

# **SOCIETY OF SOLICITOR ADVOCATES**

## **Scottish Civil Courts Review**

### **Consultation Paper**

In this response paper we have focussed on individual questions that we consider the Society of Solicitor Advocates should address on behalf of its members. We would expect that solicitor advocates will be submitting their own response as solicitors, or in their own right as solicitor advocates.

Where issues are of more general application, or impact on matters that a solicitor would deal with on a day to day basis, we have not commented on those issues.

#### **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. The structure of the civil court system ought to be attractive to litigants so that they can with confidence go to the courts to have their dispute resolved.

Civil justice is a fundamental cornerstone of a civilised society. It is the means by which the rule of law as governing human relationships is maintained. A civilised society requires a system for resolving disputes where parties are placed as far as possible on an equal footing. The purpose of this is to ensure that the strong do not prevail irrespective of the merits of their position. Civil justice also represents a bulwark against state tyranny. Tyranny may come in a multitude of forms, some of which may be categorised as trivial or unimportant. The courts must be available nonetheless to deal with these matters.

This means recognising that civil justice is just as important as criminal justice in sustaining the fabric of a democratic society. It is not just another business opportunity.

That being said the court system should be bound by the principle of proportionality (mentioned below). If a party is taking an unreasonable and disproportionate approach to resolution of the

dispute, such as refusing or failing to consider mediation, or another “alternative” form of dispute resolution, then the court should not hesitate to show its displeasure through a costs sanction. We do not consider that an automatic or compulsory reference to mediation or (for example) conciliation is appropriate.

The system should encourage resolution of disputes as quickly as is reasonably possible. Opportunities for parties to meet face to face should be part of the procedural framework as this will encourage settlement discussion.

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?**

The Society of Solicitor Advocates agrees that the guiding principles should be proportionality and value for money.

However, 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. The English Law Society is campaigning to promote England as a jurisdiction of choice. We must not lag behind in that competition.

**3. Are there any matters within the Review’s remit about which you have concerns but which are not dealt with in this paper?**

The Society of Solicitor Advocates is concerned about the absence of recognition for solicitor advocates in Sheriff Court proceedings. A motion has been requisitioned to the Annual General Meeting of the Law Society of Scotland on 22 May 2008 instructing Council to seek to secure parity of treatment in proceedings in the Sheriff Court for solicitors with extended rights of audience as for advocates. The provisions of the Act of Sederunt (Fees of Solicitors in the Sheriff Court) and the Civil and Criminal Legal Aid Fees Regulations, made under the statutory provisions, as they apply to Sheriff Court proceedings do not recognise solicitors with extended rights of audience. However, they do allow causes to be certified as suitable for the employment of specialist pleaders, namely advocates, whose fees can then be recovered. There is nothing in the Sheriff Court (Scotland) Act 1907 or the Legal Aid (Scotland) Act 1986 which prohibits the rules from being rewritten to extend the power of certification to include solicitor advocates.

The Society of Solicitor Advocates believes that this lack of parity inhibits the rights of solicitors and restricts the choice of solicitor and client when specialist pleading is necessary. At present

for a client to recover specialist pleading fees he has no choice but to engage an advocate. If the client chooses a solicitor advocate then the specialist fees will only be recoverable at ordinary solicitor rates and the instructing solicitor's fee will be disallowed altogether. Clients should not be forced to choose between appropriate representation and cost.

The Society of Solicitor Advocates considers this is a very important point particularly in relation to this Consultation which may lead to much first instance civil work being moved out of the Supreme Court. If a unified court of first instance, regardless of what it might be called, is created then we anticipate that rights of audience will be restricted to solicitors and advocates. However the current arrangements, for sanction for additional payment being available only for advocates, ought to be reviewed. This is not an issue which is mentioned in the Consultation Paper and the Society would urge the Review to take account of this disparity in their deliberations.

## CHAPTER 2: Access to Justice

### 5. Are there any other issues which impact on access to justice in Scotland which the Review should consider?

The Society of Solicitor Advocates believes that there are two main issues which impact on access to justice as regards the use of advocates and solicitor advocates.

The first of these is in relation to the mixed doubles rule. The new Dean of the Faculty of Advocates has declared publicly that the mixed doubles rule will most likely be revoked. However, no timetable for that is in place and the Society of Solicitor Advocates would urge the Review to consider that rule as a restriction on access to justice. Clients do not have a free choice as to the representation they can have in court. There is no reasonable explanation for why a client cannot choose to employ a solicitor advocate and an advocate to work together on his case. The Society of Solicitor Advocates can provide numerous examples where the mixed doubles rule has prevented a solicitor advocate who has dealt with a case through its initial stages from continuing to represent the client with the addition to the team of an advocate. This is not in the interests of justice in Scotland.

