

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill

[AS AMENDED AT STAGE 2]

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Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill

[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to make provision about success fee agreements; to make provision about expenses in civil litigation; to make provision about the offices of the Auditor of the Court of Session, the auditor of the Sheriff Appeal Court and the auditor of the sheriff court; and to make provision about the bringing of civil proceedings on behalf of a group of persons.

PART 1

SUCCESS FEE AGREEMENTS

1 Success fee agreements

(1) In this Part, 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—

(a) 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

(b) 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.

(2) In this section—

“claims management services” means services consisting of the provision of advice or services, other than legal services, in connection with the making of a claim for damages or other financial benefit, including—

(a) advice or services in relation to—

(i) legal representation,

(ii) the payment or funding of costs associated with making the claim,

(b) referring or introducing one person to another,

(c) making inquiries,

“legal services” means services consisting of the provision of legal advice, assistance or representation,

“payment” includes a transfer of assets and any other transfer of money’s worth,
“relevant services” means legal services or claims management services provided
in connection with a matter—

- (a) which is the subject of civil proceedings to which the recipient is a party
before a Scottish court or tribunal, or
- (b) in relation to which such proceedings are in contemplation,

“Scottish court or tribunal” means a court or tribunal established under the law of
Scotland.

- (4) In this Part, the following terms, in relation to a success fee agreement, are to be
construed in accordance with this section—

“payment”,
“provider”,
“recipient”,
“relevant services”,
“success fee”.

2 Enforceability

- (1) A success fee agreement is not unenforceable by reason only that it is a pactum de quota
litis (that is, an agreement for a share of the litigation).
- (2) Subsection (1) does not affect any other ground on which a success fee agreement may
be unenforceable.

3 Expenses in the event of success

- (1) This section applies where the recipient of relevant services under a success fee
agreement—
- (a) is awarded expenses in civil proceedings concerned with a matter to which the
agreement relates, or
- (b) agrees with another person that the recipient is entitled to recover expenses from
that person in relation to such a matter.
- (2) Unless the success fee agreement provides otherwise—
- (a) the provider is entitled to recover and retain the expenses so far as those expenses
relate to the relevant services provided by the provider in relation to the matter,
and
- (b) the amount of the success fee to be paid under the agreement is not affected by the
amount of expenses recovered and retained by the provider.
- (3) Subsection (2) is subject to section 17(2A) of the Legal Aid (Scotland) Act 1986 (which
makes provision for circumstances in which expenses recovered are to be paid to the
Scottish Legal Aid Board).

4 Power to cap success fees

- (1) The Scottish Ministers may by regulations make provision for or about the maximum amounts of success fees that may be provided for under success fee agreements.
- (2) Regulations under subsection (1) may specify maximum amounts or provide for them to be determined in accordance with the regulations.
- (3) Subsection (4) applies where the maximum amount of the success fee that may be provided for under a success fee agreement is restricted by—
- (a) provision made in regulations under subsection (1), and
 - (b) another enactment.
- (4) The maximum amount of the success fee that may be paid under the agreement is the lower of the amounts allowed for by the enactments mentioned in subsection (3)(a) and (b).
- (5) A success fee agreement is unenforceable to the extent that it provides for a success fee of an amount that is higher than the maximum amount allowed for by virtue of this section.

5 Exclusion for certain matters

- (1) A success fee agreement must not be entered into in connection with a matter which may be the subject of civil proceedings of a description specified by the Scottish Ministers in regulations.
- (1A) Regulations under subsection (1) may relate to all success fee agreements or to success fee agreements of a description specified by the Scottish Ministers in the regulations.

6 Personal injury claims

- (1) This section applies to a success fee agreement entered into in connection with a claim for damages for—
- (a) personal injuries, or
 - (b) the death of a person from personal injuries.
- (2) The agreement must provide that the recipient of the relevant services is not liable to make any payment (including outlays incurred in providing the services) to the provider in respect of the services, apart from the success fee, regardless of whether any damages are obtained.
- (3) In subsection (2), “outlays” do not include any sums paid in respect of insurance premiums in connection with the claim to which the agreement relates.
- (4) The agreement must not provide that any damages for future loss obtained in connection with the claim (the “future element”) will be included in the amount of damages by reference to which the success fee is to, or may, be calculated (the “relevant amount of damages”).
- (7) The agreement is unenforceable to the extent that it makes provision contrary to subsection (2) or (4).
- (9) In subsection (1), “personal injuries” include any disease and any impairment of a person’s physical or mental condition.

