

Consultation response

Civil Courts Review
Signet Library
Parliament Square
Edinburgh EH1 1RF

DATE: 04 April 2008
TO: Civil Courts Review Team

RESPONSE BY: Julia Clarke
Which?
The Executive Centre
7 North St David Street
Edinburgh EH2 1AW

Civil Courts Review Response from Which?

Section 1 Questions for Discussion

- 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 be designed to encourage early resolution of disputes, preferably without resorting to the courts. The key features of the system should be fairness, proportionality, ease of access and simplicity.

We would cite as an example, the Overriding Objective (Rule 1) in the England and Wales civil procedure rules, which requires the court to deal with cases justly, in so far as is practicable, for example by:

- (a) ensuring that the parties are on an equal footing;
- (b) saving expense;



- (c) dealing with the case in ways which are proportionate –
 - (i) to the amount of money involved;
 - (ii) to the importance of the case;
 - (iii) to the complexity of the issues; and
 - (iv) to the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly; and
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

In addition, the civil justice system should encourage active case management which should include, amongst others:

- (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
- (b) identifying the issues at an early stage;
- (c) deciding promptly which issues need full investigation and trial and accordingly ~~disposing~~ of the others;
- (d) deciding the order in which issues are to be resolved;
- (e) encouraging the parties to use an alternative dispute resolution^(GL) procedure if the court considers that appropriate and facilitating the use of such procedure;

The system is currently too complex and difficult for people to find their way through. It is too formal and often so prohibitively expensive that this must act as a barrier for many sections of the community looking for justice.

Mediation and arbitration are sensible first ports of call in many areas, but the court system must be available to ultimately settle disputes where this does not work, and the courts must therefore be fit for that purpose.

2. So you agree that the principles and assumptions of 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?

Proportionality and value for money should underpin reform, as should ease of use and simplicity. We would like to see courts take more of a problem-solving role in consumer cases in particular, rather than an adversarial one.

Again, we would refer to the principles set out in the Overriding Objective (Rule 1) in England and Wales, which allows cases to be dealt with justly.



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 current formality of wigs and gowns in court are unhelpful in civil cases, and overwhelming for many litigants. It can be difficult for people to find the right court room and almost impossible for them to understand the system and the rules.

Far less formality would be helpful, with greater easy to understand information on what will happen.

We also think the courts could examine whether they can help successful litigants, particularly where they are unrepresented individuals, to enforce their decree.

Section 2 Access to Justice

2.1

What contribution can public legal education make to improving access to justice?

Which? believes that there is an important role for public legal education in improving access to justice. Greater public understanding of their consumer rights in particular would we believe be helpful in preventing consumer issues reaching the courts. This might be achieved through, for instance, consumer education in schools.

2.2

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?

We hope that grant funding to non-solicitor advice agencies and law centres will go ahead as promised, as this will address some unmet consumer need for help in this area.

2.3

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?

Which? believes it should be as easy as possible for individuals to get the justice they deserve. Legal procedures and processes should be simple and straightforward enough so that where possible and/or appropriate, individual litigants are able to argue the facts of their case by themselves. The legal system should not require claimants to use a solicitor as a



matter of course, particularly for low value claims. Anything else would be inefficient. Obviously in some cases it would be unsuitable and inappropriate for an individual to represent themselves, and in fact in some cases this should be prevented because there is the risk of wasting court time. Accordingly, any change would need to be underpinned by appropriate safeguards.

The requirements and/or the expense of having to use a lawyer can deter some potential claimants, particularly where the value of the claim is quite low. The legal system should not be established such that claimants with valid cases are prevented from getting these off the ground at the outset.

Litigants within the Small Claims System should be able to represent themselves and navigate the system easily. Currently too much of the process and procedure is unnecessarily complex and inaccessible. The court procedure rules should be laid out much more simply.

Wigs and gowns should be dispensed with in this area, and the process could be conducted in an office setting privately in front of the Sheriff with both litigants, and not in open court, which is over-formal and intimidating for those unfamiliar with the courts.

The system needs to move from an adversarial to a dispute-solving system, and to become much more accessible.

Forms are still too complex and people may not be willing or able to take time off work to attend during current hours. The assumption in these small-scale consumer cases should be that people will be able to represent themselves adequately.

