

SCOTTISH CIVIL COURTS REVIEW

RESPONSE BY SCOTTISH ASSOCIATION OF LAW CENTRES

CONTENTS

- 1 Introduction and Summary
- 2 General principles for guidance
 - a The quality of decision-making
 - b Serving the public.
 - c Efficiency and cost effectiveness.
- 3 Specialisation in the civil courts – Housing cases.
- 4 Multi-party actions.
- 5 The availability of Advice and Assistance and Legal Aid
- 6 Low value cases.

1 Introduction and Summary

Law Centres in Scotland have been operating since 1978. Law Centres concentrate on areas of social welfare law including housing law, debt, employment law, state benefits and other areas. Housing law and debt are of particular relevance to some of the points raised in the review.

In responding to the review, we have therefore decided to restrict ourselves to some very specific points. The questions upon which we propose to comment are as follows.

Chapter 4 Question 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?

Chapter 6 Question 23

Would it be desirable to introduce separate procedures for multi-party litigation?

Chapter 3 Question 6

To what extent and in what respects does the availability of legal advice and assistance and legal aid affect access to justice?

Chapter 2 Question 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?

In regard to the first three questions we believe it would be advantageous for there to be a greater degree of specialisation, particularly in regard to housing law in the Sheriff Court.

Multi-party actions are likely to be particularly applicable to tenants in certain circumstances.

The extension of advice by way of representation in housing cases would in our view be a much more efficient way of providing legal help to litigants in housing cases.

While we take the view that it is very important for housing cases to remain in the Sheriff Court, we consider that cases which presently begin as Small Claims could be better dealt with in a debt tribunal or panel, with a referral to the Sheriff Court when necessary.

2 *General principles for guidance*

In coming to a view on the above matters, we have been guided by three general principles which we consider are particularly applicable to the issues in the Review.

Firstly, it is important to consider the quality of decision making.

Secondly, the civil justice system should exist to serve the public.

Thirdly, the civil justice system should be efficient and cost effective.

a The quality of decision-making

It is very important that the decisions made within the civil justice system are self evidently of a high quality. Care must be taken to see that all relevant matters are taken into account. Any decision should of course be made in accordance with the law and parties should receive a fair hearing.

However, the judicial resources applicable to any case should be proportionate - the higher the level of court, the higher the quality of decision making. One would expect to find a greater degree of judicial expertise in an appeal in the Court of Session or House of Lords than in a Small Claim at first instance.

b The civil justice system should exist to serve the public.

The initiation of a court action indicates that two parties have a dispute which requires to be resolved. Those involved in the civil justice system, whether decision makers, representatives of the parties or administrative staff, should focus on meeting this requirement.

The system should be usable, and accessible to all actual and potential litigants. There should be public confidence in the civil justice system. It should be functional enough to discourage methods of dispute resolution which are not in the public interest.

c ***Efficiency and cost effectiveness.***

Cases within the civil justice system should be expedited as quickly as possible, but in ways which are consistent with the above principles. The benefits of the civil justice system should outweigh the costs of providing it.

These last two points should be placed within a wide context. It is not enough to simply consider the cost of providing and maintaining court buildings and the labour costs of those who work there, and setting against that the financial benefit of those who are successful in court actions. Wider social benefits should be taken into account, for example the social value of avoiding the unnecessary eviction of tenants and their families. This is obviously a very difficult thing to assess.

We make the following points against the background of these principles.

3 Specialisation in the civil courts – Housing cases.

In general we agree that it would be an advantage for there to be greater specialisation within the Sheriff Court. A familiarity with a certain area of law amongst a group of sheriffs is likely to lead to a higher quality of decision making. In our view it would be advantageous for actions involving housing law to be dealt with separately from other actions or types of actions. We think there would be a particular improvement where an identifiable group of sheriffs in a Sherriffdom chose to preside over housing cases within the Sheriff Court.

At present, many Sheriff Courts already separate summary cause actions for recovery of heritable property from other types of actions, but this is mainly for administrative purposes. Such cases now represent a substantial proportion of those raised in the Sheriff Court.

Many other types of case involve similar matters. For example, a mortgage arrears case where a minute under the Mortgage Rights (Scotland) Act 2001 can be lodged involves an assessment of the reasonableness of a removal. And, an action alleging disrepair by a landlord also involves contravention of the terms of a lease. Such cases might also involve a reluctance or indeed a refusal to pay rent which would in turn lead to a summary cause action for recovery.

Disputes also arise in other areas of housing law, such as disputes over abandonment, succession, the right to buy rented property and the right to a written lease.

There are therefore a large number of current actions which raise closely related matters. If these were presided over by a specific group of sheriffs we consider that valuable experience and greater expertise in the relevant issues would result, and this would lead to both greater efficiency and better decision making.

