

Justice Committee
Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill
Written submission from Thompsons Solicitors Scotland

Introduction

1. Thompsons Solicitors are one of Scotland's largest specialist personal injury and employment rights practice. We act for the vast majority of Scotland's Trade Unions, pursuing claims on behalf of their members for compensation for accident, injury and disease through the civil litigation process. We work with Scotland's major asbestos charities and have unrivalled experience in relation to pursuing claims for compensation in relation to claims for asbestos related disease. We also act for individuals who suffer injuries as a result of accidents on the road, at work, in public places and many other spheres.
2. With our considerable experience we fully recognise the "asymmetrical relationship" currently at the heart of the litigation process as identified by Sheriff Principal Taylor in his report published in September 2011. We agree entirely with Sheriff Principal Taylor's view that the asymmetrical relationship stands as a barrier to access to justice and that there is a clear need for legislative reform to improve access to justice by creating more accessible, affordable and equitable civil justice system.
3. We therefore broadly support the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill [hereafter referred to as "the Bill"]. We entirely support the Scottish Government's declared intention to fully implement Sheriff Principal Taylor's recommendations in relation to Qualified One Way Cost Shifting (QOCS). We fully support the need to introduce QOCS.
4. However, in our submissions the current drafting of the Bill fails to sufficiently redress the asymmetrical relationship between rich and powerful insurers and pursuers in civil litigation. On the current drafting of the Bill, therefore, it is our submission that the Bill fails to fully implement key policy objectives and recommendations set out in Sheriff Principal Taylor's report.
5. This submission shall set out in detail two key areas where the current drafting of the Bill fails, in our submission, to implement Sheriff Principal Taylor's recommendations. They are:
 - The drafting of Section 8 of the Bill ("restriction on pursuer's liability for expenses in personal injury claims") and
 - The potential applicability of Section 10 ("third party funding for civil litigation") to cases supported by Trades Unions.
6. Additionally, although not part of Sheriff Principal Taylor's recommendations we submit that the Bill ought to provide an unsuccessful Pursuer with the same protection from court fees as it does in relation to expenses. We would submit that is particularly the case in light of the recent Supreme Court judgment in

relation to employment tribunal fees: R (on the Application of Unison) v the Lord Chancellor [2017] UKSC 51.

7. For completeness we should make clear that we entirely agree with policy objectives underpinning Parts 1 (Success Fee Agreements), 3 (Auditors of Court) and 4 (Group Proceedings) of the Bill.

Sheriff Principal Taylor's recommendations and the Scottish Government's response to them

8. At paragraphs 89-90 of the Scottish Government's consultation on the Bill published in January 2015 it was stated:

"The Scottish Government believes that in order for a system of qualified one-way costs shifting to work it will have to create an appropriate degree of certainty for pursuers and we agree with Sheriff Principal Taylor that the bar should be set high. Losing qualified one-way costs shifting should be the exception and not the rule and the pursuer should only lose the benefit of qualified one-way costs shifting in extreme cases i.e. where the Scots law test of fraud is met (recommendation 51), there is an abuse of process (recommendation 52), where the pursuer's case is disposed of summarily and in the case of "Wednesbury" unreasonable behaviour (recommendation 54).

A reasoning or decision is "Wednesbury" unreasonable if it is so unreasonable that no reasonable person acting reasonably could have made it ... the test is a different (and stricter test) than merely showing that the decision was unreasonable."

9. Thus, to improve access to justice and to equitably rebalance the current asymmetrical relationship in the litigation process it was recognised that pursuers should have certainty that they will benefit from the protection of QOCS in all but "extreme cases". That is only where there has been a high or significant level of misconduct on the part of the pursuer.
10. Certainty is key to achieving the policy objectives underlying Sheriff Principal Taylor's recommendations. If a pursuer does not have confidence that the bar is set sufficiently high, the current levels of litigation and therefore access to justice will remain the same. In those circumstances the Bill will have failed to improve access to justice. There must also be certainty in the mind of insurance backed defenders who may be willing to enrol motions before the court to remove the benefit of QOCS under section 8 of the Bill. Such defenders must be aware that such motions will only succeed in "extreme cases" and there is no point in "having a go" as it were. If the Bill is drafted in a way that serves as an open invitation to defenders to seek to have the benefit of QOCS removed in significant numbers of cases the Bill will have failed to improve access to justice.
11. To achieve the appropriate level of certainty the language of the Bill requires to be clear. It must reflect the need for certainty, for the bar to be set high and for benefits of QOCS only to be removed in extreme cases.