7 Form, content etc.

- (1) A success fee agreement must be in writing.
- (2) A success fee agreement must specify the basis on which the amount of the success fee is to be determined.
- 5 (3) The Scottish Ministers may by regulations make further provision about success fee agreements including in particular provision about—
- (a) their form and content (including their terms),
 - (b) the manner in which they may be entered into,
 - (c) their modification and termination,
 - 10 (d) the resolution of disputes in relation to such agreements,
 - (e) the consequences of failure to comply with the requirements of subsection (1) or (2) or the regulations,
 - (f) the application of this Part, or any provision made under it, where a recipient receives relevant services from more than one provider in connection with the same matter.
- 15 (4) Regulations under subsection (3) may modify this section so as to—
- (a) add text to it,
 - (b) modify any text added under paragraph (a).

PART 2

EXPENSES IN CIVIL LITIGATION

8 Restriction on pursuer's liability for expenses in personal injury claims

- (1) This section applies in civil proceedings where—
- (a) the person bringing the proceedings makes a claim for damages for—
 - (i) personal injuries, or
 - 25 (ii) the death of a person from personal injuries, and
 - (b) the person conducts the proceedings in an appropriate manner.
- (2) The court must not make an award of expenses against the person in respect of any expenses which relate to—
- (a) the claim, or
 - 30 (b) any appeal in respect of the claim.
- (3) Subsection (2) does not prevent the court from making an award in respect of expenses which relate to any other type of claim in the proceedings.
- (4) For the purposes of subsection (1)(b), a person conducts civil proceedings in an appropriate manner unless the person or the person's legal representative—
- 35 (a) has acted fraudulently in connection with the claim or proceedings, or makes a fraudulent representation,

- (b) behaves in a manner which is manifestly unreasonable in connection with the proceedings, or
- (c) otherwise, conducts the proceedings in a manner that the court considers amounts to an abuse of process.

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- (5) For the purpose of subsection (4)(a), the standard of proof is the balance of probabilities.
 - (6) Subsection (2) is subject to any exceptions that may be specified in an act of sederunt under section 103(1) or 104(1) of the Courts Reform (Scotland) Act 2014.
 - (7) In subsection (1)(a), “personal injuries” include any disease and any impairment of a person’s physical or mental condition.

10 **9 Representation free of charge**

- (1) This section applies in civil proceedings where—
 - (a) a party to the proceedings is represented by a legal representative, and
 - (b) some (or all) of that representation is provided free of charge.
- (1A) The party must disclose to the court the fact that some (or all) of the representation is provided free of charge.
- (2) The court may order a person to make a payment to the charity designated under subsection (3) in respect of the representation which was provided free of charge.
- (2A) In considering whether to make an order under subsection (2) and the terms of such an order, the court must have regard to—
 - (a) whether, had the representation not been provided free of charge, the court would have awarded expenses in respect of the representation, and
 - (b) if so, what the terms of the award would have been.
- (3) For the purposes of subsection (2), the Lord President of the Court of Session must designate a charity which—
 - (a) is registered in the Scottish Charity Register, and
 - (b) has a charitable purpose (however described) of improving access to justice in respect of civil proceedings in Scotland.
- (3A) Subsection (2) does not apply in relation to representation provided under section 28 of the Equality Act 2006 (legal assistance).
- (4) In this section, “free of charge” means otherwise than for or in expectation of a fee, gain or reward.

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10 Third party funding of civil litigation

- (1) This section applies where a party to civil proceedings receives financial assistance in respect of the proceedings from another person (whether directly or through an intermediary) who is not a party to the proceedings (“the funder”).
- (2) The party receiving financial assistance must disclose to the court—
 - (a) if known to the party, the identity of the funder and any intermediary, and
 - (b) the nature of the assistance being provided.

- (2A) If the funder has a financial interest in respect of the outcome of the proceedings—
- (a) the party receiving the assistance must disclose that interest to the court once the substantive issues in dispute in the proceedings have been decided or otherwise resolved, and
 - (b) the court may make an award of expenses against the funder and any intermediary.
- (2B) Subsection (2A) does not apply where the assistance is provided under a success fee agreement (within the meaning of section 1).
- (3A) Subsection (2A) does not apply where the assistance is provided by a trade union or similar body which represents the interests of workers.
- (3B) This section does not apply where the assistance is provided in respect of family proceedings by—
- (a) the spouse or civil partner of the party receiving the assistance,
 - (b) a person living with the party as if they were married to each other,
 - (c) a parent of the party,
 - (d) a child of the party,
 - (e) a sibling of the party (whether of the full-blood or of the half-blood).
- (4) For the purposes of this section—
- “family proceedings” has the same meaning as in section 135 of the Courts Reform (Scotland) Act 2014,
- “financial assistance” does not include a payment from the Scottish Legal Aid Fund.
- (5) This section is subject to an act of sederunt under section 103(1) or 104(1) of the Courts Reform (Scotland) Act 2014.

