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Civil litigation reform in Scotland—what next?

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John MacKenzie considers how well the Gill Review reforms, including DBAs, will work in Scotland & compares them to the Jackson reforms

- **Considers how the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 will work.**
- **Looks at DBAs, third party funding and group proceedings**
- **Compares the reforms of Scotland's Gill & England & Wales' Jackson**

On 1 May 2018 the Scottish Parliament passed the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act Bill. Now that it has Royal Assent it is the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. But what effect will the Act have, and what's next for civil litigation in Scotland?

Reform of the Scottish courts has been proceeding slowly.

The Gill Review

This is the latest step in a process of reform. Lord Gill's review on the civil courts in Scotland started the latest push for reform and was published on 30 September 2009.

At that time Lord Gill said: ' For the last 20 years, the Court of Session has been run on principles of crisis management.'

This was only the start of a commentary that will ring true for anyone who has practised before the Scottish Courts. The observations in Lord Gill's Review of Civil Justice in Scotland made depressing reading.

'The practitioners of 100 years ago would have little difficulty in picking up the threads of today's system. In the Scottish civil courts, processes are still conducted as a paper exercise. Data keeping is done by manual counts. The format of pleadings and many of their stylised formularies have not changed in over 100 years. … Since litigants have virtually unrestricted access to the Court of Session for minor litigations and since almost all disappointed litigants have the right to appeal to the Inner House without leave, the Court of Session is now a court whose first instance business is to great extent that of acting as a settlement medium in personal injury claims and whose appellate business consists to a great extent of cases of small value and little legal significance. … [T]he Court of Session at both levels has become a playpen for certain frivolous and irresponsible party litigants.'

Structural reforms were introduced and Sheriff Principal Taylor's review of expenses and funding of civil litigation followed in October 2013. The Bill itself was introduced to the Scottish Parliament on 2 June 2017.

The Act

The Act introduces a number of reforms that will be of particular interest to personal injury practitioners, the most significant of which is the introduction of Qualified One Way Cost Shifting. For the purposes of this article, the focus is on damages-based agreements (DBAs), third party funding, and group proceedings.

The Act allows Scottish solicitors to enter into DBAs with clients. Perhaps better known as 'no win, no fee', DBAs allow solicitors to be rewarded through a share of the damages awarded. The higher the award, the higher the solicitor's fee.

The Act also recognises the growing market for third party funding, and places obligations of disclosure of those funding arrangements on a statutory footing.

Finally, the Act allows for group proceedings, or class actions, that may be brought only with the permission of the court. Regulations to follow will provide guidance on opt-in and opt-out proceedings.

The Bill was widely covered, and some said it could bring seismic change,with shockwaves travelling through many sectors. The reality is likely to be less dramatic. For SMEs (small to medium enterprises) and larger corporate organisations based in Scotland, the Act brings Scotland more or less into line with the position in England. DBAs have been available in England for many years (albeit with a relatively low take up), and group actions have been recently introduced.

These reforms should help with the difficult question of access to justice for individuals. For lower value claims in particular, where a large body of people are affected, it will be a boon for claimant lawyers. And with the introduction of the GDPR (General Data Protection Regulation) and the recent decision in *Various Claimants v Wm Morrisons Supermarket PLC* [2017] EWHC 3113 (QB) , claims under data protection legislation following a data breach are likely to become much more common. While businesses need to be ready for large class actions, at least the Scottish courts will be able to service claims under this important area of law.

DBAs & third party funding

The reforms relating to third party funding are less exciting. Third party funding has always been available to litigants in Scotland (and England), and the Act simply provides some clarification around the obligations to disclose the nature of the arrangements.

One area where Scotland might have stepped ahead of England is in relation to DBAs. The Act calls them ‘success fee agreements’, and there is a subtle difference. The Act provides that a ‘success fee agreement’ is an agreement between a person providing relevant services (the ‘provider’) and the recipient of those services (the ‘recipient’) under which the recipient—

1. ‘is to make a payment (the ‘success fee’) to the provider in respect of the services if the recipient obtains a financial benefit in connection with a matter in relation to which the services are provided, but
2. is not to make any payment, or is to make a payment of a lower amount than the success fee, in respect of the services if no such benefit is obtained.’

When considering the effect of the reforms in its impact assessment, the Scottish Government hoped that the Bill would provide greater access to justice and greater predictability of costs. In addition, it was thought that it would extend the funding options available to parties who wish to enforce their legal claims.

