RECOMMENDATIONS OF SHERIFF PRINCIPAL TAYLOR'S REVIEW OF EXPENSES AND FUNDING OF CIVIL LITIGATION IN SCOTLAND

CHAPTER 2 COST OF LITIGATION – JUDICIAL EXPENSES

Recovery of Judicial Expenses

Commercial actions

1. The present criteria for awarding an additional fee should be revised for commercial actions. This would involve listing a number of criteria to include i) complexity ii) specialised knowledge or skill iii) whether there is any legal precedent for the issues iv) urgency v) likely volume of paperwork or electronic material vi) number of parties with a distinct interest vii) net value of the claim viii) commercial status of the parties and ix) expert witness requirements. Each of these criteria should be given a weighting and solicitors required to complete a pro-forma setting out their assessment of the case under each of the criteria when arriving at their view on the level of additional fee which should apply.(Paragraph 66)

2. The concept of an additional fee should be retained for commercial actions with the decision as to what the additional percentage should be falling to be made at the outset of the proceedings. The maximum percentage increase should be 100%. (Paragraph 78)

3. Any application for an additional fee in a commercial action should not have retrospective effect. The extent of any additional fee should be kept under review during the litigation but any review should also not have retrospective effect. (Paragraph 78)

4. The block table of fees should be framed to more fully reflect the procedure in commercial actions and should be designed to incentivise efficiency. (Paragraph 78)

5. There should be an option available to parties and the court in commercial cases whereby the hourly rates used in the calculation of judicial expenses are the hourly rates which the solicitors for the successful party have charged their client. (Paragraph 78)

Actions subject to judicial case management

6. The concept of an additional fee should be retained for all other litigations subject to active judicial case management with the decision as to what the additional percentage should be falling to be made at the outset of the proceedings. The maximum percentage increase should be 100%. (Paragraph 79)

7. Any application for an additional fee should not have retrospective effect. The extent of any additional fee should be kept under review during the litigation but any review should also not have retrospective effect. (Paragraph 79)

8. The existing block tables of fees should be revised with a view to incentivising efficiency. (Paragraph 79)

Actions subject to case flow management

9. The issue of whether there should be an additional fee in actions subject to case flow management, such as personal injury actions, should be resolved at the conclusion of the proceedings, as is the case at present. The maximum percentage increase should be 100%. (Paragraph 80)

10. The block tables of fees for personal injury actions should be revised with a view to incentivising efficiency. (Paragraph 80)

Motions for an additional fee

11. The Judicial Institute for Scotland should include in its training programme guidance as to how to approach motions for an additional fee. (Paragraph 81)

12. In actions subject to judicial case management the member of the judiciary in whose docket the case is placed should determine whether an additional fee is appropriate and what the percentage increase should be. (Paragraph 81)

13. In actions subject to case flow management the member of the judiciary hearing the motion for an additional fee should determine whether an additional fee is appropriate and what the percentage increase should be. (Paragraph 81)

Review of level of fees for litigation

14. The Scottish Civil Justice Council should form a sub-committee to deal with the level of fees for litigation which may be recovered as expenses. Membership should include the users of the system (such as the existing members of the Lord President's Advisory Committee on Solicitors' Fees), the funders of the system (such as a representative of the insurance industry and also a representative of the Scottish Legal Aid Board), a sheriff court auditor, a sheriff, a law accountant, a lay person who may well be an economist and someone to represent the interests of the consumer. (Paragraph 102)

Interest on Judicial Expenses

15. The courts should have the power to award interest on judicial expenses from 28 days after an account of expenses has been lodged. (Paragraph 130)

16. An account of expenses in sheriff court actions must be lodged no later than four months from the date of the final interlocutor. If the party fails to comply with this time limit, leave of the court will be required to lodge the account late, subject to such conditions (if any) as the court thinks fit to impose. (Paragraph 130)

CHAPTER 3 COST OF LITIGATION – JUDICIAL EXPENSES

Counsel's Fees

The sheriff court

17. The current test for granting sanction for the employment of counsel in the sheriff court should remain one based on circumstances of difficulty or complexity, or the importance or value of the claim, with a test of reasonableness also being applied.(Paragraph 8)