11 Awards of expenses against legal representatives

- (1) This section applies in civil proceedings where the court considers that a legal representative of a party to the proceedings has committed a serious breach of that representative’s duties to the court.
- (2) The court may make an award of expenses against the legal representative.
- (3) This section is subject to any limitations that may be specified in an act of sederunt under section 103(1) or 104(1) of the Courts Reform (Scotland) Act 2014.

12 Minor and consequential modifications of the Courts Reform (Scotland) Act 2014

- (1) The Courts Reform (Scotland) Act 2014 is amended as follows.
- (1A) In section 81(5)(b) (expenses in simple procedure cases), for “unreasonably” substitute “in a manner which is manifestly unreasonable”.
- (2) In section 103(2) (examples of how the power to regulate procedure and practice in the Court of Session may be exercised)—
 - (a) in paragraph (j), for “to parties to” substitute “in”,
 - (b) in paragraph (k), after “parties” insert “or persons representing such parties”.

- (3) In section 104(2) (examples of how the power to regulate procedure and practice in the sheriff court and Sheriff Appeal Court may be exercised)—
- (a) in paragraph (j), for “to parties to” substitute “in”,
 - (b) in paragraph (k), after “parties” insert “or persons representing such parties”.

5 **12A Meaning of “legal representative”**

In this Part, “legal representative” means—

- (a) a solicitor enrolled in the roll of solicitors kept under section 7 of the Solicitors (Scotland) Act 1980,
- (b) a member of the Faculty of Advocates,
- 10 (c) any other person who may exercise a right of audience or conduct litigation in civil proceedings on behalf of a party to the proceedings.

PART 3

AUDITORS OF COURT

13 **Auditors of court**

- 15 (1) There is to continue to be—
- (a) an office of the Court of Session called the Auditor of the Court of Session,
 - (b) an office of the Sheriff Appeal Court called the auditor of the Sheriff Appeal Court,
 - (c) an office called the auditor of the sheriff court.
- 20 (2) In this Part, the holders of those offices are referred to as the “auditors of court”.
- (3) The Scottish Courts and Tribunals Service (“the SCTS”) has the function of appointing individuals to hold those offices.
- (4) A person’s appointment as an auditor of court—
- (a) lasts for such period, and
 - 25 (b) is on such other terms and conditions,
- as the SCTS may determine.
- (5) The auditors of court are also members of the staff of the SCTS and, accordingly, a reference in any enactment to the staff of the SCTS includes, except where the context requires otherwise, a reference to the auditors of court.
- 30 (6) The Auditor of the Court of Session is to continue to be a member of the College of Justice.
- (7) The schedule modifies enactments in relation to the auditors of court.

13A Temporary Auditor of the Court of Session

- (1) Subsection (2) applies during any period when—
- 35 (a) the office of the Auditor of the Court of Session is vacant, or

- (b) the holder of that office is for any reason unable to carry out the functions of the office.
- (2) The Lord President may appoint a person to act as the Auditor of the Court of Session during that period.
- 5 (3) A person appointed under subsection (2)—
- (a) is to be appointed on such terms and conditions as the Lord President determines,
- (b) while acting as the Auditor of the Court of Session, is to be treated for all purposes, other than those of sections 13(4), (5) and (6) and 15(1) and (5), as the Auditor of the Court of Session.

10 **14 Auditors' functions**

- (1) An auditor of court—
- (a) is to tax such accounts of expenses as are remitted to the auditor for taxation by a court or tribunal,
- 15 (b) has such other functions as are conferred on that office by an enactment (including this Act).
- (2) An auditor of court may tax such accounts as are submitted to the auditor for taxation otherwise than on remission from a court or tribunal or where required by an enactment.
- (3) An auditor of the sheriff court may—
- 20 (a) tax an account of expenses remitted to any auditor of the sheriff court by a court or tribunal,
- (b) exercise the functions of that office in any sheriffdom.

