Justice Committee

Courts Reform (Scotland) Bill

Written submission from David Bartos, Advocate

1. Introduction

1.1. I am a self-employed advocate (Counsel) of 20 years standing in practice. I practice in the area of contract, property law, commercial law, insolvency and wills, trusts and succession. My work includes instructions from smaller or medium-sized solicitors’ firms who instruct me on behalf of small or medium sized businesses and, particularly in relation to the wills-side of the practice, from individual Scottish citizens. I believe that I am well placed to comment on the effect that the key reforms of the Bill are likely to have on Scottish citizens and businesses and on Scots law in general. I have extensive experience of both the sheriff courts and the Court of Session. Many of these disputes are worth c. £50 000 to £150 000.

1.2 The Bill brings much needed reform into the Scottish judicial system. However it is crucial that the “baby is not thrown out with the bathwater”.

2. Summary

2.1 New Levels of Exclusive Sheriff Court Competence: The extension of exclusive competence of the sheriff court from £5 000 to £150 000 is prejudicial to ordinary Scottish citizens and small and medium-sized businesses in providing an obstacle to obtaining independent top quality representation from an independent advocate at a reasonable cost.

2.2 The extension is hugely out of line with the Republic of Ireland, Northern Ireland, and England and Wales - for no good reason.

2.3 Unaltered the sheriff court extension will encourage large businesses to contract in English law with English courts having exclusive jurisdiction and take litigation business away from Scotland: they will prefer the English High Court (Premiership) to the Scottish sheriff court (Scottish Division One).

2.4 An extension to £50 000 in respect of personal injury claims and £30 000 in respect of other claims would be appropriate. Failing that recovery of advocates’ fees should be presumed to be available in the sheriff court (i.e presumption of sanction for counsel).

2.5 The proposal for valuation of non-monetary disputes is likely to cause confusion and delay.

2.6 Sheriff Appeal Court: There should be unified criteria for appeals from sheriffs reaching the Court of Session (whether by remit or appeal)
2.7 There should provision for “leapfrog appeals” from the sheriff to the Court of Session

2.8 Generally: The status of the Court of Session as the guardian of Scots law and an internationally recognised centre of dispute resolution is undermined if the reforms are left unaltered

2.9 The coherence of Scots law and the order of hierarchy between the Court of Session and the Sheriff Court is threatened and placed into doubt

2.10 The possibility of Scotland attracting international litigation is compromised: the commercial court judges will lack business to be sufficiently credible to resolve high value commercial cases.

3. Policy Objective of the Bill

3.1 The stated policy objective of this Bill and the accompanying policy document is to address the deficiencies of the Scottish court system which were identified by Lord Gill in the Scottish Civil Courts Review of 2009 (“the Gill Review”). I agree that there are deficiencies which require to be addressed. As Lord Gill observed in his the Introduction to the Review,

“An efficient civil justice system is vital to the Scottish economy. It is also vital to the survival of Scots law as an independent legal system. Some Scottish commercial undertakings have so little confidence in our system that they enter into contracts providing for English jurisdiction and choice of law. If the Scottish civil courts and their procedures continue to fail the public, it is inevitable that Scots law itself will atrophy.”

3.2 What is important is that the reforms create confidence in the civil justice system and do not do the opposite. They should not encourage businesses to adopt English law to govern their contracts.

4 The Court of Session and the Sheriff Court

4.1 An important part of the Bill is the redistribution of business between the Court of Session and local Sheriff Courts. To appreciate the significance of this it is important to note the differences between the staffing of the Court of Session and in the sheriff court.

4.2 The Court of Session, established by the independent Scottish Parliament in 1532 is one of the oldest and most esteemed judicial bodies in the world. It was explicitly preserved for all time coming in the Act of Union 1707. Its judges, known as Senators of the College of Justice have always comprised the most distinguished legal minds in Scotland. It has a distinguished record in upholding the rights of ordinary Scots and others who seek relief. For example in Knight v Wedderburn it held that slavery was no part of the law of Scotland in the 1770s. The Court has a first instance section (the Outer House) where cases are raised at the outset and an
appellate section (the Inner House) to which appeals are taken from the sheriff courts and the Outer House. Judges can sit in both Houses.

