“AIMS OF THE CIVIL COURTS REFORMS”

FACULTY OF ADVOCATES’ CONFERENCE – 18 SEPTEMBER 2015

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Introduction

As we anticipate the introduction, this Tuesday, of major elements of courts reform, the approach of a new legal year provides an opportunity to reflect on what it is that the reforms are designed to achieve, as well as how those aims will be translated into practice. The Scottish Civil Courts Review – the Gill report – called for a targeted and systematic overhaul of the civil justice system. It is long overdue. The mechanics of comprehensive change have been developed over an extended period, following the Review reporting in 2009. By 2013, the Scottish Civil Justice Council had been established, in preparation for the reforms to follow. In 2014, the Courts Reform (Scotland) Act defined the framework of reform. Now, in 2015, the process of implementation is underway.

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1 I am grateful to my law clerk Jacqueline Fordyce for carrying out much of the research and preparing the initial draft of this paper.

These are times of great change and some uncertainty in many quarters. The reforms present significant challenges to those striving to manage their impact on everyday practice. That is so not only for the legal profession, but also for the judiciary and the courts administration. All have had to devise methods of smoothing transition. It remains important in the transitional phase not to lose sight of the underlying rationale for reform, and the benefits which will ultimately be gained.

Courts reform is never complete. That is not a cause for concern. It is a sign of progress. The immediate goal has been to achieve structural change. The lasting effect will be to enable continuous improvement and to respond appropriately to changing conditions in a progressive society. The essential consideration is to promote and support justice, more particularly access to justice, through the quality and efficiency of our courts. Of course, there is only so much that can be achieved through the vehicle of courts reform alone. The related issue of the appropriate level of state funding, where necessary, is an important element, which is not overlooked, but is beyond the scope of this address. What is envisaged is “rationalisation”; improved organisation not only of the court structure, but also the allocation of cases to be heard. The objective is to ensure that cases are given the appropriate level of scrutiny and determined expeditiously and in accordance with our principles of law and justice.
This is merely an outline of the changes that will come into effect. Greater detail will be added by other speakers, but this sketch will give some context to the observations that will follow on the identified themes and the wider aims of the reform programme.

The sheriff court landscape

The start of the legal year will trigger the transformation of the sheriff courts. The extension of their exclusive jurisdiction to proceedings up to a value of up to £100,000\(^3\), at least for the time being\(^4\), will be supported by dual provision for: remits to and from the Court of Session, according to the importance or difficulty of the cause\(^5\); and reasonable sanction for counsel, having regard to difficulty or complexity, the importance or value of the claim, and the desirability of avoiding unfair advantage to any party\(^6\). The parallel introduction of the summary sheriff\(^7\), with concurrent jurisdiction in certain categories of proceedings, will be invaluable to the efficient disposal of civil and criminal business. In the civil sphere\(^8\), the summary sheriffs will be able to undertake a significant and varied workload of family matters, warrants and interim orders, diligence, time to pay applications, and

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\(^3\) 2014 Act, s 39; SSI 2015/247, art 2, sch 1, para 1.
\(^4\) 2014 Act, s 39(5): “The Scottish Ministers may by order substitute another sum for the sum for the time being specified…”
\(^5\) 2014 Act, ss 92(4), 93(5).
\(^6\) 2014 Act, s 108.
\(^7\) 2014 Act, ss 5 and 10; SSI 2015/247, art 2, sch 1, para 1.
\(^8\) 2014 Act, s 44 and sch 1.
proceedings, when it is introduced perhaps later next year, under the “simple procedure”. In the criminal sphere, they will have powers to deal with almost all summary business.

