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Access to civil justice
- briefing note from Govan Law Centre

Access to justice implications from the Small Claims (Scotland) Amendment Order 2001 and Sheriff Courts (Scotland) Act 1971 (Privative Jurisdiction and Summary Cause) Order 2001

It is understood that the above noted draft Scottish Statutory Instruments (SSIs) will be reconsidered by Justice 2 on Tuesday 20 November 2001. We apologise for submitting this briefing note at short notice, but believe that the proposed orders will have a significant impact on access to civil justice in Scotland.

Law Centres are staffed by qualified solicitors working within an independent legal practice under the auspices of a voluntary community management committee, but like private law firms, are regulated by the Law Society of Scotland. All income generated by the legal practice is the property of the law centre, to be held in trust for the purpose of using legal skills and remedies to tackle poverty, unmet legal need and to disseminate legal know-how within our community.

In our view, it is important that we voice the interests of our client base (typically those living in poverty, debt, and/or inadequate housing conditions). Ordinarily we would prefer to co-ordinate a collective response through the *Scottish Association of Law Centres* (SALC). However, there is insufficient time to do so. This note therefore attempts to illustrate the likely impact of civil jurisdiction changes from the viewpoint of Govan Law Centre clients.

1. Background

Proposed civil jurisdiction reforms were first mooted in a consultation document issued by the Scottish Courts Administration on behalf of the Lord Advocate in July 1998. Reforms were announced – in the midst of the Ruddle affair - before the Justice Committee by Justice Minister, Jim Wallace MSP on 31 August 1999. The decision to double the small claims limit to £1,500, and more than triple the summary cause limit to £5,000, took many practitioners by surprise. The orders were subsequently withdrawn when concerns were acknowledged, and on 18 April 2000, the Justice Minister wrote to the then Convenor of the Justice and Homes Affairs Committee (Roseanna Cunningham MSP) to advise that:

> "The orders will be re-laid when concerns which prompted their withdrawal have

> been addressed. Concerns which had been raised included the need to have in place new procedural rules, particularly in relation to Summary Cause procedure, and also an amendment to the Table of Fees payable to solicitors in Summary Cause actions. These are not matters for Ministers".[1]

On 14 November, the Deputy Justice Minister (Iain Gray MSP) appeared before the Justice 2 Committee (Meeting 31, 2001) and confirmed that:

> "The purpose of the orders is to improve access to justice and to provide a quick and inexpensive outcome for claimants" (col 588).

We would like to examine the likely effect of these orders as against the Deputy Justice Minister's stated policy aim of improving access to justice.

2. Impact of the Small Claims (Scotland) Amendment Order 2001

The effect of the Small Claims (Scotland) Amendment Order 2001 is to restrict access to the civil legal aid scheme for all cases other than 'personal injury actions'. In so doing, the order will have a positive and negative consequence - (a) the welcome provision of access to civil legal aid for eligible small claim reparation litigants and (b) the unwelcome erosion of civil legal aid for all other litigants.

In 1998, Scottish Office research confirmed that the small claims system was responsible for restricting access to justice in personal injuries cases.[2] Key findings from this research included the following conclusions:

- *Personal injury claimants found it difficult to assess the legal basis of their claim without legal advice.*
- *Advice agencies were unable to provide personal injury claimants with legal advice and assistance.*
- *Unassisted personal injury litigants found it difficult to pursue their action at full (proof) hearings, and were rarely successful when they did so.*
- *Unassisted claimants were particularly vulnerable in personal injury litigation because they were more likely to come face to face with litigation and reparation specialists in court.*

At present, there is no civil legal aid provision for litigants raising small claims actions. Accordingly, under the draft order all actions under £1,500 (other than personal injuries) will no longer be eligible for civil legal aid. In short, this means that people will be expected to conduct such litigation themselves, without qualified legal representation (unless they can pay for same).

Individuals are unlikely to obtain adequate representation from the voluntary advice sector – which is principally geared up to disseminate high volume generalist advice and helpful

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[1] Justice & Home Affairs Committee minutes & papers for 2 May 2000; 16th Meeting, JH/00/16/A.

[2] *In the Shadow of the Small Claims Court – the impact of the small claims court on personal injury litigants and litigation*. Elaine Samuel, Legal Studies Research Findings No. 18 (1998), Scottish Office. Available at - http://www.scotland.gov.uk/cru/resfinds/lsf18-00.htm

information. For example, in 1998, a Citizens Advice Scotland (CAS) survey stated that in Scotland there were only "3 CABx representatives involved in small claims representation 'often', 13 in the eviction court 'often' and 45 in the employment tribunal 'often or very often'".[3]

What we see in the small claims court is the practice of creditors and businesses employing solicitors and specialist practitioners, and individuals either failing to appear, or attempting to represent themselves. This 'inequality of arms' is not good for civil justice.

