

## INTRODUCTION

Maria, Thank you; and Ladies and Gentlemen Good afternoon; As Maria has said I am Joseph d'Inverno. Since 2005, I have held full time appointment as an Employment Judge sitting in the Employment Tribunal (Scotland); and previously, in a part time capacity from 2002. Prior to taking up Judicial Appointment I practised for some 21 years as a solicitor, including 10 as a solicitor advocate.

I have been privileged to be a member of the Scottish Civil Justice Council, since its inception in 2013, and to have served on the Access to Justice Committee since its first meeting in December of that year. My aim today is to say something to you of the work of That Committee - both regarding what it has been doing since it was set up, and about what it is planning to do in the future.

## WHAT HAS THE COMMITTEE BEEN DOING?

The Scottish Civil Justice Council has tasked the Access to Justice Committee with looking at the implications of Proposed Civil Courts Reform on litigants and potential litigants who, of course, lie at the heart of the courts system. A key aspect of providing access to justice is ensuring that provision for the resolution of disputes is widely accessible, and includes those who do not have access to professional legal representation.

With this in mind, one area at which the Committee is looking is that of arrangements for actions conducted by Party litigants – that is, by those who represent themselves in court.

People may find themselves without legal representation in court for many reasons, for example as a result of; being unaware of the help available or of not having the funds to instruct a solicitor; And those who do, are likely to be unfamiliar with courts and court procedure, and may find the prospect of conducting their case to be daunting .

In December of last year, The Committee published a comprehensive literature review, about party litigants and the support available to them. The review looked at research in this area, and at recent developments in other jurisdictions. It also examined such guidance, advice and support as is currently available to party litigants in Scotland, and the difficulties which they encounter.

The review identified that while in-court advice services funded by the Scottish Legal Aid Board are thought to be helpful to those representing themselves, and thereby to increase access to justice, currently, such services are only available in some courts.

One of the options available, to those unable to access professional legal representation is having a lay representative, or non-legally qualified person, assist them in the court. At present however, the rules regarding what lay assistance may consist of differ, as between the Sheriff Court and the Court of Session; something which can prove confusing to party litigants and lay representatives. This, therefore, is an area at which the Committee intends to look in the future.

In that area, and in others, I am able to bring to the deliberations of the Access to Justice Committee experience of the Employment Tribunal which is an example of an adversarial civil court, in which a number of the procedural changes,

recommended in the Scottish Civil Justice Review for introduction to the Sheriff Court and Court of Session, have already been in operation for some considerable time) -. For example, in the Employment Tribunal, although frequently benefiting from appearance by Scottish and English qualified Solicitors, Counsel and Solicitor Advocates, the right of audience is not, and never has been, restricted to those who are professionally qualified, and the Employment Tribunal remains[ “a court designed by Parliament for access to Justice by Party Litigants”].

### Alternative Dispute Resolution

Now a word about Alternative Dispute Resolution or ADR, which the Committee has also been examining. Alternative Dispute Resolution is, of course, an umbrella term encompassing various techniques for resolving conflict outside of the court. It is generally classified into six types: negotiation, mediation, arbitration, conciliation, collaborative law (most frequently encountered in the area of family disputes) and, early neutral evaluation. ADR, with the exception of arbitration, is for the most part a type of facilitated settlement. It is termed ‘alternative’ in that, in theory at least, the legal system is not involved in either the process or the outcome of the dispute, or, even if initially in the process, ultimately not in the outcome.

As a way of resolving disputes, ADR is generally regarded as both cheaper and quicker than going to court, although, importantly, it may not be suitable for all types of case. In some situations, it is also thought to be more likely to provide solutions that people want, as the Remedy which a court can deliver is constrained by the 4 corners of the writ or summons, whereas, in a settlement achieved by ADR, e.g. through mediation, parties are at liberty to include whatever elements they wish. For these reasons it may well have a significant part to play in increasing access to justice.

The Committee has therefore been looking at this area in some detail, and published a relative literature review in December of last year. This examined the various methods of ADR which exist, and reviewed the current availability of such arrangements in Scotland. For example, the Edinburgh Sheriff Court Mediation Project is funded by the Scottish Legal Aid Board and has reported a settlement rate of 78% of cases where the parties had opted for mediation. However, at the moment in Scotland, such in-court mediation services are the exception rather than the norm.

One such exception has already delivered a measure of success in the Employment Tribunal where, with the engagement of seven trained Judge Mediators, of whom I am one, "Judicial Mediation", has been operating, in more complex cases, since 2010. Enjoying an average annual success rate of in excess of 75%; it has also proved most cost effective, both for parties and from an Administration of Justice perspective, with an average of 103 listed (sederunt) hearing days per annum saved, for an average of 18 days of Judicial time expended on Judicial Mediation.

The review also examined the different approaches to alternative dispute resolution found in other jurisdictions. For example, in the Netherlands, there is a strong presumption in favour of ADR reflecting the Dutch legal doctrine that litigation should only be available as a final option or *ultimum remedium*.

The Committee's Future consideration of alternative dispute resolution will be informed by the results of a research project, which the SCJC has jointly funded with the Scottish Legal Aid Board.

The research will examine two ADR projects funded by SLAB:- the Edinburgh Sheriff Court Mediation Project, and the Tayside Court Advice Project; And is

intended to assist in the development of alternative options for resolving civil disputes, both before they come to court and once they have become court actions.

### Simple Procedure

Since the Courts Reform (Scotland) Act 2014 received Royal Assent on 10<sup>th</sup> November last year, much of the work of the Committee has focused on the development of the rules for the Simple Procedure, required to implement section 72 of the Act. The simple procedure will be a new procedure replacing small claims and summary causes, in actions less than five thousand pounds.

This new departure in court rules in Scotland is being developed with party litigants in mind. It is intended that the rules be understandable to lay people with a purpose of helping party litigants navigate their way through the process of bringing, what are currently small claims or summary cause actions.

For example, one approach under consideration is setting out the procedure as a series of questions and answers such as *'what are the sheriff's powers?'* and *'how do you make a claim?'*.

The development of the policy for the simple procedure is at an advanced stage, and it is intended that the draft rules be submitted to the Council for initial consideration at its' September meeting, later this year. A formal consultation on the draft Simple Procedure is planned, before implementation in spring 2016.

## WHAT THE COMMITTEE WILL DO NEXT

Once the simple procedure rules have been submitted to the Council, the Committee will turn its mind to consideration of the next steps, which lead on from the literature reviews that it has published.

Following the review of arrangements for party litigants the Committee plans to re-examine the court rules relating to lay representation, with a view to making recommendations to the Council.

Likewise, having reviewed alternative dispute resolution, the Committee will be considering; - whether sufficient information about ADR is available to all parties; whether there should be any element of compulsion to engage with ADR; and, at what point during the lifetime of a case, its use or possible use, would be most appropriately focussed.

And lastly, as already mentioned, the Committee will conduct a consultation about the new simple procedure, before its planned implementation in spring of next year.

## CONCLUSION

In closing, and on behalf of Lady Wise our Chair and all members of the Access to Justice Committee, I express our thanks to all those who have contributed to the work of the Committee, and make particular mention of the sterling work of the legal drafters.

Now, it only remains for me to introduce the next speaker, Eric Baijal, who is going to tell you about the work of the Costs and Funding Committee.