high value claims, they can still remain in the Court of Session but the majority of such action should, in our opinion, be restricted to the Sheriff Court. This would have the additional affect of ensuring that expenses were awarded/agreed on a scale more appropriate to the final settlement sum. We have a concern that settlement is delayed in such cases with the effect that increased Court of Session expenses are awarded.

5.2.3 Judicial review/Immigration

We believe that there may be merit in allowing some judicial reviews to be heard by the sheriff court. These should probably be restricted but could include some statutory matters/tribunal “appeals” and potentially immigration hearings. This is a policy matter for legislature.

5.2.4 Class Actions

We would support the introduction of class action procedure into the Court of Session. However, we share the concern that it may lead to “blackmail litigation” (as referred to in paragraph 6.97). There should be some form of gatekeeping procedure to ensure that the body of claims was reviewed at an early stage of the actions.

5.3 **Written judgments**

We are not of the opinion that written judgments are required in all cases, particularly in the Sheriff Court. There are many cases where the dispute is narrow and often limited to a decision on the facts as opposed to the law. In such cases, a decision from the bench may be suitable. If parties wish to appeal the decision, the criminal practice of asking the sheriff to write on the matter would seem appropriate.

5.4 **Reform to Pleadings**

We would be supportive of a change to the requirement for traditional full pleadings. It is important that pleadings give a clear statement of the factual and legal issues at stake between the parties and the traditional system is not necessarily the best for this. Taking a traditional approach can result in unnecessary delay in litigation as parties use procedural, rather than substantial arguments. Our experience of the commercial court is that the statement of issues methodology often assists in focusing on what is at dispute. Equally, we would be concerned that pleadings become too abbreviated. We have had experience with

Rule 43 procedure whereby the legal case has not been stated clearly enough but the abbreviated pleadings procedure has caused problems in trying to have this clarified.

5.5 **Increased Case management**

Subject to our comments on paragraph 4.1.1 above as regards training judges, we believe that increased case management would bring greater efficiency to dispute resolution.

5.6 **Increased Use of Technology**

We are very supportive of any increased use of technology in the courts.

The use of telephone, email and video technology brings obvious benefits to parties involved. As well as the time saving aspect of having more certainty and flexibility for dealing with routine matters, it also often means that it is the principal solicitor who “attends” which is of more assistance to the court.

As regards use of IT in the court itself, we have considerable experience of this having sourced and supplied (on behalf of clients) a significant level of IT input in the McTear v Imperial Tobacco litigation. That included a court document management and display system and a real time transcription service (“Livenote”). Document management in particular can dramatically reduce wasted court time in looking at productions.

The time savings and convenience to the court and parties were immeasurable and we would refer the panel to Lord Nimmo-Smith’s comments in his judgment in this regard(31/5/2005 CSOH69). While the ESDU (see paragraph 5.31) were helpful in this case, they were very limited in practical assistance they could provide. We understand that their focus is the provision of IT for criminal cases with any benefit for civil cases being a “spillover” from the provision of facilities for crime. The high level of IT used in the McTear case was only possible because it was entirely funded by the defenders (including the provision of his Lordship’s laptop). The cost of Livenote in Scotland is very expensive because it is only provided by English based companies. As a result, the use of such technology is really only an option when both parties can afford it (or one party is prepared to pay for it). The costs of such technology would reduce if it were used (and encouraged) more in Scotland with the ensuing benefits therefore being available to a wider sector of litigators.

Through our membership of the Court Technology Forum, we have seen a demonstration of an e-filing solution for the Scottish courts. Subject to ensuring that any such technology meets the practical requirements for lodging of papers etc, then we would encourage any move to increase the use of such software in our judicial system.

6 **WHAT CHANGES CONTEMPLATED IN THE CONSULTATION PAPER WOULD WE NOT WELCOME?**

6.1 **Flexible Forums**

Whilst we are supportive of regional civil centres, we do not think that the suggestion set out in paragraph 4.57 of the report is workable. It suggests that while a case may be allocated to one court, hearings could be transferred at short notice to another. This would bring about considerable practical difficulties for parties. For example, witnesses will be cited to one court and if they are reluctant to attend in the first instance, the problems of dealing with a transfer of location could impede the proper hearing of the case.

6.2 **Disclosure**

We note the comments at paragraph 6.55 as regards the use of the English disclosure rules. We would not encourage the introduction of the English procedure in this regard. Our experience in England through our London litigation practice is that this increases the cost of litigation hugely and that the benefits of such an exercise rarely justify the costs that have been incurred. Instead, we find the use of the specification procedure to be sufficient albeit that we would encourage the latest judicial moves to allow motions to be granted at an earlier stage.

6.3 **Compulsory Mediation**

We are not of the opinion that mediation should be made compulsory. While there may be scope for judicial enquiry as to whether the option of mediation has been explored, mediation is often not the best means for resolution of a dispute. For example, there are cases where one party will maintain their right to a judicial determination and no amount of mediation would shift their position. This may be because the case is being treated as a test case or parties are too entrenched in their dispute. For commercial reasons, parties may be concerned to “disclose their hand” at a mediation which in itself may prejudice the conduct of future litigation. In our opinion it would not be beneficial to enforce mediation (and the ensuing costs) on parties.

6.4 **Expert Reports**

We would be concerned about the introduction of a single court appointed expert. In large scale litigation, we believe this may increase costs as each side then engages their own expert to give advice on what the court appointed expert states.

7 **CONCLUSION**

We are supportive of changes that could be made to the current judicial system. It is important that Scotland continues to provide an effective, accessible and efficient system to resolve disputes. As set out above, there are a number of barriers which are increasingly discouraging people from litigating in Scotland. However, we are aware that financial limitations are such that a root and branch reform may not be possible. Instead, we would wish to ensure that any changes that are made do not prejudice the substantial business community interest in the provision of the judicial system in Scotland.