The sheriffs will be enabled to exercise all-Scotland jurisdiction, where particular courts and proceedings are specified for this purpose. In the first instance, the Personal Injury court will be established within Edinburgh Sheriff Court, exercising jurisdiction in respect of actions of damages with a value in excess of £5,000, and in excess of £1,000 for workplace-related injuries. The Personal Injury court will hold civil jury trials. The newly developed suite within Edinburgh Sheriff Court, formed from what was the agents’ room, is an excellent example of a modern, technologically-enabled courtroom, purpose-built to accommodate the particular requirements of personal injury, notably civil jury business. Whilst this is, as yet, the only specialist all-Scotland court identified, the appointment of those nominated as specialist sheriffs in this area is to be

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9 The provision for “simple procedure” has been brought into force, as yet, only for the purpose of making further provision by act of sederunt: 2014 Act, s 72(1) and (2); SSI 2015/77, art 2, sch 1, para 1.
10 2014 Act, s 45.
11 2014 Act, s 41.
12 The All-Scotland Sheriff Court (Sheriff Personal Injury Court) Order 2015 (SSI 2015/213).
13 In respect of personal injuries actions remaining in the Court of Session, see Court of Session Practice Note No 4 of 2015 (Personal Injury Actions), which also comes into force on 22 September 2015.
14 2014 Act, s 63(7): “relevant proceedings” means proceedings (a) of a type specified in an order under section 41(1), and (b) which would be a jury action within the meaning of section 11 of the Court of Session Act 1988 if the same proceedings were (disregarding section 39) – (i) taken by an action in the Court of Session, and (ii) remitted to probation there.
15 http://www.scotland-judiciary.org.uk/25/1470/Personal-Injury-Specialist-Sheriffs-Appointed
welcomed. It promises to ensure a high quality and consistency of case management and disposal in this important sphere of litigation.

The Sheriff Appeal Court will come into being\textsuperscript{16}, although it will not yet be exercising its civil jurisdiction\textsuperscript{17}. The powers of the High Court (excluding the \textit{nobile officium}) in respect of summary appeals will be transferred to the Sheriff Appeal Court.\textsuperscript{18}

The highly experienced sheriffs and sheriffs principal who have been appointed to sit in their new role of Appeal Sheriff\textsuperscript{19} will add prestige to the court as it develops. In passing on the criminal and civil batons, the High Court and Court of Session will wish the President and the Vice President every success in steering the course of the new Sheriff Appeal Court in its early stages of existence. Each is amply qualified, by both wisdom and experience, to undertake the task ahead.

What then of the new appeals landscape in the Supreme Courts that will be formed as a result of the imminent changes? It is the appellate structure that will, if properly applied, ensure efficiency in the system and impose a degree of finality which is currently lacking in what is a highly permissive or open structure.

\textsuperscript{16} 2014 Act, ss 46 – 48.
\textsuperscript{17} SSI 2015/247, sch 1, art 2.
\textsuperscript{18} 2014 Act, s 118.
\textsuperscript{19} \url{http://www.scotland-judiciary.org.uk/25/1442/Sheriff-Appeal-Court-appointments-confirmed}
The civil appeals landscape

Using appeal in its broadest context, significant changes are to take effect in judicial review, not least with the introduction of a three month time limit for the bringing of proceedings. No longer will applicants enjoy a right, qualified only by the principles of mora, taciturnity and acquiescence, to seek to invoke the supervisory jurisdiction of the court. Applicants will be required to demonstrate in addition “sufficient interest” and “a real prospect of success” before the petition will be allowed to proceed. This is the new “permission” or leave stage. Applicants in proceedings relating to Upper Tribunal decisions will have to identify an important point of principle or practice, or some other compelling reason, before the application will be allowed to proceed. These provisions mirror the test of “standing” now adopted at common law in public law proceedings, following the United Kingdom Supreme Court in AXA General Insurance v Lord Advocate, and the “second appeals” test, derived from Eba v Advocate General. The latter has been

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20 Court of Session Act 1988, s 27A, (introduced by 2014 Act, s 89).
21 1988 Act, s 27B (introduced by 2014 Act, s 89).
   (a) a decision of the Upper Tribunal for Scotland in an appeal from the First-tier Tribunal for Scotland under section 46 of the Tribunals (Scotland) Act 2014,
   (b) a decision of the Upper Tribunal in an appeal from the First-tier Tribunal under section 11 of the Tribunals, Courts and Enforcement Act 2007.”)
23 1988 Act, s 27B(3) (introduced by 2014 Act, s 89).
24 2012 SC (UKSC) 122.
25 2012 SC (UKSC) 1.
replicated already in respect of second appeals under the Tribunals (Scotland) Act 2014.26

