Justice Committee

Courts Reform (Scotland) Bill

Written submission from the Forum of Insurance Lawyers

The Forum of Insurance Lawyers (FOIL) exists to provide a forum for communication and the exchange of information between lawyers acting predominantly or exclusively for insurance clients (except legal expenses insurers) within firms of solicitors, as barristers, or as in-house lawyers for insurers or self-insurers. FOIL is an active lobbying organisation on matters concerning insurance litigation.

FOIL represents over 8000 members. It is the only organisation which represents solicitors who act for defendants in civil proceedings.

Following consultation with the membership in Scotland the response has been drafted by Rory Jackson at McClure Naismith; Jenny Dickson at Morton Fraser; Gilbert Anderson at DAC Beachcroft; and Garry Ferguson at bto Solicitors.

Introduction

FOIL is enthusiastic and supportive of the ambition and much of the content of the Court Reform Bill. It has some concerns about the practical application of parts of the Bill and those shall be set out further below.

Of particular concern to us is the intention to re-introduce civil jury trials in the sheriff court which shall be expanded upon below.

Evidence on the Bill

Moving civil business from the Court of Session to the sheriff courts

As stated in previous submissions FOIL is in favour of the increase in privative jurisdiction to £150,000. In past submissions it has proposed that the privative jurisdiction might even be increased to £200,000.

Creating a new judicial tier within the sheriff court

FOIL members are all aware of the financial imperatives and the need to ensure that the judicial system is efficient both in terms of time of delivery of justice and in cost terms. FOIL supports the introduction of summary sheriffs to deal with cases at an appropriate level. However, it would simply note caution that summary sheriffs will be required to understand a wide range of legal matters as noted in Schedule 1. The breadth of matters before a sheriff in terms of the simple procedure would be extensive and the period of introduction and training for summary sheriffs would be required to be considered.
The appointment of specialist sheriffs

FOIL supports the appointment of specialist sheriffs. The development of an in depth knowledge of particular legal issues should ensure the best quality of decision making. Few practitioners will profess expertise in every area of law and such specialism within the judiciary is welcomed.

The creation of a specialist personal injury court

FOIL supports the creation of a specialist Scotland-wide court for personal injury cases. The Bill permits that court to sit across Scotland and for the purposes of access to justice FOIL respectfully suggests that that court should sit in different locations across Scotland depending on the presence of relevant cases. Whilst there is an attraction of having a “central belt” specialist court, as an organisation FOIL believes that to allow access to justice, claims should be able to be raised in a reasonable locality to the claimant. FOIL members are concerned that the administrative and financial burden of having jury trials in personal injury cases in numerous courts across Scotland would be. FOIL does not agree that civil jury trials should be available in the sheriff court (see below).

The retention of civil juries in the Court of Session and their introduction to the specialist all-Scotland personal injury sheriff court

FOIL has serious concerns over the retention of civil jury trials for enumerated cases in the Court of Session and their introduction in the proposed all-Scotland personal injury sheriff court. At the heart of its concern is the need for legal advisers, whether for pursuers or defenders, to be able to give reasonably clear and consistent advice to their clients on the value of claims, particularly for non patrimonial loss claims, ie solatium in personal injury claims and distress and anxiety, grief and sorrow, and loss of society in claims arising out of fatalities.

Awards by juries are wholly unpredictable. Legal advisers find it increasingly difficult to give meaningful advice to clients on the likely value of their claims. While there is a general feeling that juries’ awards of solatium are consistently higher than those for judges, there is evidence of juries awarding lower sums than judges in such cases. It is submitted that this is not a satisfactory position. It is, of course, appreciated that following the guidance of the Inner House in the case of Hamilton v. Ferguson Transport (Spean Bridge) Ltd. 2012 (SC 486) the presiding judge is now able to provide the jury with a range of figures for its consideration. It has to be emphasised to the jury that the range is not binding upon it. If the presiding judge is now able to provide the jury with a range of figures there must be a question as to whether the jury’s function is now necessary.

Pursuers suffering personal injury or relatives of deceased victims rely on their legal advisers in deciding whether settlement offers are fair and reasonable. Against a background of materially different jury awards it is virtually impossible for a pursuer’s adviser to give rational advice on the likely value of a claim. In the same way it is extremely difficult for legal advisers acting for defenders, and in particular their insurers, to advise on suitable reserves and the level at which settlement offers should be made. In FOIL’s view such a state of affairs is completely unsatisfactory.
since it discourages settlement and thereby generates unnecessary additional expense. In FOIL’s submission this is not in the public interest.

By way of contrast, awards by judges for generally similar injuries have been reasonably consistent. This enables parties’ advisers to discuss settlement within a relatively small range. In FOIL’s view such an environment encourages settlement. Judges are well experienced in the use of inflation tables to ensure that past awards for broadly similar injuries are increased to take account of inflation.

By retaining civil juries in the Court of Session and extending their use in the proposed all-Scotland personal injury sheriff court this will cause additional administrative expense for citing jurors, paying them expenses and loss of earnings in attending and, of course, inconvenience to jurors in being required to attend.