4.3 The Court of Session has not stood still. It has been ready to innovate and in 1995 commenced a widely regarded and successful commercial court consisting of specialist commercial judges who provide a critical service of the highest quality to the business community of Scotland at all levels.

4.4 The Court of Session does not operate in isolation. It is part of the College of Justice. A critical part of the College of Justice are the advocates (also known as counsel) who are specifically tasked with appearing before the court and presenting arguments based on demanding thorough and rigorous legal research of the highest quality. As any judge will acknowledge he or she is very largely dependent on the quality of the arguments presented by the lawyers appearing before them. The presence of the advocates - and since the 1990s solicitor-advocates - is a critical element of the success of the Court of Session.

4.5 A sign of a healthy legal system is that it has a coherent, systematic and logical set of rules and case precedents. This allows citizens generally and in particular business people to know what the law is and to regulate their activities accordingly. Scotland is a small jurisdiction with now about 6 million people. For such a jurisdiction it is essential that there is a healthy central supreme court staffed by the best legal minds. The Court of Session has fulfilled that role exceptionally well over the past 470 years. Given that 6 million people will not generate as many cases as 50 million people it is particularly crucial that there is sufficient throughput of cases through that central court so that arguments are tested and decided by the best minds available, particularly if rights of appeal to that central court are to be restricted.

4.6 Often in the past cases of no exceptional value have been used by the Court of Session to decide points of considerable legal importance. To maintain the Court of Session as a centre of excellence and to develop its reputation internationally in the attraction of litigants from abroad it is crucial that the Court maintains a sufficient throughput of cases both first instance and appellate.

4.7 As the late Lord Rodger of Earlsferry, the distinguished former Lord President of the Court of Session, Law Lord and Supreme Court Justice, observed, in his lecture “Delivering Excellence in Scotland’s Civil Justice System” (20 June 2008), the Court of Session, “should continue to be a first instance court to which people can take their case in the expectation that it will be dealt with, straightaway, by a judge who is one of the best legal minds”.

4.8 The Court of Session is a distinct civil court despite its judges also by virtue of their appointment as Senators of the College of Justice, sitting as judges of the criminal High Court of Justiciary.

4.9 The sheriff courts date back into the middle ages when the sheriff was the principal representative of the Crown in the shire in question. Unlike the Court of
Session the principal concern for the sheriff (later known as sheriff principal), and his substitutes (later known as sheriffs) was law enforcement in criminal law. Unlike the Court of Session, which is a civil court, the principal concern and business of the sheriff court was and remains to this day predominantly criminal.

4.10 The effect of the criminal business nature of the sheriff court is that the experience of its judiciary (the sheriffs) lies principally in criminal matters. Of its civil jurisdiction the vast majority is concerned with family law matters such as divorce, residence and access of children and adoption. Only a small minority of sheriff court business above its current exclusive competence of £5,000 lies in areas of commercial law and property disputes and personal injury disputes. This remains the case despite the existence of a commercial division in Glasgow.

4.11 The lawyers arguing in the sheriff courts are predominantly solicitors whose work differs from that of advocates in that through direct contact with clients, they have a far greater administrative burden to meet and so less time to prepare for court appearances. It follows that, through no fault of their own, the arguments of solicitors in the sheriff court are generally of a lower quality than counsel or solicitor-advocates in the Court of Session. Solicitor-advocates in the Court of Session are typically from larger firms of solicitors whose greater resources allow solicitor-advocates greater time to prepare.

4.12 In short, while having proper regard and respect for the important work done by sheriff courts, the effect of the domination of criminal and family business means that sheriffs can often lack experience in other areas, especially commercial and property law. Another factor is that most sheriffs are former solicitors who may not have been exposed to such litigation as the Queen’s Counsel (senior advocates) who are Court of Session judges will have been. The effect of this is that the quality of decision-making is on the whole lower than in the Court of Session. This is reflected in the greater confidence placed by lawyers and parties in the Court of Session.

5 Proposed Exclusive Competence of the Sheriff Courts

5.1 A central part of the Bill is s.39 which seeks to increase the current exclusive competence of the sheriff court from £5,000 to £150,000 - an increase of 3,000%. In other words it is intended to deprive Scottish citizens and Scottish and foreign businesses in Scotland the benefit of having the Court of Session decide cases of very significant value on any view.