We are concerned that any further erosion of civil legal aid will have an adverse impact upon our client base. While law centres provide a free service, they rely upon the civil legal aid scheme in order to enforce their clients legal rights though the courts. The following example (taken from a law centre case) attempts to illustrate this problem.

> **Case example**
> Mr S and family reside in a housing association flat in Glasgow. The family are in receipt of income support. The ceiling in Mr S's living-room and bedroom shows structural cracking. He is about to complain to his local office when part of the ceiling collapses, damaging various items of moveable property. The claim is valued at £1,250 (for replacement of goods, together with an element of *solatium*, i.e. inconvenience, and upset). A claim is intimated, but repudiated by solicitors acting on behalf of the landlord, upon the basis Mr S failed to notify the landlord of the disrepair. Mr S has a breach of contract claim.
>
> He applies for civil legal aid to raise summary cause proceedings. The landlord intimates its objection to this, but Mr S obtains civil legal aid. An architect's report for Mr S (cost £225, paid for under advice and assistance) had confirmed that the cracking, and subsequent ceiling collapse, occurred due to previous defective repairs by the landlord. Just as the summons is about to be raised the landlord offers £1,000 to settle, together with legal fees and outlays on Chapter 10 (the extra-judicial scale). Mr S accepts and obtains £1,000.

Under the new SSI, Mr S would not have been able to apply for civil legal aid. He would have been expected to prepare and run his own case at the sheriff court, as a small claims action. It is our position that he would have been unable to do so, and could have had little prospect of success due to complexity of fact and law.

The Scottish Office research (*cited supra*) in our experience can be extrapolated to many landlord and tenant disputes concerning disrepair, dampness, and burst pipes etc., Such cases are not categorised as 'personal injury', but often involve issues as complex, if not more so, than reparation cases.

It is important to note that solicitors acting for commercial/insurance companies often do not negotiate until they are faced with the prospect of litigation. The removal of civil legal aid in landlord and tenant breach of contract cases under £1,500, will result in insurance companies being free to repudiate claims, in the safe knowledge that most claimants will be unable to secure legal representation.

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[3] See further July and August 1998 editions of SCOLAG Legal Journal.

In our experience, complex issues of fact and law also arise regularly in defender debt and consumer law cases. For example, a recent law centre case involved a less than reputable lender pursing a £1,000 loan agreement. The defender, in receipt of incapacity benefit, disputed he had ever signed the agreement. An expert handwriting report was obtained, civil legal aid applied for, and the action defended successfully.

Other regular problem cases include hire purchase default cases where all sorts of expensive irrecoverable charges (e.g. invented costs and *de facto* penalties) are, in practice, added on to the debt. Again, while such cases are not necessarily 'everyday', they do occur. With access to civil legal aid, many irrecoverable debt cases can be successfully challenged.

Debtors have to deal with complex issues arising from the Consumer Credit Act 1974, the Sale of Goods Act 1979, Sale and Supply of Goods Act 1994, the Unfair Terms in Consumer Contract Regulations 1994 and the Unfair Contract Terms Act 1977. Legal complexity is not necessarily related to financial value, and a significant number of legal disputes of 'low value' nevertheless concern complex areas of law. Under the SSI, many defenders would automatically be denied the right to apply for civil legal aid.

The Justice 2 committee may wish to take evidence on whether the small claims SSI is European Convention compliant.[4] For example, where a citizen on low means has a complicated defence or legal claim (in terms of fact and/or law) the proposed SSI could deny that citizen the right to a "fair hearing", by removing the ability to obtain legal representation. The fact that a sum sued for is less than £1,500, does not necessarily mean that the case is of small importance – for example, pursuing or being pursued for £750 to £1,499 when household income is low is a serious matter.

This gives rise to the fundamental question: who will benefit from this order? It is fair to note that the small claims court, generally, is used largely by the business and credit sector to enforce and pursue debts. Indeed, it is often referred to as the '*debtor's court*' in Glasgow and in other sheriff courts in Scotland.

In 1998, the Lord Advocate estimated that if the small claims limit was doubled to £1,500, approximately 76% of all sheriff court actions would be small claims. Leaving aside reparation actions, this would mean that most civil actions in the sheriff court would be ineligible for civil legal aid.