A less formal setting and system might also encourage non-lawyer advisers to represent clients in these circumstances, which will continue to be appropriate for some litigants who require extra help. At the moment very few people are represented by non-lawyers, but an improved system should encourage this to happen where necessary.

In principle, non-lawyers should be allowed to represent claimants as they are in some cases in England and Wales. Some people are unable to represent themselves and cannot afford a lawyer and/or don't want to have one. Vulnerable people such as the elderly or the mentally impaired would be prime examples. They should not be denied access to justice simply because they cannot argue their case in person in court.

However, allowing lay representatives would need to be subject to a number of safeguards to prevent the system being abused – consumers should as far as possible be protected from paying fees for poor advice, and from lay representative bodies encouraging claimants to launch cases they would not otherwise take.

It may be that the use of lay representatives should be approved by the court for the case in question. Otherwise, it could be that only licensed representatives could be used. Alternatively, you could limit the amount lay representatives could charge, or only allow people to act on a pro-bono basis. To a large extent, this should prevent the system being misused.



2.4

What contribution, if any, can a) 'self-help' services for party litigants and b) court-based advice services make to improving access to justice?

We agree that it would be helpful for guidance to be provided on the type of information and evidence which should be provided to the court in particular types of cases, what actions are required by particular court procedures, and how court forms should be completed.

Some litigants would clearly be able to make use of such support materials. However, the production of such materials would need to be undertaken with care and we would not like to see the rules setting out procedures, which could in practice prevent valid claims getting off the ground. For example, in terms of the evidence needed to bring a case, there is a risk that the rules could be too prescriptive and set the threshold unnecessarily high - in reality the appropriate evidence could only be determined on a case by case basis.

Additionally, the in-court advice services have clearly been a success and should be made more available in order to support and aid litigants.

2.6

Is there a case for a new method of dealing with low-value cases? If so, should this be within the existing court structures or separate from it? What kind of cases would be suitable for such treatment?

At the moment the Small Claims system is not operating properly as a bread and butter way for consumers to gain redress for poor goods and services. The system is over complex and over formal, preventing the public accessing and using it easily.

We support the idea of a specialised consumer court or forum, where consumer cases could be dealt with at a new lower level, perhaps by a tribunal presided over by a legally-qualified decision maker akin to a tribunal chair, or perhaps by a non-legally qualified justice with a legally qualified clerk, along similar lines to the district court.

It may be useful to establish an ombudsman type scheme where the ombudsman tries to achieve a fair result based on the evidence put to him, Such a scheme – whose purpose is to permit consumers to obtain access to justice quickly - risks being undermined if there is a right to appeal. The downside is there is no defined precedent, although in practice, the ombudsman is likely to make similar decisions if similar sets of facts are presented to him.

There is also scope for developing a written only process, thereby avoiding the need for an oral hearing unless this is deemed necessary by the court/ombudsman and/or one of the parties believes it is necessary and can convince the court/ombudsman accordingly. In any



event, in a predominantly written process, it is important the consumer has the right to an oral hearing should they so wish.

Section 3

Cost and Funding of litigation

3.2

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

There are two types of deterrence at work within the civil justice system; the effect of the cost of paying for your own legal fees, court fees etc. on the one hand, and on the other hand, the deterrence effect of the risk of having to pay the costs of the defendant. The latter can be a significant factor because you have no control over what they will spend, which lawyers they will use etc, and while they should act reasonably, even then costs could spiral out of control. This is the case even if you win overall, as you may lose parts of the case and have to pay the defendant's costs in respect of those parts.

This is of course not the case in small claims cases. And for consumer cases generally, it might be sensible to introduce protections against the claimant paying the defendants' costs – cost capping, costs protection orders etc. - providing there are appropriate safeguards in place to ensure unmeritorious claims are weeded out, for example through the use of strong case management powers by the court.

Fear of the cost of pursuing consumer claims prevents many people from reasonably pursuing their rights in this area. Without an inexpensive, easy to use and understandable system of pursuing consumer rights, many people simply do not get access to justice.

This undermines their belief in the justice system and allows unscrupulous traders to continue to prey on consumers without penalty.