Looking at the costs and benefits of the success fee agreements, all that was said was:

‘The wider choice of funding methods may lead to an increase in the number of actions raised affecting the Scottish Government, local authorities and other bodies or individuals who may be subject to a claim. It is not possible to quantify this. Some defender solicitors believe that those with valid claims have no difficulty in finding legal representation at present. They fear that some claims may not have merit. If there were to be an increase in valid claims, this may lead to councils, NHS Scotland health boards being liable for increased amounts of damages.’

In fact, the Scottish regime may be more effective than the English DBA regime because it allows for what have been called ‘hybrid DBAs’. In England the Damages-Based Agreements Regulations 2013 appear to require ‘pure’ DBAs (although this has been debated). So the client pays nothing unless they win. In Scotland, the Act appears to allow the solicitor to obtain a payment even if the client does not win. This difference makes the Scottish regime much more attractive to solicitors in the short term.

The post-reform landscape

So what next? Are these reforms likely to have a dramatic effect on access to justice? Are they likely to see an increase in work for the Scottish courts? The answer, in my view, is unfortunately not.

A little like the retail sector (where the long-heralded demise of the high street is now coming to pass), the advent of online commerce, instant communication, online communities and international trade is having a real impact on the volume and type of cases coming before the courts. Unless and until the Scottish (and English) courts find a way to enable consumers and businesses to resolve their online disputes without the massive costs associated with traditional litigation the courts will become less and less relevant.

At a recent conference focusing on the issue of electronic documents and the challenge of managing the huge volume of documents now part of the typical case, the issue of compliance with the rules, and the challenge of having appropriate skilled practitioners deal with cases was discussed. This takes us to the difficult issue of the approach that the courts take to the management of cases. The recent case of *Shanley v Clydesdale Bank* [2018] CSIH 32 was mentioned. In that case, the Scottish Appeal Court, the Inner House, allowed the appeal principally on the basis that 'in the operative part of the reasoning there is little or no recognition of the fact that, come the critical period, the failings were ultimately those of the pursuer's solicitors'. Both the first instance judge and the Inner House observed that the solicitor was 'overwhelmed' and that contributed to the catalogue of errors and failures to meet deadlines.

The Jackson reforms

In England, the Jackson/civil litigation reforms in April 2013 introduced a new culture to the courts which has seen much less tolerance of delays and breaches of court orders and time limits. The English courts have developed a broad three-stage test following the cases of *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537, and *Denton v TH Ltd and another, Decadent Vapours Ltd v Bevan and others and Utilise TDS Ltd v Davies and another* [2014] EWCA CA Civ 906.

The English courts will first identify and assess the seriousness of the failure. Is the breach 'serious or significant'? If it is, why did the default occur? The court will consider all the circumstances of the case in order to deal with the application 'justly', including the need for efficient and proportionate litigation. Importantly the court will consider the need for compliance with court rules and court orders.

This final factor recognises the importance to the wider community of the efficient use of court resources. It is not fair that a party who instructs solicitors who are unable to cope with the demands of a significant claim (or defence) take up the valuable and limited resources that the court has. Broadly, the English courts have rejected failures by solicitors as being good reasons.

The examples of good reasons given by the Court of Appeal in *Mitchell* were things which are outside the control of the party in default. They said that overlooking a deadline or pressures of overwork were not likely to be sufficient. However, the solicitor suffering a debilitating illness, an accident or a later development in the litigation which shows that the original deadline was unreasonable may be sufficient.

While the courts justify the application of the principle by reference to the court's resources, there is a positive side effect. It is at least a partial recognition that as the world moves faster, so the courts need to move faster too.

In contrast, in *Shanley* the Inner House seems to suggest that the failings of a solicitor can found an excuse and relief from dismissal.

Scotland & England

The English position was driven by the Jackson reforms. The English courts also have the benefit of a steady throughput of cases on a very large range of issues. Tricky issues can be discussed and decided, and the guidance recorded in the bible of all English law practitioners, the White Book.

While the reforms introduced by the Act are welcome, the real test is whether they attract day to day business to the Scottish courts. Scotland may have the highest quality judges, and an impressive history, and now a level playing field when it comes to options on costs

and procedures, but it is the way in which individual cases are managed that really make an impression on clients.

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