18. When deciding a motion for sanction for the employment of counsel in the sheriff court, the court should have regard, amongst other matters, to the resources which are being deployed by the party opposing the motion in order that no party gains an undue advantage by virtue of the resources available to them. (Paragraph 9)

Actions subject to judicial case management in the sheriff court

19. For cases proceeding under active judicial case management in the sheriff court a motion for sanction for the employment of counsel should be made at the start of the proceedings or, at a later stage, on cause shown. (Paragraph 15)

20. Counsel's fees should be a competent outlay in a judicial account of expenses only from the date of an interlocutor sanctioning the employment of counsel. (Paragraph 15)

21. Where counsel is required to be instructed urgently, either before the raising of proceedings or during the proceedings, parties may apply for retrospective sanction provided that the application for sanction is sought as soon as is reasonably practicable following the instruction of counsel, which will normally be at the next case management hearing. Any refusal of a motion will be *in hoc statu* and a new motion can be enrolled in the event of there being a change in circumstances. (Paragraph 15)

22. The amount of fees for counsel which can be recovered as an outlay in a judicial account should be stipulated by the sheriff at the hearing to sanction the employment of counsel. (Paragraph 25)

Court of Session

23. In actions in the Court of Session, an instructing solicitor should be obliged to inform the opposing party that junior and/or senior counsel has been instructed. (Paragraph 38)

Recoverable charges for counsel

24. Counsel and solicitor advocates should be entitled to recover a cancellation fee where a case settles within two working days of the first scheduled day of a hearing. The fee should be determined by the number of days for which the hearing was set down. It should be calculated as follows:

Scheduled length of hearing	Fee
Up to 7 days	1 day
Up to 11 days	2 days
Up to 15 days	2½ days
16 days or more	3 days

Equivalent provisions should apply if a case settles after a hearing commences. That is to say, the fee should be for one day if there are up to seven days of the hearing remaining; two days if there are up to eleven days remaining; and so forth. (Paragraph 57)

25. Save for fees to cover the three elements of preparation, appearance and cancellation, counsel and solicitor advocates should not be able to recover any other payment. The concept of a commitment fee should play no part in a judicial account. (Paragraph 58)

Fees of expert witnesses

26. When assessing the reasonableness of instructing an expert and what that expert should be paid, the court should have regard to the proportionality of instructing the expert and his or her charges. (Paragraph 64)

27. Certification of an expert witness should be obtained prior to his or her instruction in cases proceeding under active judicial case management in the Court of Session and in the sheriff court or, where that is not possible, such as when an expert has to be instructed before the raising of the action, as soon as reasonably practicable after proceedings are initiated. In most circumstances, this will be at the first case management hearing. Any refusal of a motion will be *in hoc statu*. The test to be applied will be whether that instruction at that time was reasonable. (Paragraph 73)

28. For cases proceeding under active judicial case management in the Court of Session and in the sheriff court, expert witnesses' fees should be recoverable from the date of certification. For parties who seek retrospective sanction of expert witnesses instructed prior to the commencement of litigation, any fees reasonably incurred would become a competent outlay at this stage. Should a party fail to obtain certification as soon as reasonably practicable after proceedings are initiated, they should not be able to recover in a judicial account any fee charged by the expert witness during the period between when it would have been reasonably practicable to obtain certification and when it was achieved. (Paragraph 77)

29. For cases proceeding under active judicial case management in the Court of Session and in the sheriff court, the amount of expert witnesses' fees that can be recovered as an outlay in a judicial account should be stipulated by the presiding judicial officer at the hearing for the certification of an expert witness. (Paragraph 87)

CHAPTER 4 PREDICTABILITY

Fixed expenses

30. The court should have a discretion to restrict recoverable expenses in a small claim in cases where a defender, having stated a defence, has decided not to proceed with it. This should be reflected in the rules for the new simple procedure. (Paragraph 21)

31. With the exception of personal injury actions, recoverable expenses in actions under the simple procedure should be fixed. (Paragraph 69)

32. When a case is remitted from the simple procedure to the ordinary cause roll, the scale upon which expenses should be assessed should be a matter for the discretion of the court that allows the remit and should be determined at the time the remit is made. (Paragraph 70)

33. A model along the lines of the Patents County Court should be introduced for cases proceeding under Chapter 47 of the Rules of the Court of Session (commercial actions). (Paragraph 72)

