

RESPONSE OF THE ELECTRONIC COMMERCE SUB-COMMITTEE OF
THE LAW SOCIETY OF SCOTLAND
TO
SHERIFF COURT RULES COUNCIL CONSULTATION PAPER
ON
PROPOSALS FOR FURTHER EXTENSION OF THE USE OF
INFORMATION TECHNOLOGY IN THE SHERIFF COURT

(November 2004)

RESPONSE OF THE ELECTRONIC COMMERCE SUB-COMMITTEE OF THE
LAW SOCIETY OF SCOTLAND
TO
SHERIFF COURT RULES COUNCIL CONSULTATION PAPER
ON
PROPOSALS FOR FURTHER EXTENSION OF THE USE OF INFORMATION
TECHNOLOGY IN THE SHERIFF COURT.

Introduction

The Electronic Commerce Sub-Committee (the Committee) welcomes the initiative now being taken by the Rules Council. The Committee values the opportunity of contributing its views. The Committee has been an advocate of technological reform in relation to civil court processes for several years. For example in Autumn 2001 the Committee was invited by the then senior Commercial Judge, the Hon. Lord MacFadyen, to prepare and deliver a presentation for the Commercial Court Consultative Committee of the Court of Session. During Autumn 2001 a Committee working party met with various technology providers concerned with issues of security and authentication. On 17th December 2001 the Committee convener gave the presentation to an audience including four senators of the College of Justice and the Principal Clerk of Session. The focus of the presentation was a web-based system enabling solicitors to submit completed formal documents, and evidential documentary productions, remotely and securely. The presentation also envisaged the availability of a comprehensive search facility enabling records posted to the website to be located promptly.

In the course of the discussions referred to above, the Committee met with the head of IT at the Scottish Court Service. It was indicated that although the concepts were of interest generally, there were many calls on the time and resources of the SCS, that priority was then being given to criminal matters, but that other projects would be considered if evidence of demand emerged from the profession. It is the Committee's view that the Rules Council consultation indicates that the time for action has now arrived.

The Committee feels that it is not an overstatement to say that the use of IT to achieve remote filing and searching of court papers is an inevitability. In England the Money Claims OnLine service already enables the centralised issue and service of proceedings up to the value of £100,000. The World Intellectual Property Organisation and Nominet UK have proved the efficacy of web-based dispute resolution. The UK Patent Office and its European counterpart have both embraced web-based filing of claims. In the USA, 36 out of 94 Federal District Courts use the CM/ECF electronic case filing system. Singapore has a very advanced electronic filing and case management regime, backed by digital signatures and smart cards. Portugal, Spain, and the Brazilian Labour courts are other examples of jurisdictions where remote filing backed by digital signatures has been adopted. Most recently in the United Kingdom, the Department of Trade and Industry has adopted the use of digital signatures for the issue of North Sea petroleum and gas block exploration licences. Shell UK has adopted the technology in respect of the provision of meteorological services from subcontractors.

Bearing all the above in mind, the Committee has the following recommendations to make.

First Recommendation

Electronic transmission, lodging and storage of the following documents should be competent:

- (a) Initial Writs/Petitions/Applications*
- (b) NID*
- (c) Defences/Answers*
- (d) Closed Record*
- (e) Motions*
- (f) Minutes*

In reaching the first recommendation the IT Committee considered which parts of the court process it should be permissible to transmit to and lodge in court in electronic form. The Committee reached the view that allowing the whole process to be transmitted and lodged electronically would be a significant step towards an

electronic office. This is the direction most businesses and professions are moving in. It is also the Government's policy to move towards electronic delivery of services.

The Committee was of the view that this recommendation would produce significant efficiency gains and monetary savings to the benefit of courts and solicitors and, as a consequence, to the benefit of the individual users of the court system. It was also considered that the use of electronic means of transmission of the whole process rather than, for example, motions alone, would encourage more to take advantage of the system when introduced.

The Committee did not address the electronic transmission and storage of productions. This matter will be considered separately.

Question 1.1 - Do you consider this proposal to be a step in the right direction?

The Committee firmly believes that the proposal to allow electronic transmission of key documents in civil cases represents a major step forward in the delivery of civil justice in Scotland. For some time the technology and the legislative framework has been in place to allow such a development to occur. The proposals which are now presented will deliver major advantages to the profession and to the end-users of the justice system.

Question 1.2 - What would the advantages be?