In *Striking the Balance – a new approach to debt management*, the Scottish Executive working group recommended the creation of a new debt arrangement scheme in Scotland. It is understood that the Scottish Executive is considering a comprehensive diligence review for Scotland.

Is it not premature and inconsistent to alter jurisdiction limits, when the Scottish Executive is considering a radical overhaul of the sheriff court debt recovery system?

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[4] As required by the Scotland Act 1998, and the Human Rights Act 1998. For example, Article 6 to schedule 1 of the Human Rights Act 1998 safeguards the right to "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law". Implicit in the requirement for a "fair hearing" is the principle of equality of arms between litigants, and the opportunity to present a case. For example see: *Airey v Ireland* (1979) 2 EHRR 305.

3. Impact of the Sheriff Courts (Scotland) Act 1971 (Privative Jurisdiction and Summary Cause) Order 2001

The Scottish Legal Aid Board (SLAB), report on '*Public and Faculty Meetings February to June 2000*', noted there was 'a perception that some solicitors were not carrying our legal aid work because of the rates of payment, and this could deny people access to justice if they cannot find a solicitor willing to take on a legal aid case, particularly in rural areas where there are less solicitors'.

A significant area of law centre work is defending eviction actions. Our experience in this field confirms the above noted concern, as expressed within the SLAB report.

For example, most (but not all) private firms do not get involved in defender eviction work because (a) rates of pay are on the summary cause scale (which can work out at less than half of the ordinary cause rate[5]) and (b) because most court appearances (e.g. continuations to monitor repayments) are not covered by the civil legal aid scheme at all. In short, this area of work is financial unattractive. Through local authority funding – for example in Glasgow - some citizens in Scotland have access to qualified legal representation for free in specific legal fields such as housing, employment, child law and mental health. Most do not.

The extension of the summary cause scheme to actions with a value up to £5,000 may give rise to a number of access to justice problems:

(a) As noted, many private legal firms are reluctant to take on summary cause work, because of the low rate of remuneration. While law centres position themselves to tackle 'unmet legal need' as it arises, the number of law centres in Scotland is very limited. If more private firms of solicitors decide to avoid summary cause litigation for economic reasons[6], we could see additional areas of unmet legal need being created in Scotland. Who will meet this need – particularly in rural Scotland?

(b) Alternatively, where private firms do take on pursuer summary cause litigation, they may require to charge their successful client for "irrecoverable sums". Govan Law Centre never does this – although to be fair, we have no requirement to make a profit, and receive an important element of core funding from Glasgow City Council, which enables services to be provided free at all times. However, private firms will require to recover their costs.

Where a litigant is successful, judicial expenses can be recovered from the opponent (if the opponent is not legally aided). These are known as party-party expenses, as distinguished from client-solicitor expenses. Where a case is complicated in fact and law, the solicitor may require to carry out a large proportion of work which is not recoverable from the other side. If more compensation (breach of contract) and personal injuries (reparation) actions are to fall within the summary cause limit, this discrepancy would be exacerbated. It is noted (from the Deputy Minister's previous evidence to Justice 2) that there may be some changes to the summary cause fee scales, however, it is not clear if these changes will address this issue.

[5] See Appendix 1 to this note for a full analysis of comparative costs between summary and ordinary cause procedure, as against civil legal aid rates, and judicial expenses.
[6] See Appendix 1.

What is clear, is that many more reparation and compensation actions will fall within the ambit of summary cause.[7] If so, firms may have little option but to recover shortfalls from the client's principal sum. This would be a regressive development.

(c) A summary cause privative jurisdiction of £5,000 will penalise housing and social welfare litigation, and test case work – and will favour a culture of 'production-line' litigation for actions between £1,500 and £5,000. For example, Govan Law Centre conducts a significant proportion of reparation actions for child and adult asthma and respiratory ill-health, and disrepair actions generally. Such cases are notoriously time consuming and contentious.

We have recently utilised new dust mite and fungicidal research from cutting-edge academic work carried out in Scotland. Technical developments mean we can now obtain a joint architect's report, with a report on dust mite population in the household, together with blood tests to establish the relationship between species of mould and toxins within blood. All of this is costly and time consuming.

The courts in Scotland have quantified the value of one year's exacerbation of asthma from damp living conditions at around £600-£700. It is therefore apparent, that many complex cases will fall below £5,000 – yet the level of work involved can be immense. In the case of law centres, two issues emerge. Firstly, as we never deduct any money from the client's principal sum we will sustain a major reduction in recoverable expenses. Such income is used by law centres to cross-subsidise non-paying legal work; legal research, and the salaries of additional members of staff. Secondly, it will become more difficult to develop legal remedies and take on test case work – as there will be no way to subsidise such work.