5.2 Comparison with other jurisdictions in the British Isles may be appropriate here for a sense of perspective. The Republic of Ireland, Northern Ireland and England and Wales all have central courts such as the Court of Session and lower courts such as the sheriff court.

5.3 In the Republic of Ireland, with effect from February this year (2014) the competence of the lower (circuit) courts was increased to Euro 75,000 (c. £62,000) for claims other than for personal injury. For personal injury cases the increase was to
Euro 60,000 (c. £ 50,000). While the circuit courts do not have exclusive jurisdiction, if an action is raised in the High Court (their equivalent of the Court of Session) which could have been raised in the circuit court, only expenses on the circuit court level are recoverable. In practice, therefore, the competence of the High Court in the Republic begins at those levels.

5.4 In Northern Ireland, the exclusive competence of the county courts was increased recently to £ 30 000, leaving the remainder for their High Court.

5.5 In England and Wales, a much larger jurisdiction, and therefore arguably with a central court less in need of a throughput of cases, the exclusive competence of a county court is at £ 25,000 subject to exceptions. Thus for personal injury claims it is £ 50,000 and for other claims in the £ 25,000 to £ 50,000 bracket there will generally be a remit by the High Court to the county court except where the claim falls within a specialist list such as chancery case (e.g. one involving wills or trusts), a commercial case, a technology or construction case, a patent case or an admiralty case. So for commercial cases the High Court in England and Wales, a jurisdiction with far more case throughput than Scotland the central court of expertise, the High Court, has competence (jurisdiction) to deal with cases over £ 25 000.

5.6 The High Court of England and Wales (the equivalent of the Outer House of the Court of Session) has an outstanding international reputation in commercial, technology and construction cases and attracts much international business as a result.

5.7 The issue of cost of litigation has been of concern in England and Wales. However the Jackson Report on Costs does not suggest that that solution is to take away the competence of the High Court. To any objective observer it is clear that to do so would be to “throw the baby out with the bathwater”.

5.8 Against this background very compelling justification would be necessary to justify the Court of Session being restricted to cases with sums claimed of over £ 150,000.

5.9 No such justification has been demonstrated. The figure of £ 150,000 appears to originate in the Gill Review (ch.4 para. 104). No basis for the selection of £ 150,000 as opposed to any other figure has ever been given. While there were statistics from one limited source - in 2007-08 - on personal injury actions which suggested that at £ 150,000 the proportion of expenses to settlement was lower than at £ 100,000, and lower fixed figures, that ignores two important points.

5.10 Firstly there is a age-old practice of in a summons claiming solatium (pain suffering and loss of amenity) in personal injury claims at rough random figures which are not closely related on any true value. Therefore in a personal injury action the amount sued for can never be seen as in any way indicating the value of a claim. The ratios that the Gill Review contains are therefore flawed, based as they are on such a practice. The remedy would appear to lie in the elimination of the practice rather than to exclude such cases from the Court of Session with its efficient procedure for personal injuries.
Secondly and importantly, the Court of Session deals with many more other cases than personal injury. I refer in particular to commercial cases, property litigation and litigation involving wills and trusts. Such litigation is far from the “routine litigation” envisaged by the Gill Review for the sheriff courts (para.117) even if it is not the “most complex and most important” litigation in a general sense. It often involves difficult issues of fact and law which are of great importance to the litigants in question. They can litigate already in the sheriff courts but they choose to go to the Court of Session. Why should they be denied that choice?

It was hinted in the Gill Review that a high exclusive competence for the sheriff court might be necessary to deter overinflated claims. There is no suggestion anywhere in the Gill Review that that is a problem outwith the personal injury sphere. The remedy for claims which are overinflated in order to cross a monetary threshold is in the Court of Session allowing expenses only on a sheriff court scale where Counsel’s expenses would be excluded. If the Court of Session’s powers need to be strengthened in that regard I would support that. However that is no justification at all for a £150,000 limit as opposed to any other limit, particularly outwith the personal injury sphere.