Law Centres now operate in a number of Sheriffdoms throughout Scotland. Many Law Centre solicitors however practice at Glasgow Sheriff Court, and in our respectful view, the volume of heritable actions there is causing problems for the administration of the system. We do not believe however that this is a good reason for removing these actions from the Sheriff Court.

We take the view that these cases are of fundamental importance to the parties concerned. There is very little which is more important than being forcibly removed from your home. A court order in these terms can have traumatic consequences for those involved. We think that such an order should only be granted after substantial scrutiny. We believe that these cases merit the highest level of judicial decision making.

We are therefore strongly opposed to housing cases being removed from the Sheriff Court and redirected to an alternative forum. The high quality of decision making found in the Sheriff Court appears to us to be most appropriate for cases of this level of seriousness. We would suggest instead that a housing court within the Sheriff Court should be established and that greater judicial resources should be allocated. In this way the problems caused by the high volume of actions would be alleviated.

We accept that such a proposal might be easier to implement in Sheriffdoms which are geographically smaller. In larger Sheriffdoms it might be necessary for Sheriffs participating in the housing court to attend a number of Sheriff Courts, however this would not appear to be so impracticable as to prevent the changes we propose.

Other approaches to reducing the number of cases within the housing court might be considered. For example, the introduction of a rule requiring a minimum level of rent or mortgage arrears would be a way of restricting the number of actions raised. This would also impress on landlords

and heritable lenders that the removal of a tenant or homeowner was a substantial and serious matter. We would propose that no such action should be raised unless the sum claimed in rent or mortgage arrears was £1,000 or more. It would still be open to pursuers to raise an action of payment for lower sums.

We therefore take the view that actions involving the removal of tenants and homeowners from their homes is sufficiently serious as to merit the highest possible quality of decision-making and judicial scrutiny, and that to divert such cases to an alternative court or tribunal is to provide the public with an inappropriate service. Greater efficiency can be achieved by a more specialised provision of judicial resources.

4 *Multi-party actions.*

We agree that a separate procedure for multi-party actions should be created. In particular, tenants living in tenements or other buildings containing a number of flats might well have a common cause of action where a common defect caused loss and damage throughout the building. In these circumstances one multi-party action would be substantially more efficient and cost effective than a large number of individual actions.

5 *The availability of Advice and Assistance and Legal Aid*

In our view the incidence of defenders with difficulty finding representation is particularly high in rent and mortgage arrears cases. We are particularly concerned that tenants and homeowners in this position might suffer substantial injustice, and the likely consequence, that they suffer eviction or ejection, is particularly severe. Our proposals in this context chiefly relate to legal aid and advice and assistance. These proposals are briefly stated since they may fall outwith the terms of the Review. However, a greater incidence of representation in housing actions is likely to lead to greater efficiency in dealing with cases in court.

At present legal aid is generally available. The procedure for applying for legal aid however has become increasingly cumbersome. We propose that assistance by way of representation should be available for all housing actions. We also propose that, in general, there should be no award of expenses against defenders in actions involving rent arrears and mortgage arrears. In the vast

majority of such actions defenders are on very limited income and already have severe problems of debt. An award of expenses simply exacerbates this problem and it makes it more likely that the defenders' debt problems will continue.

Further, in order to encourage representation for tenants and home owners in housing actions, there should be an enhanced rate of advice and assistance for housing actions.

The availability of legal aid should be maintained however. Applications for legal aid will be appropriate in certain cases.

The Scottish Legal Aid Board will have the power to award grants once the relevant provisions of the Legal Profession and Legal Aid (Scotland) Act 2007 come into effect. While we are very much in favour of this power being introduced, legal aid and advice and assistance currently available should not be prejudiced.

6 *Low value cases.*

We believe that the procedure for dealing with low value cases could be much improved.

At present the Small Claims procedure deals with many thousands of consumer credit cases. Only a tiny proportion of Small Claims are defended, and of these, only a small proportion proceed to proof.

We propose that the jurisdiction for dealing with the commencement of Small Claims should be removed from the Sheriff Court. We propose that a new tribunal should be created, which would in effect be a consumer debt panel.

We propose that the new tribunal should consist of a legally qualified chairperson with lay wing members with experience of consumer issues.

It would be a fundamental part of the constitution of this body that, where one party had a dispute on fact or law, then there would be an automatic referral to the Sheriff Court. The procedure used in the Children's Panel might be a useful model here.

The principal functions of the consumer debt panel would therefore consist of granting orders for payment in undefended actions; dealing with applications for payment by instalments, deferred payments or similar; and deciding whether or not a question of fact or law existed which would then be referred to the Sheriff Court for decision by a sheriff. Such cases would not require the degree of judicial scrutiny available in the Sheriff Court and this would free resources there for other purposes.

This arrangement would achieve greater efficiency in the administration of debt cases, and would also preserve the role of the Sheriff Court in determining factual or legal disputes between parties.

Scottish Association of Law Centres

March 2008