"Mixed doubles" has operated without difficulty in England since solicitors were given rights of audience in the higher courts.

The other issue which we believe is relevant to access to justice is the Solicitors (Scotland) (Supreme Courts) Practice Rules 2003. The substance of the rules in paragraph 3 is to impose a duty on a solicitor when a situation arises "which may require appearance" in one of the higher courts to advise the client that rights of audience in the courts are restricted to solicitor advocates and advocates and to give advice about the advantages and disadvantages of instructing appearance by one or other, which advice shall cover (a) the gravity and complexity of the case, (b) the nature of practice, including specialisation and experience of the solicitor advocate, and (c) the likely cost of instructing the one or the other. The decision which to instruct must be that of the client.

The Society of Solicitor Advocates is concerned that these rules place an unnecessary additional burden on solicitors. Failure to observe the rule may be treated as professional misconduct. In terms of the Code of Conduct for Scottish Solicitors 2002, clients have the benefit of other protections which are sufficient to ensure that the instructing solicitor instructs a solicitor advocate or advocate of appropriate skill, specialisation and experience to the task and who, whether solicitor advocate or advocate, will charge an appropriate and reasonable fee. Issues have arisen in relation to evidence of compliance and there is also uncertainty about prediction of costs, the extent of comparison required and the real potential for breach of the rule. Solicitors in

firms or organisations, such as public bodies, who routinely instruct advocates without considering the possibility of instructing a solicitor advocate are just as much in breach of the rules as any solicitor who instructs a solicitor advocate without giving his or her client the requisite advice.

The Society of Solicitor Advocates have requisitioned a motion to the Annual General Meeting of the Law Society of Scotland on 22 May 2008 instructing Council to promulgate rules revoking the Solicitors (Scotland)(Supreme Courts) Practice Rules 2003.

## **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 Society of Solicitor Advocates members' experience is that the judicial expenses rules in Scotland allow a successful litigant to recover only around 40 to 60 per cent of the costs of litigating from their opponent. We understand that in England recovery is between 70 and 80 per cent and in many cases can be as high as 85 to 90 per cent. In relation to encouraging clients to use Scotland as a jurisdiction of choice, this is not a helpful comparison.

In the context of the "competition" for litigation, whether complex commercial litigation, or volume personal injury litigation, this a factor that the review out to address as a matter of priority.

- 2. To what extent does the cost of litigating deter people from pursuing or defending cases in court?**

There can be no doubt that the cost of litigating deters people from pursuing or defending cases in court. For any individual or company the risk associated with taking a case to court is significant. The Society of Solicitor Advocates believes that a significant factor in whether or not to raise or defend an action is the low recovery of judicial expenses. There is a clear decline in the number of actions being raised and the Society believes that this is at least in part attributable to costs.

- 3. Does the current system of levying court fees affect access to justice? If so, how and in what kinds of cases?**

No.

- 4. Are the current rules for recovery of judicial expenses satisfactory?**

The Society of Solicitor Advocates has had mixed experience in relation to the recovery of judicial expenses for the use of solicitor advocates.

The Auditor at the Court of Session has changed his position in relation to the way in which accounts should be set out on a couple of occasions. The issue relates to whether the solicitor advocate charges are treated like advocate charges, in other words as an outlay. There are issues which arise in relation to judicial expenses accounts where the solicitor advocate has performed work both as a solicitor and as a solicitor advocate.

The Auditor also queries the level of charges claimed by solicitor advocates particularly where these are equivalent to a senior junior. To restrict solicitor advocates to junior rates simply because there are only a few solicitor advocate QCs seems an unnecessary restriction. Proper

guidelines about the way in which solicitor advocate charges should be dealt with would be appreciated.

In most non-contentious civil matters a client expects to pay his own lawyer and is free to agree the rate of payment for the work. As soon as the matter becomes contentious, however, the client expects to avoid paying his own lawyer so far as possible, though faces the risk he will have to pay both his own and his opponent's. The client cannot negotiate with his opponent's lawyer so there is a system whereby the court regulates the amount of recoverable expense. The current system fails properly to compare what the client might have to pay in the market for an equal amount of work in a non-contentious and a contentious matter.

## **CHAPTER 4: The 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?**

The Society of Solicitor Advocates believes that the pressure of criminal business is one of the main problems which the Civil Justice Review must address if the civil justice system in Scotland is to be improved. This is one of the most common causes of delay and disruption. The Society's members regularly have clients frustrated by either the late start of civil cases or the complete non-availability of Judges. If we are to make our jurisdiction attractive to clients who wish to litigate this must be addressed.

2. **Should (a) some judges of the Supreme Courts and (b) some sheriffs be designated to deal with civil business?**

(a) Yes.