12. In our submission, the current drafting of the Bill does not sufficiently achieve those important outcomes.

Comparing section 8 with Sheriff Principal Taylor’s recommendations

Section 8(4)(a)

13. The sub section directs that the benefit of QOCS will be lost if a pursuer “*makes a fraudulent representation in connection with the proceedings*”. [Emphasis added].

14. The use of the indefinite article “a” and the very flexible term “in connection with” creates a test for removing the protection of QOCS which is imprecise. It is a test that is certainly open to interpretation. It is a test that will positively invite defenders to bring challenges in court. It is an open invitation to satellite litigation and does not provide the certainty that both The Taylor Report and the Scottish Government were seeking to achieve.

15. Additionally, the drafting is such that the bar for removing the protection of QOCS could be very low indeed once the matter is determined by the court. It is certainly likely to be too low when judged against the overarching principles set out above which direct that the removal of QOCS should be rare and only in extreme cases. For example, as currently drafted a single comment or representation in an otherwise meritorious case could result in the removal of QOCS. Representations relating to matters quite peripheral to the main subject matter of the litigation could also result in the removal of the protection of QOCS

16. Subsection (4)(a) should be considered in contrast to the equivalent provision in England which states that the protection of QOCS will be removed “where the claim is found on the balance of probabilities to be fundamentally dishonest”. The English test requires a high level of dishonesty and that dishonesty must relate to the entire case rather than a single (small) portion of it; that may be no more than loosely connected with the case.

17. Sheriff Principal Taylor did consider the English test. He took the view that it was better to use a legal term of art known to the Courts (fraud) rather than the term of fundamental dishonesty. He did so for the purpose of ensuring certainty. The Taylor Report however made no comment or criticism of the fact that in England the dishonesty test related to the material aspects of the claim rather than potentially a small part of it.

Section 8(4)(b)

18. Under this sub section a pursuer will lose the benefits of QOCS where the person “*behaves in a manner which the court considers falls below the standards reasonably expected of a party in civil proceedings*”.

19. We suspect that this is intended to implement the “Wednesbury unreasonable behaviour” (recommendation 54). In our submission it does not do so. As quoted above, and as the Scottish Government explained in the January 2015

consultation document, the Wednesbury unreasonable test is a high one that is only met if the conduct “is so unreasonable that no reasonable person acting reasonably could have made it”. It will instantly be seen that the Wednesbury test is a very different formulation to the current drafting in the Bill.

20. Indeed, as also quoted above, and as the Scottish Government explained in their consultation document that “the test is a different (and stricter) test than merely showing that a decision was unreasonable. In our submission the current drafting of sub section 8(4)(b) strikes at exactly the “merely” “unreasonable” behaviour that the Scottish Government did not want to form the basis for removing the benefit of QOCS.

Section 8(4)(c)

21. We would submit that this sub section does adequately implement Sheriff Principal Taylor’s recommendation 52.

Satellite litigation

22. “Satellite litigation” is a well-recognised part of the litigation process in England and Wales. It describes, often protracted, arguments and sometimes separate legal proceedings to determine issues relating to legal costs. They are lengthy, expensive and delay justice. Satellite litigation has never formed part of the litigation process in Scotland. Our fear is that Scotland will follow England if current drafting of sub-sections 8(4)(a) and (b), open as they are to multiple interpretation, are not amended.