15 Guidance

- (1) The Auditor of the Court of Session must issue guidance to the auditors of court about the exercise of their functions.
- 25 (2) The guidance may, in particular, include guidance relating to the types and levels of expenses that may be allowed in an account of expenses.
- (2A) When preparing the guidance, the Auditor of the Court of Session must have regard to the desirability of auditors of court exercising their functions in a manner which is consistent and transparent.
- 30 (3) An auditor of court (including the Auditor of the Court of Session) must have regard to the guidance when exercising the auditor's functions.
- (4) The guidance must—
- (a) be in writing, and
- (b) be published (as soon as reasonably practicable after it is issued) in such manner
- 35 as the Auditor of the Court of Session considers appropriate.
- (5) The Auditor of the Court of Session may, from time to time, issue revised guidance (and the references to guidance in subsections (2) to (4) include references to any revised guidance).

16 Reports

- (1) The Scottish Courts and Tribunals Service (“the SCTS”) must publish, for each financial year, a report setting out the information mentioned in subsection (2) in relation to—
- (a) the Auditor of the Court of Session,
 - (b) the auditor of the Sheriff Appeal Court,
 - (c) the auditors of the sheriff court.
- (2) That information is—
- (a) the number of judicial taxations carried out during the year, and the amount of fees charged in respect of those taxations,
 - (b) the number of other taxations carried out during the year, and the amount of fees charged in respect of those taxations,
 - (c) the amount of fees charged in respect of any other work carried out during the year.
- (3) A report must be published—
- (a) as soon as practicable after the end of the financial year to which it relates,
 - (b) in such manner as the SCTS considers appropriate.
- (4) For the purposes of subsection (2), a judicial taxation is the taxation of an account of expenses remitted for taxation to an auditor of court by a court or tribunal.

PART 4

GROUP PROCEEDINGS

17 Group proceedings

- (1) There is to be a form of procedure in the Court of Session known as “group procedure”, and proceedings subject to that procedure are to be known as “group proceedings”.
- (2) A person (a “representative party”) may bring group proceedings on behalf of two or more persons (a “group”) each of whom has a separate claim which may be the subject of civil proceedings.
- (3) The Court must specify the proceedings as opt-in group proceedings or opt-out group proceedings.
- (3A) “Opt-in group proceedings” are group proceedings which are brought on behalf of each group member who opts in by notifying the representative party, in a manner and by a time specified, that the claim should be included in the group proceedings.
- (3B) “Opt-out group proceedings” are group proceedings which are brought on behalf of each group member except any group member who opts out by notifying the representative party, in a manner and by a time specified, that the claim should not be included in the group proceedings.
- (4) A person may be a representative party in group proceedings—
- (a) whether or not the person is a member of the group on whose behalf the proceedings are brought,
 - (b) only if so authorised by the Court.

- (5) There is to be no more than one representative party in group proceedings.
- (6) Group proceedings may be brought only with the permission of the Court.
- (6A) The Court must designate a description of a group of persons whose claims are eligible for inclusion in the group proceedings.
- 5 (7) The Court may give permission—
- (a) only if it considers that all of the claims made in the proceedings raise issues (whether of fact or law) which are the same as, or similar or related to, each other,
 - (aa) only if it is satisfied that a group or the representative party has made all reasonable efforts to identify and notify all potential members of the group, and
 - 10 (b) in accordance with provision made in an act of sederunt under section 18(1).
- (8) In group proceedings, the representative party may—
- (a) make claims on behalf of the members of the group,
 - (b) subject to provision made in an act of sederunt under section 18(1), do anything else in relation to those claims that the members would have been able to do had 15 the members made the claims in other civil proceedings.
- (9) Section 11 of the Court of Session Act 1988 (jury actions) does not apply to group proceedings.

18 Group procedure: rules

- (1) The Court of Session may make provision by act of sederunt about group procedure.
- 20 (2) Without limiting that generality, the power in subsection (1) includes power to make provision for or about—
- (a) persons who may be authorised to be a representative party,
 - (b) action to be taken by a representative party in connection with group proceedings (whether before or after the proceedings are brought),
 - 25 (c) types of claim that may not be made in group proceedings,
 - (d) circumstances in which permission to bring group proceedings may be refused,
 - (e) appeals against the granting or refusal of such permission,
 - (f) the disapplication or modification of section 39 of the Courts Reform (Scotland) Act 2014 (exclusive competence of the sheriff court) in relation to group 30 proceedings,
 - (g) the making of an additional claim in group proceedings after the proceedings have been brought (including the transfer of a claim made in other civil proceedings),
 - (h) the exclusion of a claim made in group proceedings from the proceedings (including the transfer of the claim to other civil proceedings),
 - 35 (i) the replacement of a representative party,
 - (j) steps that may be taken by a representative party only with the permission of the Court.
- (3) Nothing in an act of sederunt under subsection (1) is to derogate from section 17.