(d) It is also worth noting that summary cause procedure has no facility for 'legal debate' – that is an argument on the relevancy, specification and competency of written pleadings. Again, this will penalise many housing and social welfare cases where defenders put forward spurious defences, which at the moment we can knock out at debate, and thus exert a pressure to settle in favour of the client. It is not apparent that any consideration has been given by the Scottish Executive to the impact of this change on housing and social welfare law litigation.

4. Conclusions

It is not apparent that full consideration has been given to the impact of proposed changes to small claims and summary cause jurisdiction. Our key concerns relate to housing and social welfare cases in Scotland, but it is clear that the draft orders have major implications to access to civil justice generally. We would hope the Scottish Executive could consider the draft orders within the *Striking the Balance* and forthcoming diligence policy reviews. Alternatively, we would hope Justice 2 would consider taking further evidence on possible adverse implications to access to justice from these orders.

Mike Dailly
Principal Solicitor
Glasgow, 19 November 2001

[7] Some litigants will be prevented from raising actions in the Court of Session – as all actions under £5,000 would require to summary cause actions. This issue appears to have been conjoined generally with changes to sheriff court jurisdiction, and should be explored separately with respect to its own policy implications.

Appendix 1

Analysis of work involved in a typical damages/breach of contract action for £3,000 claim as at 1998 rates (*Reproduced from an article by Derek O'Carroll, Advocate*[8])

PROCE-DURAL STEP	ORDINARY CAUSE: LEGAL AID FEE	ORDINARY CAUSE: JUDICIAL EXPENSES	SUMMARY CAUSE: LEGAL AID FEE (IF APPLI-CABLE)	SUMMARY CAUSE : JUDICIAL EXPENSES (IF APPLI-CABLE)	COMMENT
Instruction Fee	217.3	306	65.75	82.8	Includes service fee
Pre-cognition's	313.6	552	180	234.4	
Inventory of productions	41.2	66.8	23.4	30.6	
Considering opponents productions	20.6	33.4	N/A	N/A	
Adjustment fee	99.9	139.3	N/A	N/A	
Options hearing(1/2 hour)	82.4	111.4	N/A	N/A	
Note of plea	20.6	27.9	N/A	N/A	
Specification (opposed)	63.9 (assume ½ hr in court)	61.3	27.4	34.7	
Minute of Amendment for Pursuer(or equivalent)	39.1	55.7	33.3	41.6	
Considering answers	15.5	22.3	N/A	N/A	
Attendance at court re MoA (1/2hr)	22.6	30	N/A	N/A	Fee for this included in SCR fee
Considering Minute of Amendment for defender	31.9	44.6	N/A	N/A	
Lodging Answers etc	15.5	30	N/A	N/A	
Attendance at Court re MoA (1/2 hr)	22.6	30	31.6	33.4	

[8] First published in SCOLAG Legal Journal, August/September 1998.

Hearing Limitation Fee (MODIFIED TO ½)	97.85	139.1	N/A	N/A	
Preparation for proof fee	233.8	323	54.8	69.6	
Inspecting opponents productions (1 hr)	49.6	66.8	N/A	N/A	
Conduct of Proof (9 hrs)	406.8	601.2	284.4	361.8	
Final procedure	59.7	83.6	33.3	41.6	
Drawing a/c expenses	47.9	72.5	33.8	41.6	
Copying 50 pages	4	55	N/A	N/A	
SUB-TOTAL	1906.35	2851.9	767.75	972.1	
10% Process Fee (12% post and incidents for summary cause)	190.63	285.19	92.13	116.65	
SUB-TOTAL	2096.98	3137.09	859.88	1088.75	i.e. Ordinary Cause Procedure judicial expenses are about 100% higher
Court fees (approx)	260	260	35	35	
SUBTOTAL	2356.98	3397.09	894.88	1123.75	
Witness expenses including expert report and attendance of expert plus shorthand writer fee (notes not extended) **in ordinary cause only,** say…	750	750	550	550	

TOTAL	£3106.98 plus VAT on solicitor fee	£4147.09 plus VAT on solicitor fee	£1444.88 plus VAT on solicitor fee	£1673.75 plus VAT on the solicitor fee	After adding in other costs, judicial expenses for the same case under Ordinary Cause Procedure are about 150% more and legal aid costs are about 115% higher
TOTAL inc VAT	**£3473.95**	**£4696.08**	**£1595.35**	**£1864.28**	