There are many advantages. The public might expect the following advantages:

- Faster access to the court
- Faster delivery of justice
- Potentially lower costs (in that both court and profession would save in administration which savings could be passed on to the litigant)
- Better quality of service
- Elimination of distance as an impediment to rural clients, allowing them better access to justice

From the profession's point of view, these would include:

- Reduced turnaround of applications (eg motions for interim orders)
- Automation of uncontested applications (for example, where an opponent endorsed a motion as unopposed, the matter could be determined on an almost instantaneous basis, without waiting for the expiry of the *induciae*)
- Reduced secretarial requirements and reduction in human error (for example, preparation of a record could be achieved by cutting and pasting, rather than typing afresh)
- Integration with case management systems

Question 1.3 - What would the disadvantages be?

Disadvantages are less obvious, but must be anticipated as far as possible. Issues to be guarded against might include:

- Experience has shown that good ideas may not always translate into good practice. Technology, in itself, should not be seen as an aim – it is the useful application of technology that matters. Whether the proposed system will work to the benefit of the public and the profession will depend upon its design. It has to be implemented in a way that maximises the benefits to all parties.
- There are parts of the profession that are simply not geared up to take advantage of electronic systems at this time. One might argue that the creation of an electronic court (particularly with an element of compulsion) could act to the disadvantage of those professionals and their clients. However, the profession is a marketplace: the ability to participate in electronic systems will be a factor that clients consider in the selection of their representative, and, as in all areas of business, agents will have to adapt to compete and survive.

Question 1.4 - What impact do you think this proposal would have on the litigant?

Reference is made to the first part of paragraph 1.2.

Question 1.5 - 1.51 Do you have any general comments to make?

In the future, the profession will increasingly compete for business with other providers of assistance and dispute resolution. Access to the court is one of the ways in which we deliver our services. Our ability to compete with those outside the profession will depend on how quickly and efficiently we can conclude disputes, and the proposed changes represent major advances in this regard.

Another point to make is that the proposal could go further. There is no obvious reason why the list of documents should not include lists of witnesses and inventories of productions (with the productions themselves, unless there is a particular evidential reason why the principals must be lodged). Fee exemption certificates should be included, and there should be an extension of the credit scheme to ensure that payment of dues can be achieved at the time of lodging.

Second Recommendation

All interlocutors pronounced by the court (including warrants granted by sheriffs and clerks) should be transmitted electronically to agents (and party litigants where they wish to avail themselves of this service).

In reaching this conclusion the IT Committee considered the advantages that would be gained by the litigant. It again concluded that there was the potential to make significant efficiency gains in that the solicitors and party litigants who were participating in the use of electronic means of transmission could have the court's interlocutor (or order) in their possession much more quickly than would otherwise be the case. Electronic transmission of court interlocutors should also bring about savings in time and effort expended by solicitors and, as a consequence, savings in the overall cost to the litigant.

Question 2.1 - Do you consider this proposal to be a step in the right direction?

This recommendation represents a step in the right direction. Just as the first recommendation removes unnecessary administration from the making of applications, so the second removes administration from the delivery of determinations.

Question 2.2 - What would the advantages be?

This proposal would allow interlocutors and decrees to be in the hands of parties and their agents without any delay.

Question 2.3 - What would the disadvantages be?

None.

Question 2.4 - What impact do you think this proposal would have on the litigant?

The proposal would lead to faster implementation of interlocutors and decrees.

Question 2.5 - Do you have any general comments to make?

The process should be extended. The rules should specifically allow the onward transmission of interlocutors and decrees to sheriff officers, who should be entitled to serve prints of such documents received electronically. An example might be in an urgent interdict action: agent sends writ electronically to the court; same appears on the screen of the duty sheriff (whether the sheriff is in the court building or elsewhere); a grant of interim interdict allows an electronic interlocutor to be instantaneously transmitted to the agent and to the other party; agent sends interlocutor and writ to sheriff officer electronically; sheriff officer effects service. A process which, in the past, may have taken the best part of a day could be achieved in under half an hour.

Third Recommendation

The system should be operated by use of a website that provides positive confirmation of receipt.

In reaching this recommendation the Committee very much relied upon professional technical advice. The advantages and disadvantages of e-mail and website submission of documentation were presented to the Committee. The presentation included advice on the capability of the Case Management System currently used by Scottish Court Service. The advice strongly favoured a website based system.