- (4) An act of sederunt under subsection (1) may make—
- (a) incidental, supplementary, consequential, transitional, transitory or saving provision,
 - (b) provision amending, repealing or revoking any enactment relating to matters with respect to which an act of sederunt under subsection (1) may be made,
 - (c) different provision for different purposes.
- (5) This section is without prejudice to—
- (a) any enactment that enables the Court to make rules (by act of sederunt or otherwise) regulating the practice and procedure to be followed in proceedings to which this section applies, or
 - (b) the inherent powers of the Court.
- (6) In subsection (2), “representative party” is to be construed in accordance with section 17(2).

PART 4A

REVIEW OF OPERATION OF ACT

18A Review of operation of Act

- (1) The Scottish Ministers must, as soon as practicable after the end of the 5 year period, review the operation of this Act and lay before the Scottish Parliament a report on that review.
- (2) The report must, in particular, contain information about the effect of the operation of—
- (a) section 8,
 - (b) section 17,
- on access to justice and the administration of Scottish courts.
- (3) The report must include a statement by the Scottish Ministers setting out—
- (a) whether they intend to bring forward proposals to modify any provision of this Act, and
 - (b) where no such proposals are to be brought forward, their reasons for not doing so.
- (4) The Scottish Ministers must, as soon as practicable after the report has been laid before the Parliament, publish the report in such a manner as they consider appropriate.
- (5) In this section, “the 5 year period” means the period of 5 years beginning with the day of Royal Assent.

PART 5

GENERAL PROVISION

19 Regulations

- (1) Any power of the Scottish Ministers to make regulations under this Act includes power to make—

(a) incidental, supplementary, consequential, transitional, transitory or saving provision,

(b) different provision for different purposes.

(2) Regulations under section 4(1), 5(1), 6(8), 7(3) and (*Fees in respect of cases to which section 8(1) applies*)(1) are subject to the affirmative procedure.

(3) Regulations under section 20(1)—

(a) which add to, replace or omit any part of the text of an Act are subject to the affirmative procedure,

(b) otherwise, are subject to the negative procedure.

(4) This section does not apply to regulations under section 22(2).

20 Ancillary provision

(1) The Scottish Ministers may by regulations make any incidental, supplementary, consequential, transitional, transitory or saving provision they consider appropriate for the purposes of, in connection with or for giving full effect to this Act or any provision made under it.

(2) Regulations under this section may modify any enactment (including this Act).

21 Meaning of “court”

In this Act, in relation to civil proceedings in the sheriff court, a reference to the court includes a reference to the sheriff conducting the proceedings.

22 Commencement

(1) This Part comes into force on the day after Royal Assent.

(1A) Part 4A comes into force at the end of the period of 2 months beginning with the day of Royal Assent.

(2) The other provisions of this Act come into force on such day as the Scottish Ministers may by regulations appoint.

(3) Regulations under subsection (2) may—

(a) include transitional, transitory or saving provision,

(b) make different provision for different purposes.

23 Short title

The short title of this Act is the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018.

SCHEDULE
(introduced by section 13)

AUDITORS OF COURT: MODIFICATION OF ENACTMENTS

Court of Session Act 1821

5 1 The Court of Session Act 1821 is repealed.

Administration of Justice (Scotland) Act 1933

2 The following provisions of the Administration of Justice (Scotland) Act 1933 are repealed—

(a) section 25(2),

10 (b) section 26,

(c) section 27(1),

(d) section 28.

Solicitors (Scotland) Act 1980

15 2A In the Solicitors (Scotland) Act 1980, in section 51(3) (complaints to the Scottish Solicitors' Discipline Tribunal), after paragraph (c) insert—

“(ca) the auditor of the Sheriff Appeal Court.”

Law Reform (Miscellaneous Provisions) (Scotland) Act 1990

3 In the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, section 36(4) is repealed.

20 *Legal Profession and Legal Aid (Scotland) Act 2007*

4 In the Legal Profession and Legal Aid (Scotland) Act 2007, in section 2(2)(b) (receipt of complaints by Scottish Legal Complaints Commission: preliminary steps), after subparagraph (v) insert—

“(va) the auditor of the Sheriff Appeal Court.”

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill

[AS AMENDED AT STAGE 2]

An Act of the Scottish Parliament to make provision about success fee agreements; to make provision about expenses in civil litigation; to make provision about the offices of the Auditor of the Court of Session, the auditor of the Sheriff Appeal Court and the auditor of the sheriff court; and to make provision about the bringing of civil proceedings on behalf of a group of persons.

Introduced by: Michael Matheson
Supported by: Annabelle Ewing
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