(b) Yes.

The Society considers increased specialisation of the judiciary to be essential. Solicitor advocates and advocates are increasingly specialising in response to client demand, and this makes it unrealistic for judges to continue as generalists.

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.

3. **Should the sheriff courts be separated into civil and criminal divisions? What would be the advantages and disadvantages of such a separation?**

The Society believes that Sheriff Courts should be separated into civil and criminal divisions. The main general advantage of such a split is that disposal of business could be handled more effectively and speedily. The delays and disruptions caused by the criminal business taking precedence would be alleviated.

Clearly, the provision of separate civil courts would be a cheaper alternative as there would be no requirement for cells or secure entrances for Reliance vans etc. The new Civil Building at Hamilton Sheriff Court is a good example of how standard office accommodation can be converted for the purpose of civil business. The split from the criminal business in Hamilton has been beneficial.

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?**

The Society of Solicitor Advocates believes that a greater degree of specialisation within civil Sheriff Courts in Scotland is long overdue. While the problem is not so great in the Court of Session where the practitioners and judges tend to be more familiar with more complex cases, it can be “hit or miss” in the Sheriff Court. It is no uncommon to encounter a Sheriff who has practiced criminal law all of his or her career presiding over a civil proof. The impression often given is of a Sheriff learning on the job, getting to grips with the issues as the Proof proceeds.

Having a specialist judge would allow particular issues (or indeed hopeless arguments) to be identified early and dealt with swiftly. The areas of specialisation should be in the areas of reparation (especially personal injury), commercial (contractual disputes, insolvency, intellectual property) and family law.

The Commercial Court in Glasgow Sheriff Court is proving to be an excellent forum for litigation. The confident and proactive 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 though to the key issues in dispute. In this, it has been more successful 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 Society sees no reason why greater specialisation in other areas would not produce the same beneficial effect.

7. **Should the jurisdiction of the Court of Session and the sheriff court be unified to create a single civil court?**

The Society of Solicitor Advocates supports the idea of a single civil court in general terms. Their support for this concept is, however, conditional upon the issue raised in the introductory section about parity of treatment between solicitor advocates and advocates in the Sheriff Court being addressed. In any single civil court created parity of treatment would be paramount.

## **CHAPTER 6: Working Methods of the Civil Courts**

### **1. What are the advantages and disadvantages of pre-action protocols?**

In general terms pre-action protocols call for an exchange of facts, legal argument, and to a certain extent evidence so that the parties are aware of the case to be litigated. The parties are also aware of the risks that are run in pressing forward with a case or defending a claim.

There is a risk that one party may seek to intimidate the other into spending an inordinate or disproportionate amount of time on the pre-action protocols stage. However that is a risk where any party is not represented by an experienced litigator. Similarly it might be said that pre-action protocols impose an unnecessary expense on the parties.

The alternative however is that parties discover and develop their case through the course of the litigation with the associated uncertainty, delay and expense.

Advantages – the spirit of pre-action protocols is generally to ensure as much pre-action ventilation of the issues as possible. This can improve the chances of settlement, reduce court time and have a beneficial effect on the cost of litigation.

Disadvantages – Good quality pre-action correspondence can be expensive, since it requires more investigation, more advice to the clients and more work in preparation. Compliance with the protocol and satisfying the court with evidence of compliance does put some clients off completely.

These disadvantages are, however, points of detail which ought to be capable of being addressed given the benefits that can be derived from good quality pre-action protocol correspondence. Pre-action protocols, to be of maximum effect, must be backed up by strong enforcement of their provisions in the event of litigation being raised.

### **2. Should there be a greater use of pre-action protocols? If so, in what courts and for what types of action?**

Yes. In all courts and for all actions.

The pre-action protocols developed by the English courts are an incredibly useful checklist of matters that will be covered in any particular litigation.

The protocols do not need to be developed all in one go. It is quite possible for the protocols to be developed over time.

3. **Should compliance with pre-action protocols be voluntary or compulsory?**

Compliance should be compulsory in the sense that the sanction is one of costs in the first instance, or dismissal if appropriate, if a case has been brought with little or no warning. There will of course be circumstances where compliance with the pre-action protocol rules is not possible (such emergency applications) but we would expect that once the emergency is over the parties would be expected to formulate and focus their respective positions in correspondence rather than exchange of pleadings.

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?**

This should be part of tighter case management procedures.

5. **Are the current arrangements for making the rules of civil procedure satisfactory? Please give reasons for your views.**

The Consultation Paper highlights that we are currently operating with four or five sets of rules. This does not assist access to justice. There should be uniformity of procedure between the Court of Session and the Sheriff Court.

One Rules Council covering both courts would save time and resource.