Consumers have expressed concern to us at the possible cost of litigation, telling us that they would not risk an unspecified and unknowable legal expenses bill. They felt that if they did not have legal insurance, it was sometimes better to accept an injustice and go without redress than accept the financial risk of legal action which they feared.

It is important to note that even if legal insurance is available, this is often expensive and will need to be bought by the claimant in advance – either using his own funds or through third party funding. And this can be enough to put people off and/or prevent a case getting off the ground, even though the insurance premium should be recoverable at the end (assuming the consumer won). It's often a question of liquidity.



There is a need for a simple and inexpensive system to deliver consumer justice without the need to risk a large legal bill.

3.3

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

We do not believe that the current proposal to raise court fees for Small Claims by 48% is acceptable. Although the ceiling has now been raised to £3,000, this large increase is too much and may deter people from using the system.

3.5

Are the current arrangements for the taxation of judicial accounts of expenses satisfactory?

Consumers should have a simple, consistent and transparent breakdown of their legal expenses without cost, as is commonly the case in other areas of consumer expenditure.

3.9

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?

Insurance is useful, but please note the comments at 3.2.

3.10

What impact would the ability to recover 'after the event' insurance premiums from unsuccessful parties have on litigation?

It would be essential for a winning claimant to be able to claim back the insurance premium because the cost can be significant. It can be difficult enough for litigants to fund the litigation even when they know they will be able to get it back.

Section 4

Court structure and jurisdiction

4.1

Do you agree that the conduct of the civil business of the courts is adversely affected by the pressure of criminal business?

We believe that civil justice should be separated from criminal justice in order to prevent the system being overshadowed by the criminal justice system. As we say at 4.3 below,



sometimes criminal cases necessarily take precedence over civil cases, leading to delay in the civil justice system. There should be a clear division between the two, perhaps geographically but certainly in method and delivery.

4.2

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

We believe there is a strong case to be made for more specialisation in the system, possibly with some sheriffs specialising in civil justice or a third tier of consumer cases being created.

Extra training in specific areas could be provided, and sheriffs recruited for specific areas, who had interest and experience in such areas. Such areas could include, for example, medical negligence, other professional negligence, personal injury and so on.

4.3

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

Civil cases should be separate from criminal divisions. The formality and weight of proceedings of criminal courts are overwhelming and unnecessary for in particular, small scale consumer cases.

Often criminal cases necessarily take precedence over civil cases, leading to delay in the civil justice system. There should be a clear division between the two, perhaps geographically but certainly in method and delivery.

Local decision making is an important principle in civil justice, so this should be a consideration, that people will have easy physical access to courts.

4.4

Should there be a greater degree of specialisation within the civil courts in Scotland? If so, in what type of cases and in which courts?

As noted in 4.2 above, we believe it would be helpful to see more specialisation. Adversarial systems are not necessarily helpful in small scale consumer cases which should be dealt with more quickly and informally.

And as mentioned at 2.6, it may be useful to establish an ombudsman type scheme where the ombudsman tries to achieve a fair result based on the evidence put to him,



4.9

If the current structure of the courts is retained, at what level should the privative jurisdiction of the sheriff court be set?

The Small Claims ceiling should rise to £5,000 to allow more consumer cases to be dealt with, without the fear of incurring legal fees or legal costs. At the moment the system has only recently been saved from disappearance altogether by a rise from £750 to £3,000 after being frozen for nearly two decades.

The Small Claims system should become, in one or other shape or form, a consumer court, dealing quickly and effectively with injustice against consumers. People should understand they can access the system when they need to, inexpensively and with the necessary initial advice, without being swept up alongside the criminal justice system.

Section 5

Issues for reform

5.1

Should the rule 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?

Civil procedures should aim to be fair and proportionate and should be user-driven and not provider-driven. We would again refer to the principles outlined in Rule 1 of the English civil procedure rules.

5.2

Should the court a) encourage b) require, or c) in some other way facilitate the use of mediation or other methods of dispute resolution?

Mediation has a part to play and should be encouraged as a first option for solving disputes, but is not suitable for some cases, such as marital cases where there are concerns about safety.

Even if the whole case cannot be solved by mediation, often mediation can leave fewer issues to be decided by the court, thereby making the litigation process quicker, easier and cheaper.