Summary assessment of expenses

34. A procedure for the summary assessment of expenses should be introduced as a pilot for commercial actions in the Court of Session and sheriff court. (Paragraph 107)

Expenses management

35. A system of expenses management should be introduced as a pilot scheme for commercial actions in the Court of Session. (Paragraph 145)

36. One of the sheriff courts where commercial procedures have been available for some time, such as Glasgow where commercial procedures have been available since 1999, should participate in the expenses management pilot. (Paragraph 146)

CHAPTER 5 PROTECTIVE EXPENSES ORDERS

37. The power to apply for a protective expenses order in Scotland should be available in all public interest cases. However, the decision on whether to award a protective expenses order, and at what level, ought to be a matter for judicial discretion unless otherwise prescribed in Rules of Court for particular types of actions, such as those falling within the scope of the Public Participation Directive. (Paragraph 33).

38. Protective expenses orders ought to be available in multi-party actions but only where a public interest can be demonstrated. (Paragraph 37)

CHAPTER 6 BEFORE THE EVENT INSURANCE

39. Where an insured exercises the right to instruct a solicitor of choice, and that solicitor and the insurer cannot agree rates, the difference between what the insurer pays its panel solicitors and what the solicitor of choice charges should be borne by the insured. (Paragraph 64)

40. It should be made clear in the Before the Event insurance policy that should the insured exercise the right to instruct a solicitor of choice rather than be represented by the insurer's choice of solicitor, he or she may be liable to pay any difference between the respective charges. (Paragraph 65)

41. Solicitors should be under an obligation to explore with their clients all potential funding options, including the possibility that the client may be covered by an existing Before the Event insurance policy, at the time when the solicitor is first instructed. In

addition, solicitors should be obliged to write to clients with their reasoned recommendation as to which funding option best suits the client's position. The letter should specify all other forms of funding for which the client might qualify, such as legal aid, speculative fee agreements or damages based agreements and specify why, in the opinion of the solicitor, the method recommended is the best funding mechanism for the client. (Paragraph 79)

CHAPTER 7 SPECULATIVE FEE AGREEMENTS

42. The maximum success fee which can be charged in a speculative fee agreement in relation to personal injury cases should be capped with respect to what may be taken out of damages as follows. A cap of 20% (inclusive of VAT) should be set on the first £100,000 of damages, 10% (inclusive of VAT) on damages between £100,001 and £500,000, and 2.5% (inclusive of VAT) on all damages over £500,000. These caps should apply to all heads of damages. Solicitors should not be obliged to offset the judicial expenses against the success fee to which they are entitled. (Paragraph 67)

43. The maximum success fee which can be charged in a speculative fee agreement in relation to an application to an employment tribunal should be capped at 35% (inclusive of VAT) of the monetary award recovered. (Paragraph 68)

44. For all other civil actions funded by speculative fee agreements, the maximum success fee which can be charged should be capped at 50% of the monetary award recovered. (Paragraph 69)

45. In a speculative fee agreement to fund a personal injury action, the solicitor should be required to meet counsel's fees and all other unrecovered outlays, plus VAT, out of the success fee. The only outlay which should remain the responsibility of the client is any premium to obtain After the Event insurance cover, should the client deem that necessary. (Paragraph 72)

CHAPTER 8 QUALIFIED ONE WAY COSTS SHIFTING

46. A qualified one way costs shifting regime should be introduced in Scotland for personal injury, including clinical negligence, litigation. The regime should apply whether there is a single pursuer or a multiplicity of pursuers. (Paragraph 51)

47. A qualified one way costs shifting regime should apply to appeals from decisions in personal injury cases. (Paragraph 53)

48. In the event that a pursuer's successful action for personal injuries includes an unsuccessful non-personal injury element and there is an order for expenses against the pursuer for that unsuccessful element, such award will be enforceable against the pursuer. (Paragraph 54)

49. If the claim, or an element of it, is made for the financial benefit of someone other than the pursuer, the benefit of qualified one way costs shifting will extend only to the element of the claim which may benefit the pursuer. (Paragraph 54)