Third party funding and trade union supported cases

23. Section 10 applies to circumstances where “a party to civil proceedings receives financial assistance in respect of the proceedings from another person ... who is not party to the proceedings but has a financial interest in respect of the outcome of the proceedings.” In those circumstances the section requires the party to the proceedings to disclose details of the funding and allows the court to remove the benefit of QOCS in relation to those cases in respect of the third party funder.
24. On the face of the Bill, this section could apply to Trades Unions who provide financial support to their members to pursue civil litigation.
25. There is no doubt that Sheriff Principal Taylor did not intend his recommendations in relation to third party funding to apply to cases supported by an injured person’s trades union. It is clear from paragraph 57 of Chapter 11 of Sheriff Principal Taylor’s report that the purpose of the recommendations related to “a funder, motivated by a desire to make a profit, who effectively purchases a stake in the outcome of the litigation...”.
26. Indeed when Sheriff Principal Taylor described the asymmetrical relationship in the litigation process that his recommendations are aimed to redress he recognised that such an asymmetrical relationship existed even when a pursuer is supported by his/her trades union.

27. It is submitted that the Bill should state expressly that Section 10 does not apply to cases funded by trade union legal aid schemes. Such a term in the Bill would simply mirror the existing sub-section 10(4) which excludes cases funded under the Scottish Legal Aid Scheme.

Court fees

28. The Bill does not make any provision in relation to court fees that require to be paid by parties to a court action. In our submission, the Bill could and should deal with this important issue.

29. Court fees require to be paid on a “pay as you go basis”. The longer a case runs and the more procedural steps that there are in a case the more significant the level of court fees are that require to be paid. If a case proceeds to a hearing of evidence or any other formal substantive hearing the court fees will be disproportionately large as compared to all but the highest value cases.

30. Accordingly, court fees can and do represent a barrier to access to justice. If the overarching objective of the Bill is to improve access to justice by creating a more accessible, affordable and equitable civil justice system then, in our submission, the issue of court fees should be addressed in the Bill.

31. As currently drafted, a pursuer who raises a court action and conducts that action “in an appropriate manner” [such that they have the protection of QOCS] but who is unsuccessful will be out of pocket for these not insubstantial court fees that require to be paid as a case progress through court. In our submission, that outcome must run contrary to the spirit of QOCS and the spirit of the recommendations of Sheriff Principal Taylor. In our submission, under a QOCS regime, court fees should be treated in exactly the same way as expenses. There should accordingly be, in our submission, a section of the Bill relating to court fees that mirrors Section 8-11 of the Bill.

32. Further, we would submit that the recent judgment of the Supreme Court in relation to Employment Tribunal fees [R (on the application of Unison) v the Lord Chancellor [2017] UKSC 51] requires the Scottish Parliament to change its approach to court fees. The Bill is the perfect opportunity to do so. Indeed, in light of the Supreme Court judgment the current regime in relation to court fees in Scotland could be open to judicial challenge. We would submit, therefore, that the regime should be changed as soon as is practical.

33. The leading judgment was delivered by Lord Reed. The judgment was based entirely upon the fundamental right of every citizen to access to justice. Lord Reed described that right as “a guarantee to access to courts which administer justice promptly and fairly”. Lord Reed described how illegal barriers to access to justice may exist without making access to courts completely impossible – “impediments to the right of access to the courts can constitute a serious hindrance even if they do not make access completely impossible”. Lord Reed continued “even where a statutory power authorises an intrusion upon the right of access to the courts it is interpreted as authorising only such degree of intrusion

as is reasonably necessary to fulfil the provision in question”. In that context, Lord Reed concluded that employment tribunal fees represented an illegal barrier to access to justice. It will readily be seen that the court fee regime in Scotland could be viewed in exactly the same way.

34. That is not to say that a system of court fees per se is illegal. Instead, the system must strike the right balance between the State’s need to recover court fees and the “intrusion” that represents to access to justice. In our submission the current pay as you go model strikes the wrong balance. It is too great an intrusion. On the other hand, making court fees subject to QOCS would in our submission represent an appropriate “degree of intrusion as is reasonably necessary” to meet the Scottish Government’s objective in relation to the current court fees.

Auditors of court

35. In principle we agree entirely that the auditor should be a salaried position, should issue guidance and the other provisions of Part 3 of the Bill.

36. However, the auditor must have appropriate and significant experience as a Civil Court practitioner. The salary and the selection process must therefore ensure that to be the case.

37. Additionally, we believe that if the Bill results in a net increase in the Scottish Court Service’s income then the increase should be used fully to increase the resources to speed up the process of auditing accounts.

Thompsons Solicitors Scotland
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