An increase to £150,000 could only be justified if it improved confidence in the civil court system. Such a limit as doing the opposite.

At present, the Court of Session has a widely regarded and successful commercial court consisting of specialist judges who provide a critical service to the business community of Scotland at all levels.

Many commercial cases currently dealt with by that Court will fall below the proposed exclusive jurisdiction level of the Sheriff Court. Such cases are often complex involving expert evidence and difficult factual and legal issues. Such a case which is determined or settled at a level of for example £50,000 will usually be critical to the survival of a small business of whatever type. There is no merit in forcing such cases to be brought at a local level or there may be no specialist judicial resources dedicated to deal with such matters and where the costs incurred could be greater than at present due to logistics and geography.

The proposals for shrivial specialisation are quite inadequate to make up for the loss of the expertise of the Court of Session. There is no reason to believe that the difference in the nature of the background of those staffing the sheriff court will change despite the suggestion of specialist courts in s.34 of the Bill. That is of course not guaranteed as the £150,000 limit is in s.39. One of the important points of the Gill Review, namely that the transfer of business to the sheriff court would have to go hand in hand with specialist sheriffs, is not guaranteed in the Bill. Instead it is left to the Lord President’s discretion. That should not be the role of the Lord President. His role is a judicial one, and should not be burdened with administration. If he is overburdened the discretion will in effect be exercised by his officials who have no formal responsibility or training in such matters.
5.17 In any event leading Queen’s Counsel will not desire to become specialist sheriffs for a few years at the behest of the sheriff principal. Internationally the sheriff court will not have the credibility of the Court of Session. Business litigants will not be given the confidence to litigate in Scotland. They will be dissuaded from litigating in Scotland - if they have the choice - given that in at least half of commercial disputes (c.50% in 2008) they would be forced to go to the sheriff court. Companies concluding significant contracts will rather take steps to ensure that commercial disputes are dealt with in other jurisdictions such as England. It would be a supreme irony if were Scotland to become independent but at the same time direct commercial litigation to England by leaving its supreme court, the Court of Session short of business.

5.18 Finally, no survey of the effect on the Court of Session of the proposed reform has been made. The figures in the Gill Review are from 2008 and cannot be relied upon to found such a serious change as is being contemplated.

5.19 Scotland should not be disadvantaged by changes to the exclusive competence of the sheriff court relative to the other jurisdictions in the British Isles. It should be an attractive forum in which to litigate internationally. To fix a limit of £ 150 000 for the sheriff court in Scotland when the English High Court has a limit of £ 25 000 for commercial cases will encourage litigation in England: the opposite of Bill’s objective (see para. 3.1)

5.20 In the circumstances the exclusive jurisdiction of the sheriff court should be fixed at £ 30,000 and at £ 50,000 for claims involving damages (compensation) for personal injury. That is in line with the other areas of the British Isles.

5.21 The provisions for remits of cases from the Court of Session to the sheriff court set out in s.89 of the bill are wide ranging and give the Court of Session the widest discretion to exclude from the court cases whose value is likely to be less than £ 30,000 or the cost of which in terms of judicial resources or parties’ expenses relative to its value merits litigation in the sheriff court.

5.22 Section 39 of the Bill suggests that there be a “valuation” of non-monetary claims. This is highly impractical and detrimental to smooth procedure in a court case. How is a court to carry out such a valuation? Are parties to provide evidence of value? Both courts and litigants are left in the dark with such a confusing provision.

5.23 This will ensure that the “baby is not thrown out with the bathwater”.

6 Proposed Sheriff Appeal Court

6.1 The detrimental effect on the Court of Session is not limited to its Outer House. As an Appeal Court in its Inner House, the Court of Session has played the leading role in preserving the independence, integrity and rationality of the Scottish legal system.

6.2 As with the cases raised at first instance, it has been able to do this as a result of appeals being made to it, often from the sheriff court. Until now no
permission to appeal from either a sheriff (the lowest commonly used court) or a sheriff principal (the next highest) to the Inner House has been necessary. The Bill proposes a Sheriff Appeal Court to take the place of the current appeal from the single sheriff to the single sheriff principal. There is difficulty with that proposal. However the provisions for appeal to the Court of Session are so restrictive as to amount to a denial of justice to Scottish citizens and businesses and a threat to the integrity and rationality of the Scottish legal system.