The Committee considered advice to the effect that a website-based system:-

- cuts down the number of options as to the forms in which electronic information is presented to the Court Service;*
- would better facilitate a more structured submission of information;*
- would be easier for the Court Service to retrieve data from;*
- should not result in formatting problems which would be likely to occur if an e-mail based system were used;*
- is technically more efficient;*
- should have fewer technical problems; and*
- would resolve issues of time limits on the lodging of documents through the programming of the system to issue positive confirmation of receipt of the documents transmitted.*

Question 3.1 - Do you agree with the option of using a website?

The Committee approves the principle of a web-based system. The Committee would however have a serious concern if there was to be any suggestion that the website were to prevent the submission of pre-prepared documents. Such a system might be technically easier for the Scottish Court Service, but presents major logistical problems to the profession. Any system requiring the user to stay logged on so that

extensive on-screen typing could be undertaken would not be an acceptable alternative to the submission via the website of pre-typed and formatted material in final form.

Question 3.2 - Do you have any comments on any advantages

None.

Question 3.3 - 3.3 Do you any comments on any disadvantages?

As things stand, most solicitors prepare court documents in one of three ways: (1) typing onto a blank Word (or other WP software) document; (2) completion of a part-created PDF or Word style; or (3) automatic generation of a PDF or Word document by a case management system. Most practitioners (particularly those with more advanced IT systems) will use the second or third means. The use of styles (or completely automated systems) reduces the professional and secretarial time involved in the document's creation, limits the potential for errors, allows for the incorporation of house styles (in both presentation and content), and often produces some action by the case management system.

Against this background, it is unreasonable to expect the profession to move to a website system that forces users to type the whole document onto the page. Solicitors would either have to abandon their use of styles, or incur the cost of redevelopment of their IT systems. Either course would act as a disincentive to the system's use. The proposed system for an electronic court will only work if it is used. It would be of considerable regret if the potential benefits were counterbalanced by negatives caused by the insistence on a website-based system.

The Committee would prefer a system which allowed the submission of pre-prepared documents, whether via a website or by e-mail. The documents could be in an agreed form (Word or PDF, for example). Mandatory templates could be issued by the Court Service to ensure a common approach. The Committee suggest that consideration be given to the option of submission of all formal text documents in XML format (XML

stands for Extensible Mark Up Language. XML's advantage is that it is easily searchable)

Question 3.4 - Do you have any general comments to make?

The Committee would wish to reiterate that the proposed system will only deliver real advantages to its users if it is designed in such a way as to accommodate their needs. A system that is, in effect, more difficult or costly for the profession to use will not be taken up, and will not deliver benefits to the public.

Reference is made to submission 6.4 in connection with the need to ensure the highest level of security in any interactions with the website-based system.

Fourth Recommendation

After a short pilot scheme, the system should be introduced in all the courts in Scotland.

In reaching this conclusion the IT Committee considered the experience of other jurisdictions in introducing an electronic system. Experience in England showed that there was little interest in using a system which was a pilot and limited in its extent to one court. The costs in time, training and equipment in doing so were prohibitive. In Singapore, on the other hand, they had been much more radical and had applied the system instantly across the board.

The Committee believes the pilot of the website system should be very short and that thereafter it should be introduced to all the sheriff courts in Scotland. It is hoped that this course will encourage solicitors to take advantage of the benefits the system will have to offer and that they will perceive that it will enhance the quality of their service to their clients. The cost implications for solicitors are principally in relation to the purchase of the necessary software to access the system. In the Committee's view the best way of persuading solicitors to incur these costs is to have a system working across the whole country: thus the software will be capable of being used in all parts of Scotland and not only in one sheriff court.

Question 4.1 - Do you agree that the system should be introduced across the whole of Scotland?

The Committee strongly approves of the proposal to extend the scheme to the whole country. Firms would be less willing to make the necessary IT investment and changes to internal practices if the electronic court could only be used in certain cases. Comprehensive availability will encourage firms to move forward, and will therefore greatly increase take-up.

Question 4.2 - Do you have any comments on any advantages?

As above.

Question 4.3 - Do you have any comments on any disadvantages?

None.

Question 4.4 - Do you have any general comments to make?

No.

Fifth Recommendation

The electronic system should be operated by the Scottish Court Service in parallel with the existing paper system for a period of 2 years after its introduction. Thereafter it is proposed that only in limited or exceptional circumstances or on cause shown should the paper system be used by solicitors.