6. **Should there be a single set of rules of civil procedure in both the Court of Session and the sheriff court?**

It follows from our above responses above that there should be a single set of rules for both the Court of Session and the Sheriff Court and a single initiating document.

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?**

In our view the issue is not whether there should be a system of abbreviated pleadings, but how that system is policed. Technically the Scottish system of pleadings is a system which utilises abbreviated pleadings. For hundreds of years commentators have called for brevity. However, if lengthy pleadings are encouraged (by upholding arguments on lack of notice), any sensible pleadings will take the safe course and plead more than is strictly necessary.

When the commercial procedure was first introduced in the Court of Session under the stewardship of Lord Penrose one of the innovations was the encouragement of the use of abbreviated pleadings. Indeed, members of the Society are aware that Lord Penrose suggested this in relation to contractual disputes, production of the contract and a brief expedition of what the nature of the contractual interpretation dispute was would suffice. Such brevity and clarity have been departed from as the commercial procedure has developed. Even in the Commercial Court in Glasgow where the Sheriffs are very much more pro-active, pleadings can still become complex. The Society believes that proper use of abbreviated pleadings linked with excellent case management is beneficial.

9. **Are the current arrangements for summary disposal satisfactory?**

The Society considers that the ability of a pursuer, but not a defender, to seek summary decree is unbalanced. 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?**

Routine procedural matters tend to be dealt with by clerks and Sheriff Clerks in any event. Unless a motion is starred it simply requires a Judge's signature. The Society does not support the introduction of junior Judges.

11. **Are the current arrangements for dealing with routine procedural business satisfactory?**

The potential for time wasting in either a Court of Session Motion Roll or a Sheriff Court Ordinary Court is considerable. Proper diarising of hearings and increased use of technology both by telephone, conference calls and video conferencing would assist this greatly.

13. **In the conduct of substantive hearings should there be greater use of written rather than oral arguments?**

One of the biggest differences between the English procedure and the Scottish procedure is in the use of written rather than oral arguments. There is opportunity to make both an opening and closing submission in writing and the use of written witness statements reduces the time involved

and allows things to be better focussed. The comparison between the efficiency with which cases are dealt with in England and the speed with which decisions are issued is marked.

15. **To what extent should the court have control over the use of expert and other evidence?**

The control by the court over the use of expert and other evidence may be helpful in lower value cases, perhaps particularly in personal injury actions. However, in large commercial disputes the Society's view is that parties should be allowed to determine what expert evidence they wish to lead in support of their case without interference.

The court should have control over the use of expert and other evidence in the sense of actively case managing the progress of the case, and seeking to agree with parties the extent of evidence to be allowed. In that respect there should be greater scrutiny of parties and their advisers at the stage of lodging of witness lists.

However we hesitate to suggest that the court should direct how a case is conducted. That approach would represent a fundamental shift to an inquisitorial procedure.

16. **Should a system of pursuers' offers be introduced into the civil courts procedure? If so, what features should such a system have?**

There is no logical reason why a system of pursuers' offers should not be introduced.

18. **Should written judgments be required in all cases?**

Written judgments should only be required in cases which proceed to proof or debate and in appeals.

The length of time taken to issue written judgments is one of the biggest frustrations arising from our current system. While the actual time taken varies from judge to judge clients find it quite impossible to understand why it takes some Judges as long as it does to issue written judgements. Again, the comparison with England is unsatisfactory.

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?**

The Society's view is that powers already exist to allow the Court to impose sanctions for non-compliance. These should be more rigorously applied. Refusing motions with a suitable award of expenses in favour of the opponent is the best sanction available but should be used more robustly.

20. **What measures should be available to the court to identify and manage unmeritorious causes or appeals brought by party litigants.**

There should be a requirement for party litigants seeking to litigate in the Sheriff Court to obtain leave as they require to do in the Court of Session.

Secondly we think that a first stage review of all appeals, whether seeking leave to appeal in all cases, or seeking leave direct from the appeal court, would assist by providing an early scrutiny of appeals.

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.**

No. There are tremendous difficulties with opening out rights of audience to persons other than solicitors or advocates. These will have been rehearsed elsewhere, but they will include:

1. Quality of presentation, and so use of court time;
2. The responsibility, in terms of professional responsibilities, of the individual appearing;
3. The control of payment;
4. Legal knowledge and experience.

The Society would not support third parties being entitled to address the Court on behalf of a party litigant.

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

Yes.

24. **Is the rule governing the procedure to be followed for judicial review satisfactory?**

The Society welcomes the recent change in the judicial review procedures which allows for the first order to be obtained without appearance. The current rules allow parties to simply turn up at the first hearing without giving advance notice of that or lodging Answers. A requirement to lodge Answers prior to that first hearing would be an improvement.

**31 March 2008**

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