6.3 The reforms suggested by the Gill Review are intended to improve the coherence of the civil justice system. The Court of Session has always played a leading role in maintaining that coherence for the reasons already set out. Aside from the highly persuasive nature of its decisions at first instance it has done this through its binding precedent of its judgements in the Inner House on appeal. This should continue to be reflected in the current reform.

6.4 However one finds that the status of Court of Session decision is nowhere stated in s.47 which taken literally means that sheriff appeal court decisions will take precedence over both Outer and Inner House decisions. This is of concern and may result in undesirable inconsistency to the detriment of Scots law. The suggestion that a sheriff will not be able to follow a decision of the Outer House of the Court of Session which is more persuasive than a decision of the Sheriff Appeal Court carries with it the serious risk that Scots law will be become incoherent with conflicting decisions from the sheriff level and the Court of Session level which, unlike in the current situation cannot be readily resolved.

6.5 Secondly, the Bill as currently drafted means that getting a sheriff court case to the Court of Session is exceptionally difficult. Thus:

- For a sheriff to remit there must be “exceptional circumstances” (s.88(4))
- For the sheriff appeal court to remit there must be “a complex or novel point of law” (s.106(2))
- For permission to appeal from the sheriff appeal court the appeal must “raise an important point of principle or practice” or “there is some other compelling reason for the Court of Session to hear the appeal” (s.107(2))

6.6 The restriction of appeals to the Court of Session to “complex or novel points of law” is too restrictive. It does not deal with the issue of conflict of decisions with the Outer (or Inner) House identified above. It threatens the key role of the Court of Session in our small jurisdiction as the guardian of the law of Scotland in civil matters. It risks incoherence in the law.

6.7 In England and Wales there is the option of a “leapfrog” appeal from the county court to the Court of Appeal if the appeal will “raise an important point of principle or practice” or “there is some other compelling reason for the Court of Appeal to hear the appeal” (English Civil Procedure Rules r.52.14). An application for such an appeal may be granted by either the lower court or the Court of Appeal.
6.8 The test for leapfrog appeals in England and Wales should be adopted for all remits from the sheriff court to the Court of Session’s Inner House. Furthermore, parties should be able to apply to the Court of Session for it to take over an appeal, adopting the same test. As the guardian of Scots civil law it is best placed to decide the appropriate level of appeal. This will ensure that the coherence of the civil law of Scotland.

6.9 This too will ensure that the “baby is not thrown out with the bathwater”.

7. Availability of the Independent Referral Bar to Litigants

7.1 Scotland, although a small jurisdiction, continues to have a thriving referral Bar which enables independent specialist advisory and advocacy services to be provided for the benefit of the public whether on a privately paid for basis, with the benefit of legal aid or where counsel acts on a speculative basis.

7.2 One of the consequences of making the exclusive jurisdiction of the Sheriff Court in monetary cases so high, and the route of appeal so restrictive, is that both the Judiciary and the Scottish citizens will be disadvantaged in not having the benefit of counsel both to advise and to conduct litigation. Scottish citizens unable to afford to instruct larger firms who have more administrative resources in particular will be disadvantaged. The solicitors in medium-sized and small firms (whose charging rates are lower and whose administrative resources are less) will not be able to provide effective representation in high value cases in the exclusive competence of the sheriff court (e.g. up to £150,000) without the benefit of counsel. This will be a problem especially in rural areas and smaller towns where there are only such firms but it is not restricted to such places. It will prejudice the access to justice of Scottish citizens who rely on such firms and often cannot afford any other firm. They will not be able to obtain the best advice and representation.

7.3 The Bill requires to address this problem as it should not simply be left to the discretion of summary sheriffs or sheriffs in particular cases to sanction the employment of counsel so that counsel’s fees can be recovered if successful from the unsuccessful party. If, contrary to my views the exclusive competence is to be higher than the limits suggested, there should be provision that allows sanction unless the contrary can be shown to be required.

8. Conclusions

The changes suggested are critical to ensure that these aims are achieved. I would be happy to give evidence to the Committee.

David Bartos
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