5.3

If so, how should this be done, and at what point, or points the progress of a dispute?

Mediation should be encouraged at the earliest possible point or opportunity, as most people simply want to resolve their problem as quickly and with as little cost or difficulty as possible.

It may be useful for the courts to offer mediation as a first step in the hope that the problem will be resolved without resorting to court. It may have a particular benefit in small claims cases in the first instance, but less so where an unrepresented individual is in dispute with a large company. Well-versed mediators may be able to balance this imbalance, particularly if part of a court-based salaried scheme.

5.4

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.

Where the case is likely to serve as a precedent for hundreds of other cases, because a mediated outcome is likely to be subject to confidentiality. For example, it would not be appropriate for a case such as the bank charges litigation to be settled by mediation because of the widespread impact on a large number of individual consumers.

5.6

In what respects can modern communications and information technology be harnessed to improve access to the civil courts?

Modern communications and IT should be embraced by the civil court system to promote faster delivery of justice and resolution of cases. The justice system must evolve alongside the rest of society and can deliver economies of time and money.

Section 6.

Civil court procedures

6.1

What are the advantages and disadvantages of pre-action protocols?

Generally these are useful in complex matters, as they can help identify which parts of the case the litigation process should focus on, and which issues can be agreed early on. This makes any following litigation more streamlined and efficient. Also, it encourages the early disclosure of the case, which means that in some cases the action will come to a quick end, when one party properly understands the other party's arguments and case.



The disadvantages include the risk that one party may use this to introduce delays into the process, so there would need to be adequate protections, and it would be incumbent upon the courts to ensure compliance with the protocols are enforced effectively..

6.2

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

Where used properly, Which? believes pre-action protocols can bring significant benefits to the litigation process. Accordingly Which? believes there should be a general duty on parties to behave reasonably and adopt a sensible procedure prior to launching an action, so that litigation can be avoided if possible. In some types of cases, however, the subject matter may lend itself to a more formal approach, for example cases relating to personal injury, defamation or professional negligence.

6.3

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

If there is a formal pre-action protocol in place, compliance should be mandatory, but there should be protections in place which prevent the protocol being abused e.g. to introduce delay into resolving the dispute. There should also be a procedure in place to ensure that a claimant's action does not become time-barred if they are using the pre-action protocol.

Where there is no formal protocol in place, parties should be "strongly encouraged" to follow the procedure, but we do not believe it could be made mandatory. There would also need to be the above protections in place to make sure it is not abused.

6.8

To what extent should a system of abbreviated pleadings be introduced?

This would provide some of the benefits associated with a pre-action protocol or mediation, as it would enable the judge to identify the key points at issue in the case and give him/her the ability to manage the case from an early stage. In this way he could identify which points should be looked at in more detail, and which can be dealt with straightaway or should be dropped.

**6.18****Should written judgements be required in all cases?**

Yes, written judgments should be required in all cases especially if there is going to be an appeals process. However, fully reasoned decisions are not required in a consumer ombudsman type set up where there is no right of appeal.

6.22**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?**

There are occasions on which this would be useful, provided the issues raised are pertinent to the case.

Some litigants cannot afford or cannot find a lawyer to represent them and may find it beneficial and useful to be represented by a non-lawyer. We feel this should be permitted. We support the idea of Scottish courts allowing 'McKenzie friends' to accompany and perhaps represent a litigant where appropriate, provided appropriate safeguards are introduced – see our comments at 2.3 for further details. .

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

Which? believes that it would be desirable to introduce separate procedures for multi-party litigation. There are often consumer issues in which many people have suffered consumer detriment and the court should be able to deal with claims on a collective basis.

Unlike England and Wales, Scotland has no means of pursuing class actions, although the Scottish Law Commission has already recommended such a procedure be introduced. We would very much like to see a procedure for multi-party litigation be introduced.

Which? recently took action for damages against a major sportswear retailer over replica football strips. Such actions under the Competition Appeals Tribunal are likely to increase and we believe that there is increasing movement towards collective action on behalf of consumers. In particular, the European Commission is currently looking at whether procedures should be introduced across Europe to help facilitate multi-party actions for consumers.

ends

which