In FOIL’s view the present Bill is the ideal opportunity for the Scottish Parliament to re-visit retention of civil juries in Scotland. FOIL would urge the Parliament’s Justice Committee to carefully review this issue and, for the reasons set out in this submission, determine that civil juries should be abolished.

Creating a new Sheriff Appeal Court

Whilst FOIL recognises that it is necessary to balance access to justice against the need to expedite matters in the interests of all parties involved, it has some concerns that the process outlined within the Bill in relation to seeking leave to appeal a decision of the Sheriff Appeal Court which constitutes a final judgement may, in practice, be somewhat cumbersome, costly and involve potential for significant delay, as it appears to offer scope for a party seeking leave an opportunity for three separate hearings on the issue.

Following the establishment of the Sheriff Appeal Court its decisions will be binding on a sheriff anywhere in Scotland. It will no longer be possible to appeal from a sheriff to a Sheriff Principal. Any appeal from a Sheriff will go to a Sheriff Appeal Court.

FOIL has some concerns over the procedure for an appeal from the Sheriff Appeal Court to the Court of Session as set out in Section 107. That section provides that an appeal of a decision of the Sheriff Appeal Court constituting a final judgement can only be appealed with leave of the Sheriff Appeal Court. If leave is refused, a further bite at the cherry exists by seeking leave from the Court of Session.

The Sheriff Appeal Court can only grant leave in such circumstances under Subsection 2, if the appeal would raise an important point of principle or practice, or there is some other compelling reason for the Court of Session to hear the appeal. Section 109 provides that the Court of Session may provide powers by Act of Sederunt for any applications for leave to appeal to the Court of Session to be heard by a single judge of the Inner House. However in terms of Section 109, any such Act of Sederunt must also include provision for the decision of such a single judge to be reviewed by a Division of the Inner House on the application of any party.
As a result of this the following scenario is possible:

1. Final judgement
2. Leave to appeal from Sheriff Appeal Court – refused
3. Leave to Appeal from Court of Session – single judge – refused
4. Review by Division of Inner House

The Bill as drafted simply leaves it that any Act of Sederunt should deal with the procedure to be followed in such a review, with the result that it remains possible for there to be three hearings to address whether leave should be granted. The Bill also leaves it to the Act of Sederunt to set out the grounds upon which a decision may be reviewed. Although a process involving a single judge would appear to speed up the process with the hope that by testing the water with a single judge an unsuccessful applicant for leave will “read the writing on the wall”, it has the potential to simply extend the process.

Creation of a new ‘simple procedure’

FOIL supports the introduction of a simple procedure for cases worth less than £5,000. There is little benefit of having the current Small Claims and Summary Cause procedures and a single universal procedure for cases valued at under £5,000 with appropriate judicial management will achieve greater efficiency. Although expenses are due to be considered as a separate issue, FOIL submits that for cases valued at less than £5,000 the recoverable expenses should be set at a low level and that appropriate sanctions be imposed if cases are raised for a sum greater than £5,000 but result in an award of less than £5,000. Data gathered over two years by the Forum of Scottish Claims Managers concludes that over 60% of cases settled do so for £5,000 or less.

Section 77(1) of the Bill states that the Scottish Ministers may provide that, in certain categories of simple procedure cases, no award of expenses may be made, or any expenses awarded may not exceed a prescribed sum. Section 77(5)(a) provides that an order under subsection (1) does not apply to cases in which the defender (i) has not stated a defence; (ii) having stated a defence, has not proceeded with it, or (iii) having stated a defence, has not acted in good faith as to its merits. The provisions proposed are the same as those which currently exist for the treatment of expenses in small claim cases. In his report on the Review of Expenses and Funding of Civil Litigation in Scotland, Sheriff Principal Taylor recommended that the court should have discretion to restrict recoverable expenses in a small claim in cases where a defender, having stated a defence, has decided not to proceed with it. He recommended (at chapter 4, paragraph 21) that this should be reflected in the rules for the new simple procedure. The proposed rules do not allow for the discretion recommended by Sheriff Principal Taylor.

Transfer from the sheriff court to the Court of Session

FOIL is concerned about the potential effect of Section 88. It allows for certain cases to be remitted from the sheriff court to the Court of Session, provided both the sheriff court and the Court of Session have approved the remit. The test to be applied by the Court of Session in considering such a motion includes consideration of "the business and other operational needs of the court" (s 88(1)(6)). Application of
this test could result in a case being remitted when the Court of Session has limited business to attend to, and another similar case not being remitted at a time when the Court of Session is busy. Discriminating between cases on the grounds of “operational needs” may not achieve the stated aim of access to justice.

In conclusion, the Bill represents an important stage in the implementation of the reforms recommended by Lord Gill and will introduce very significant change to the civil justice system. FOIL welcomes the reforms and the opportunity to comment on the detail of the proposals. The proposed reforms will shape the civil landscape in Scotland for many years to come, recognising the needs that a modern judicial system must meet. On the issue of civil jury trials, however, FOIL believes that their reintroduction into the sheriff court process would be a retrograde step. FOIL would urge that a decision be taken now to abolish civil juries: to reduce uncertainty, inconsistency, delay and cost, and place responsibility for valuing claims in the experienced hands of the judiciary.

Forum of Insurance Lawyers
18 March 2014