The diversion of work from the Court of Session to the sheriff court may see a numerical increase in appeals. Appeals will proceed, without leave, to the Sheriff Appeal Court against all final judgments of the sheriff and those involving interim interdicts and decrees, sisting an action, allowing or limiting the mode of proof and, of course, that old staple, the refusal of a reponing note.27 Appeals against any other decisions will require the sheriff’s leave.28 There may be little perceptible change here from the existing procedure of appeals to the sheriff principal, except that it will be for the Sheriff Appeal Court to decide whether the hearing will be before one or three Appeal Sheriffs.29 Yet it is the operation of this basic structure, involving various forms of leave, that will be central to the reforms’ success.

There is a provision allowing a leap frog appeal direct to the Court of Session, but only if the Sheriff Appeal Court considers that the appeal raises a complex or novel point of law.30

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26 Tribunals (Scotland) Act 2014, s 50(7): “second appeal” means appeal under section 48 against a decision in an appeal under section 46 [an appeal to the Court of Session against a decision of the Upper Tribunal against a decision of the First-tier Tribunal].
27 2014 Act, s 110(1).
28 2014 Act, s 110(2).
29 2014 Act, s 47(2).
30 2014 Act, s 112(2).
The provisions\textsuperscript{31} for an ongoing appeal to the Court of Session require leave from either that court or the Sheriff Appeal Court. The majority of sheriff court cases are destined to end with the sheriff or the Sheriff Appeal Court, as permission to appeal can only be granted if the court considers that the appeal would raise an important point of principle or practice or determines that some other compelling reason exists.\textsuperscript{32} Thus one of the central tenets of the Act is brought into effect. Appeals from decisions of fact or discretionary determinations taken in the sheriff court are now unlikely to reach the Inner House. Those that do must have a wider significance than the norm. This test is likely to cause a significant drop in the number of appeals, with little prospect of success, reaching the Divisions, often at the instance of party litigants. Such appeals have caused major problems of programming in the Inner House in recent years and resulted in unnecessary delays in the time taken to hear meritorious cases.

Civil appeals to the United Kingdom Supreme Court

The automatic right of appeal from the Inner House to the United Kingdom Supreme Court will cease to exist. The substitution of new sections 40 and 40A of the Court of Session Act 1988\textsuperscript{33} will bring Scotland into line with prevailing judicial

\textsuperscript{31} 2014 Act, s 113.
\textsuperscript{32} 2014 Act, s 113(2).
\textsuperscript{33} 2014 Act, s 117.
attitudes regarding the proper allocation of the limited resources available in what is rapidly becoming a Supreme Court whose time, reasonably applied, can only be for the most important legal issues of the day, as distinct from adjudications on matters of fact or discretion. Leave to appeal must be sought from the Inner House, generally within 28 days, in all cases. Permission will be granted only if “the appeal raises an arguable point of law of general importance which ought to be considered by the [United Kingdom] Supreme Court”.34 Such a test is already familiar from recent cases, notably Lord Reed’s dictum in Uprichard v Scottish Ministers.35 The timing of applications continues to be relevant, as the statutory test contemplates whether appeals should proceed “at that time”.36

The specified categories of appeal are themselves well-known, if couched in updated terminology. An appeal may be taken against any final judgment, other decisions in which there is a difference of opinion, or a dismissal where a “preliminary defence” has been sustained. Where the Inner House refuses leave, permission may be sought from the UK Supreme Court.37 A residual right of appeal will be available, against “any other decision of the Inner House in any proceedings,

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34 1988 Act, s 40A(3) (substituted by 2014 Act, s 117).
35 2013 SC (UKSC) 219, Postscript of Lord Reed at para [58].
36 1988 Act, s 40A(3) (supra): “an arguable point of law of general public importance which ought to be considered by the Supreme Court at that time” (emphasis added); cf Massie v McCaig [2013] CSIH 37.
37 1988 Act (as amended), s 40(1).
but only with the permission of the Inner House”.\textsuperscript{38} In all such cases, therefore, the decision of the Inner House will be final at that stage.