The Committee considered that court users should be encouraged to use the electronic services provided through any new system in the hope that in time we can move to a completely electronic office. It was thought that a period of two years should be sufficient to enable solicitors to become accustomed to lodging material electronically. During this period they should be entitled to lodge papers either in hardcopy or in electronic form. However, the Committee proposes that once the

period of two years has elapsed, only in exceptional circumstances would hardcopy papers be accepted. In reaching this conclusion the Committee was aware that while both a manual and electronic system were running, no savings would be achieved for the Scottish Court Service. The Committee is nevertheless of the view that it will be necessary to run both systems for an initial two year period.

It is not proposed that party litigants should be required to use the electronic system.

Fifth Recommendation

Question 5.1 - Do you agree with using parallel systems initially?

The Committee agrees that a parallel system must be run for a certain period. The paper system should certainly not be withdrawn unless and until the electronic system has been comprehensively tested and found to be operating satisfactorily from the standpoint of all its users.

Question 5.2 - Do you have any comments on any advantages?

Placing a timescale on the withdrawal of the paper system would encourage practitioners to move to the new system. This would increase take-up, which in turn would allow the systems to be more comprehensively tested.

Question 5.3 - Do you have any comments on any disadvantages?

While the Courts Service undoubtedly has the IT infrastructure in place to allow such a system to be implemented, the position in the profession is much more patchy. Many firms have invested considerably in IT over recent years, and will welcome the introduction of systems which will allow them to capitalise on this. However, there are still a great number of firms who do not currently have the necessary infrastructure in place. The Committee believes that a balance has to be struck: on one hand, firms which have not made necessary investments must consider what action to take; on the other, a target for ending paper transactions which is too ambitious may ultimately have a negative impact on the proposals as a whole. A

slightly longer period (perhaps in the region of 3 years) might be more appropriate. A paper system will have to be retained in any event for party litigants, and it is hoped that the commercial benefits of electronic interaction will be just as persuasive as the use of force.

Sixth Recommendation

There should be a statutory provision that removes the need for a manual signature.

The Committee formed the view that in order to achieve a fully electronic office and facilitate full use of the electronic system the need for manual signatures would require to be removed where at all possible; and where signature was essential, a form of secure electronic signature should be introduced.

Question 6.1 - Do you agree with this proposal?

The Committee agrees with this proposal.

Question 6.2 - What do you see as advantages?

The ending of the requirement for manual signatures is a necessary consequence of the overall proposals. Electronic signatures offer a guarantee that the sender is who her or she says they are; this is not provided by manual signatures (which are in any event never verified).

Question 6.3 - What do you see as disadvantages?

None.

Question 6.4 - Do you have any general comments to make?

Both the Electronic Commerce Sub-Committee and the Society's Civil Procedure Committee considered at length the issue of dispensing with manual signatures. While both Committees agree that the ending of manual signatures is a necessary

consequence of the proposals, the Civil Procedure Committee believe that a cost effective solution is required and suggest that a user name and password protected system is the most appropriate.

However, the Electronic Commerce Sub-Committee believe it is essential that any system ensures the integrity of the data, and the authenticity of all parties to the transactions. Both Committees recognise that solicitors owe a duty of confidentiality to their clients, and also have statutory responsibilities under the Data Protection Act. For these reasons, the Electronic Commerce Sub-Committee feel that the highest level of electronic security must be considered. The Electronic Commerce Sub-Committee has had a lot of experience as a result of its participation in the Lawseal project of the Society. This project considered the implementation and deployment of electronic signatures / digital certificates using public key infrastructure (PKI). The Rules Council is invited to contact the Director of IT at the Society for further discussions in this regard.

Question 6.5 - Can you highlight any areas of primary or subordinate legislation that will require to be altered in order to achieve this intention?

With the possible exception of the Requirements of Writing (Scotland) Act 1997 and the Civil Evidence (Scotland) Act 1988, the Electronic Communications Act 2000 should remove the need for any changes to be made to primary legislation. Changes will be required to the Act of Sederunt (and other subordinate legislation which regulates court procedures).

Seventh Recommendation

Consideration should be given to the provision of other facilities such as parties being able to view the case on line.