50. In the event that the recommendation of the Scottish Civil Courts Review to adopt the rule in *Carver v BAA plc* is implemented in Scotland, the court should have a discretion to determine whether the pursuer acted reasonably in not accepting a defender's tender and thus the extent to which the pursuer should be liable to meet the defender's entitlement to judicial expenses from the date of the tender. In the event that the recommendation of the Scottish Civil Courts Review is not implemented, the pursuer's liability to meet the defender's post tender judicial expenses should be limited to 75% of the damages awarded. (Paragraph 72)

51. Where the court finds that fraud on the part of the pursuer is established on the balance of probabilities, the pursuer should lose the benefit of one way costs shifting. (Paragraph 75)

52. Where a pursuer's conduct is found by the court to have been an abuse of process, the pursuer should lose the benefit of one way costs shifting. (Paragraph 76)

53. Where a pursuer's case is disposed of summarily, the pursuer should lose the benefit of one way costs shifting. Conversely, the pursuer should be entitled to found on the defender's failure to move for summary disposal should the defender subsequently argue that the benefit of one way costs shifting should fly off. (Paragraph 77)

54. Where a pursuer conducts the litigation in an unreasonable manner, the pursuer should lose the benefit of one way costs shifting. For the avoidance of doubt, the test of unreasonableness should be that set out in the case of *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation*. (Paragraph 78)

CHAPTER 9 DAMAGES BASED AGREEMENTS

55. Damages based agreements entered into by solicitors in cases where a monetary award is sought should be enforceable in Scotland, other than in family actions. (Paragraph 70)

56. Where a damages based agreement has been entered into, solicitors should be entitled to retain the judicial expenses in addition to the agreed success fee. (Paragraph 81)

57. In personal injury cases funded by a damages based agreement, the maximum percentage which can be deducted from damages should be on a sliding scale, as follows. On the first £100,000 of damages, the maximum should be set at 20% (inclusive of VAT), on damages between £100,001 and £500,000 the maximum should be set at 10% (inclusive of VAT), and on any damages over £500,000, the maximum should be set at 2.5% (inclusive of VAT). (Paragraph 88)

58. In employment tribunal cases funded by a damages based agreement, the maximum percentage which can be deducted from the monetary award should be 35% (inclusive of VAT). (Paragraph 89)

59. In commercial actions funded by a damages based agreement, the maximum percentage which can be deducted from the monetary award should be 50% (inclusive of VAT). (Paragraph 90)

60. Damages based agreements may be entered into in commercial cases on a 'no win lower fee' basis. (Paragraph 90)

61. All damages based agreements in personal injury actions should be on the basis of 'no win no fee' as opposed to 'no win lower fee.' (Paragraph 91)

62. The damages from which a success fee may be recoverable under a damages based agreement may include damages for future loss. (Paragraph 103)

63. Should an order for periodical payments be made by the courts, the success fee in a damages based agreement should be calculated by reference to the award of damages excluding the periodical element. (Paragraph 108)

64. Where a pursuer is funded by a damages based agreement and the agreed damages contains an element for future loss in excess of £1 million, the solicitor will require to obtain either the approval of the court or a report from an independent actuary certifying that it is in the best interests of the pursuer that damages should be paid by way of a lump sum as opposed to periodical payments before the pursuer's solicitor will be entitled to make a deduction from the future loss element of an award of damages in order to satisfy the success fee. (Paragraph 111)

65. In the preparation of the report from an independent actuary, the actuary must meet the pursuer outwith the presence of the solicitor. The liability for the actuary's fee should fall upon the solicitor should the solicitor advise that a lump sum award be made, regardless of the actuarial recommendation. (Paragraph 111)

66. Where a client is advised by his or her solicitor to accept periodical payments but elects to accept a lump sum payment of damages instead, the solicitor is entitled to calculate his or her success fee only by reference to the award of damages, excluding the periodical element which the client would have received had the advice been accepted. (Paragraph 112)

67. In a damages based agreement to fund a personal injury action, the solicitor should be required to meet counsel's fees and all other unrecovered outlays out of the success fee, plus VAT. (Paragraph 115)

68. Only solicitors, members of the Faculty of Advocates and claims management companies which are regulated should be entitled to enter into damages based agreements. (Paragraph 115)

69. Prior to entering into a damages based agreement with a client, a lawyer or claims management company should be obliged to write to the client setting out in clear language what percentage will be deducted by way of a fee from the damages awarded, when and how the client may terminate the agreement, and the client's obligations in the event of such termination by the client. How conflicts of interest are to be managed should they arise must also be specified. It should also be made clear who will have the responsibility to meet an award of judicial expenses against the client. (Paragraph 116)