The criminal appeals landscape

A similar landscape will emerge in criminal cases. The Sheriff Appeal Court will absorb the jurisdiction of the High Court in relation to all summary decisions and all bail appeals, including those in petition proceedings.\textsuperscript{39} The jurisdiction encapsulates, with permission of the sheriff, section 174 appeals\textsuperscript{40}, relating to preliminary pleas. It will cover, with leave of the Sheriff Appeal Court on the sift procedure, stated cases and Notes of Appeal against sentence.\textsuperscript{41} It will include review by way of Bill of Advocation or Suspension. However, those anticipating a new approach to such appeals can be assured that the Appeal Sheriffs have been given a very firm grounding on the law and practice relating to all of these processes, whether derived from statute or the common law.

Onward appeals against any decision of the Sheriff Appeal Court may be taken to the High Court on a point of law, generally within 14 days, but only with the permission of the High Court itself.\textsuperscript{42} The threshold for permission is predictable.

\textsuperscript{38} 1988 Act (as amended), s 40(3).
\textsuperscript{39} 2014 Act, s 122 amending s 32 of the Criminal Procedure (Scotland) Act 1995.
\textsuperscript{40} 2014 Act, sch 3, para 3, amending 1995 Act, s 174.
\textsuperscript{41} 2014 Act, sch 3, para 4, amending 1995 Act, s 175 \textit{et seq}.
\textsuperscript{42} 2014 Act, s 119 inserting Part 10ZA, 1995 Act.
Once again, the appeal will have to raise an important point of principle or practice, or there will have to be some other compelling reason for the High Court to hear it.\textsuperscript{43} The “second appeals” test, already established in the civil context, is thereby imported into criminal proceedings. The familiar sift procedures will continue to apply, whereby applications will be considered and determined in chambers, initially by a single judge, subject to the applicant’s right to apply again to the three judges of the High Court in the event of refusal. The statutory language emphasises the prevailing point, which might otherwise be overlooked, that the second sift is not a form of appeal in itself (that is an appeal from the first sift), but a fresh application.\textsuperscript{44}

According to the 1995 Act relative to the disposal of summary appeals, “Every interlocutor and sentence” pronounced by the High Court, is “final and conclusive and not subject to review by any court whatsoever”\textsuperscript{45}. The existing oversight of the courts’ treatment of compatibility issues on appeal to the United Kingdom Supreme Court is, however, retained, alongside the jurisdiction of the Scottish Criminal Cases Review Commission in respect of alleged miscarriages of justice\textsuperscript{46}. One interesting point will be whether the UK Supreme Court will be inclined to take appeals already processed through two appeal stages (including sifts) of the Sheriff Appeal and High Court.

\textsuperscript{43} 1995 Act (as amended), s 194ZB(3).
\textsuperscript{44} Birnie v HM Advocate 2015 SLT 460.
\textsuperscript{45} 1995 Act (as amended), s 194ZK(1).
\textsuperscript{46} 1995 Act (as amended), s 194ZK(2).
Justice after courts reform

The reformed landscape will go a long way towards rationalising the proper use of time and resources; thereby promoting improved access to justice for all.

The shifting of civil first instance proceedings from the Court of Session to the sheriff courts, by virtue of the increased exclusive competence of the latter, will be tempered to some extent by the broader approach that is to be taken to the issue of standing in public law proceedings, as reflected in the new statutory provisions on judicial review. The various formulations of the meaning of standing at common law, in the new era of interests over rights, have not always been easy to reconcile. The UK Supreme Court has hitherto considered that a very broad test is appropriate.47 Such may be the courts’ interpretation of the corresponding statutory provision on “sufficient interest” in the future.