The IT Committee was undecided as to whether parties should be entitled to any extent to remote access to the court-stored data relative to the case in which they are involved. If each party is transmitting all documentation electronically to the court and to the other parties and each party is in turn storing that data then there should

be little or no need for such remote access. It was, however, suggested by one member of the Committee that agents would want access from their own offices into the court stored data.

Security issues were raised as concerns. The use of passwords to protect or restrict access to files was considered. Some Committee members saw difficulties that might be experienced in the use of passwords where employees change companies.

The Committee had concerns about confidentiality while, at the same time, recognising the need for parties to be assured their motions etc were being dealt with and to obtain the information they needed. The Committee made no firm recommendation to the Rules Council in this regard and it was agreed to seek the views of the readers of this consultation paper.

Question 7.1 - What information should be displayed?

At present, parties to a case are entitled to view the process as a whole (with certain limited exceptions, such as in adoption petitions). The same access should be provided to the electronic process.

Question 7.2 - What degree of security do you think is required to protect individual parties' interests?

The system should guard against the alteration of already lodged documents. It should only allow certain documents to be lodged by one party (for example, a pursuer should not be allowed to lodge documents purportedly on behalf of the defender). Those unconnected with actions (including solicitors not involved in the case) should not be allowed to see the process. There will have to be a means whereby solicitors can register their involvement upon being instructed by a party.

Question 7.3 - Any other general comments?

None.

Eighth Recommendation

There should be a centralised virtual court. In the first place every such action would go electronically to this single site and unless it was defended or a hearing was otherwise required, it would be dealt with entirely electronically at this site.

The intention here is that all small claims and summary cause actions should be lodged in electronic form and transmitted to a single site or “virtual court”. Unless they were defended or would otherwise require a hearing, these cases would be dealt with entirely electronically at this location. Defended cases and those otherwise requiring a hearing would be transmitted to the appropriate local court for this purpose.

The Committee is of the view that such a system would bring about advantages in efficiency and that there would also be potential costs benefits that would be in the interests of the parties.

Question 8.1 - Do you consider this proposal to be a step in the right direction?

The Committee agrees that this would be a step in the right direction. Reference is again made to the English Money Claims Online system, already in place.

Question 8.2 - What would any advantages be?

In such circumstances, there is no advantage created in having identical systems running in every sheriff court. The use of a single court would avoid delays which are occasionally caused by the identifying of territorial jurisdiction.

Question 8.3 - What would any disadvantages be?

None.

Question 8.4 - What impact do you think this proposal would have on the litigant?

The proposal should improve access to the justice system, and should simplify what is currently a confusing and onerous system for party litigants.

Question 8.5 - Do you have any general comments to make?

No.

Ninth Recommendation

The sheriff clerk should serve all summary cause and small claims actions.

The Committee considered that if the system for handling small claims and summary causes is to change as outlined above then this is the time to decide whether the sheriff clerk should serve all summary cause and small claims actions. The Committee saw this as a sensible step if all summonses are going to be lodged at the one central site and handled electronically. It also considered that this proposal too had the potential to generate cost savings which again could be to the benefit of the parties involved in the individual cases.

Question 9.1 - Do you consider this proposal to be a step in the right direction?

The Committee agrees. Reference is again made to the English Money Claims Online system, already in place.

Question 9.2 - What would the advantages be?

The proposal would simplify the procedure from the point of view of the litigant, and would reduce costs of representation.

Question 9.3 - What would the disadvantages be?

None.

Question 9.4 - What impact do you think this proposal would have on the litigant?

See above.

Question 9.5 - Do you have any general comments to make?

No.

Tenth Recommendation

The Secretariat should search the primary and secondary legislation to identify where changes will be required.

The Committee was of the view that rules changes may be necessary to effect any desired reforms. The Secretariat of the Sheriff Court Rules Council is currently searching rules and legislation with a view to identifying where change will be necessary.

Question 10.1 - Do you have any suggestions on where changes should be made?

Consideration will have to be given to all forms of procedure in the Sheriff Court. This will include: adoptions, child protection orders, children's referrals, Children (Scotland) Act 1995 appeals, parental responsibility orders, family actions, ordinary cause actions, multiple poindings, mental health appeals and applications, adults with incapacity proceedings, proceeds of crime applications, small claims, summary cause, heritable actions, commercial actions, Mortgage Rights (Scotland) Act 2001 petitions, fatal accident inquiries, and so on. Each has its own rules, often located in various pieces of subordinate legislation.