70. There should be a 14 day cooling off period after a client enters into a damages based agreement which would be mandatory, save in circumstances where a client's interests would be prejudiced. (Paragraph 117)

CHAPTER 10 REFERRAL FEES

71. Only regulated bodies should be entitled to charge a referral fee. (Paragraph 64)

72. Solicitors should be under an obligation to provide clients who have been referred to them by a third party agency with a written statement which should a) list all potential

factors which a responsible referring agency might consider relevant when making a referral and b) indicate whether such factors played a part in the selection of the particular solicitor for the referral. Relevant factors would include, but not necessarily be limited to i) the particular skill possessed by the solicitor, ii) whether there has been a quality control audit of the solicitor or the firm of solicitors, iii) whether the result of such an audit is available for inspection by the client, and iv) the basis upon which the solicitor is to be remunerated if legal costs are to be met by the referring agency, for example, by a Before the Event insurer. The statement should also indicate that the services provided may be available elsewhere, for example, from a firm that does not have an arrangement with the referring party. The statement should also set out the means by which the referring agency obtains its business. (Paragraph 68)

73. The referring agency should be under an obligation to provide to the solicitors to whom the client is being referred such information as is necessary to enable the solicitors to fulfil their obligations. (Paragraph 68)

74. Claims management companies, and those acting on their behalf, should not be permitted to cold call prospective clients. (Paragraph 70)

75. Solicitors who obtain clients from a claims management company should be obliged to satisfy themselves that the claims management company does not obtain clients by cold calling. (Paragraph 70)

CHAPTER 11 ALTERNATIVE SOURCES OF FUNDING

Third Party Funding

76. There should be a voluntary Code of Practice to which third party funders should conform. (Paragraph 49)

77. A professional funder who finances part of a pursuer's expenses of litigation should be potentially liable for the judicial expenses of the opposing party to the extent of the funding provided. Any award of expenses against the funded litigant should be on a joint and several basis, with the funder's liability capped at the extent of the funding provided by it. (Paragraph 57)

78. In all civil litigation in the Scottish courts, parties should be under an obligation to disclose to the court and intimate to all parties the means by which the litigation is being funded at the stage when proceedings are raised or notification given that a case is to be defended. Thus if an action is being funded by a trade union or a damages based agreement, for example, it should be disclosed in the same manner as a legally aided party is obliged to disclose that assistance has been obtained from the Legal Aid Fund. Disclosure should include both the type of funding and the identity and address of the funder. It should not include details of the financial agreement made between the funder and the funder's client before the case has been decided as this may provide opponents with too deep an insight into the funder's view as to the strength of the funded case. (Paragraph 63)

Self-Funding Schemes

79. The Scottish Government should commission financial modelling work on the viability of establishing a Contingent Legal Aid Fund to fund outlays in cases of alleged clinical negligence. The outcome of the modelling will dictate the parameters of the Contingent Legal Aid Fund. (Paragraph 127)

***Pro Bono* Funding of Litigation**

80. The civil courts in Scotland should be granted an express power to enable them to make an award of expenses in favour of a successful party who has been represented on

a *pro bono* basis. Payment of that award should be made to a charity prescribed by the Lord President. The charity must be a registered charity which provides financial support to persons who provide, organise or facilitate the provision of legal advice or assistance free of charge. (Paragraph 157)

81. When a judicial account of expenses is prepared by or on behalf of a party whose representation was *pro bono,* it should be prepared on the normal party and party basis. (Paragraph 161)

CHAPTER 12 MULTI-PARTY ACTIONS

82. Expenses management should be mandatory in all actions that proceed under multiparty procedure unless the case management judge determines otherwise, having regard to all the circumstances. (Paragraph 71)

83. Damages based agreements should be available for use in multi-party actions, subject to the same restrictions as are set out in Chapter 9 for damages based agreements. (Paragraph 81)

84. The test for making an award of expenses against the multi-party action fund should be that set out in section 19 of the Legal Aid (Scotland) Act 1986. (Paragraph 85)

CHAPTER 13 REGULATION

85. There ought to be a regulator of claims management companies. (Paragraph 18)

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