As a consequence of the reallocation of other business, the Court of Session will be appropriately placed to function as it should as the Supreme Civil Court in Scotland. It will deal with increasing volumes of public, and public interest, litigation, which is an important and developing area of jurisprudence. The devolution of certain appellate proceedings to the appropriate level of the Sheriff Appeal Court will create capacity within the Supreme Courts to deal promptly with the most important and difficult civil and criminal cases alike. Increased efficiency

47 Christian Institute & Ors v Scottish Ministers [2015] CSIH 64, LJC (Carloway) at paras [37] to [40].
and cost-effectiveness of the court system is derived from the allocation and hearing of cases before courts commensurate with the characteristics of the subject matter.

The relationship of the Supreme Courts in Scotland with the United Kingdom Supreme Court will be refined, through the strengthening of the gatekeeping function by the provision for permission to appeal in civil proceedings. Such a qualified right of appeal dovetails in part with what is the limited jurisdiction of the UK Supreme Court in criminal proceedings.

With the rationalisation of the court structure comes the integral rationalisation of the legal profession. The solicitor branch, including those with the privilege of extended rights of audience, will enjoy increased opportunities to demonstrate and develop advocacy skills in significant cases at sheriff and Sheriff Appeal Court level, in the swathe of business to be devolved from the Court of Session and High Court of Justiciary. There are, of course, funding issues that may arise. That is a matter for another day, and in respect of which the court itself is not, at least as yet, the appropriate target.

A suitable regime may follow to govern the instruction of solicitor advocates, so that they can operate properly outwith the shadow of apparent conflicts of
interest. The courts will ensure, so far as they can, that justice is seen to be done in all cases, irrespective of representation by solicitor advocate or counsel.\textsuperscript{48}

Members of Faculty may be expected to maintain their high standards throughout the sheriff and Supreme Courts, particularly as jurisprudence develops in relation to the sanction of counsel. Whilst the existing law in relation to sanction may be of assistance, it will be important for the courts to look afresh at sanction, taking account of the significance of the new court structures and the altered legislative background, as well as the circumstances of individual cases. The interests of justice no doubt require that there should be a rational relationship, in the case of specialist pleaders, between the existence of rights of audience before the court, and the sanction of the exercise of those rights, at least in terms of the recoverability of expenses, in particular cases.\textsuperscript{49}

What more?

Looking ahead, in the sphere of criminal courts reform, there is new guidance contained in the Criminal Courts Practice Note No. 3 of 2015, which is due to take effect on 1 December 2015. The guidance is a precursor to the likely implementation, by Act of Adjournal in 2016, of the enhanced case management functions

\textsuperscript{48} cf Yazdanparast v HM Advocate [2015] HCJAC 82, Lady Dorrian at para [17] \textit{et seq} (Defective representation consisting in a restriction in ability to select appropriate representation).

\textsuperscript{49} cf Taylor Clark Leisure v HMRC 2015 SLT 281.
recommended in Sheriff Principal Bowen’s 2010 Review of Sheriff and Jury Procedure\textsuperscript{50} and contained in the Criminal Justice Bill.\textsuperscript{51} The guidance provides for increased communication, preparation and disclosure, by the Crown and the defence, in advance of First Diets. It also seeks to address the difficulties experienced with the ubiquitous adjournment of First Diets and so-called “further” First Diets, and in the appropriate loading of trial diets, by enhancing communication between parties and the courts, and formalising the record of the state of preparation in advance of trial. These measures seek to achieve what has already been done in trial proceedings in the High Court, to the benefit of everyone involved. In due course similar, if simpler, protocols may be devised to tackle equivalent problems in summary criminal proceedings.

It is recognised that practitioners may be suffering from change fatigue. Nevertheless, practitioners are encouraged to engage positively with the spirit of the anticipated changes. It is much more satisfying to be part of a system which actually works rather than one regarded as dysfunctional.

As the new changes bed in, further problems will be identified and addressed as they may arise in both civil and criminal systems. These systems are not the property of aliens, or kings or even a benevolent oligarchy. They belong to the people, including the legal profession. With the constructive cooperation of the

profession, over the course of the coming legal year and beyond, there is the opportunity to establish an integrated courts and tribunals system of which we can all be justifiably proud.

CJMS