

MEETING OF THE SCOTTISH CIVIL JUSTICE COUNCIL

COSTS AND FUNDING COMMITTEE

THURSDAY 26 MAY 2022, AT 4.15 PM

VIA WEBEX

MINUTES

Members Present:

Lord Harrower (Chair)
Ian Dickson
Andrew Henderson
Stewart Mullen
Alan Rogerson
Robin Macpherson

In Attendance:

Lisa Davidson (SG)
John Hutchison (Offices of the Court of Session)

Support:

Craig McCorkindale (Director of Strategy, SCJC)
Karen Stewart (Policy Manager, SCJC)
Paula Preston (Policy Officer, SCJC)

Apologies:

Sheriff Hughes
James Mure QC
Susan Black (SG)

Item 1: Welcome, apologies and agreement of private papers:

1. The Chair welcomed those present. The apologies tendered by Sheriff Hughes, John Mure and Susan Black were noted.
- 2. The Committee agreed not to publish Paper 3.1 and Paper 3.3.**

Item 2: Previous Meeting:

2.1 Items by correspondence (Paper 2.1)

3. There was one item by correspondence; approving the minutes of the Committee meeting of 13 December 2021.
- 4. The Committee noted the contents of Paper 2.1.**

Item 3: Work Programme:

3.1. CAFC Working Group - Pre Action Protocol Fees: Business Update (Paper 3.1)

5. **Paper 3.1** provided an update, along with a revised timetable, for the development of fee structures to support the Pre-Action Protocols.

6. The Committee noted the update provided.

3.2 Update from the Scottish Government on legislative developments (Oral)

7. The oral update from Scottish Government covered:
- Preparing for stage 2 of the Coronavirus (Recovery and Reform) (Scotland) Bill;
 - The commencement of sections 9-11 of the Civil Litigation (Expenses & Group Proceedings)(Scotland) Act 2018;
 - The pending Legal Aid Reform Bill; and
 - The laying of the Court Fee Orders for 2022-25, which include fee exemptions for Protective Expenses Orders.

8. The Committee noted the update provided.

3.3 Rules Review: Protective Expenses Orders (Paper 3.3)

9. The Committee considered **Paper 3.3** which set out the matters for consideration in response to the six issues flagged in the 2021 Compliance Report from the Aarhus Convention Compliance Committee (ACCC).

Issue 1 – The Type of Claims Covered

10. Since first introduced in 2012, the definition of proceedings has limited the scope of the PEO rules to judicial review proceedings and statutory appeals, within the Court of Session. Discussions indicated that it is appropriate to consider extending that scope to other environmental law cases initiated within the Court of Session. The Committee would like to see further information on the type of cases involved, in order to inform their drafting instructions.
- 11. The secretariat is to provide further data on the types of environmental law cases arising within the Court of Session.**
12. Extending the scope further to environmental law cases arising within the sheriff courts requires a better understanding of the nature of the public nuisance cases that arise. The potential exposure to costs and expenses within those cases would need to be assessed, relative to the existing test for actions being prohibitively expensive.

13. The secretariat is to provide further data on the types of public nuisance cases arising within the sheriff courts.

Issue 2 – The Level Of Cost Caps

14. The 2018 PEO rules were amended to provide the court with the flexibility to move the £5k and £30k caps up or down on “cause shown”, rather than adopting the ACCC preference for caps being treated as a maximum figure. The setting of those £5k and £30k figures remains somewhat arbitrary.

15. The Committee discussed the option of reverting to the cost caps being treated as a fixed maximum sum. A straight cap without flexibility can appear somewhat draconian given that it removes the courts discretion to take a differing approach by exception. That said, a high number of cases going through on cause shown would imply the rule was being abused. Data on how the rule is operating would be helpful.

16. The Committee agreed that the current rules do provide the courts with a level of discretion that is warranted for use on a ‘by exception’ basis.

17. The secretariat is to provide further data on how often that exception for “on cause shown” is used in practice.

Issue 3 – The Differential In Cost Protection On Appeal

18. The 2018 PEO rules require a differential approach to be taken i.e. an applicant may need to make two applications for a PEO (one for proceedings heard at first instance and one on appeal), whereas the respondent only makes the one application with their PEO automatically carried forward for any appeal. That position reflected a view that a fresh application would be required to take account of the different circumstances that may pertain on appeal. That approach was consistent with the need to provide finality of the courts decisions, and the need to minimise potential routes for unnecessary onwards appeals.

19. The Committee discussed the perception of unfairness that arises with the differential approach being taken.

20. The secretariat is to liaise with the LPPO to identify the drafting options available.

Issue 4 – The Disclosure Of Financial Information

21. There is a potential chilling effect in any situation where a person risks the unnecessary disclosure of their financial information. The fact remains that the court does need to be provided with sufficient information to form a view on whether the test for an action being prohibitively expensive is met. That

information includes an awareness of pro bono representation, but that information does not need to be conveyed to the wider public. It should be possible for the rules to reinforce the need for financial information to be provided to the courts “in confidence”.

22. The Committee agreed that the court does need to know the basis of representation, but that does not need to be a matter of public record.

23. The secretariat is to review how confidentiality is addressed within other court procedures, and identify the drafting options available.

Issue 5 – The Recovery of Intervener Costs

24. The discussion on the rules for intervener’s was postponed.

25. The secretariat will arrange for this topic to be revisited at the next meeting.

Issue 6 – The Recovery Of Court Fees

Recovery is for payments actually made:

26. The perception of uncertainty was linked to the case of *Keating v the Advocate General for Scotland* [2020 CSOH 75]. In the Committee’s view, that judgement does not create uncertainty around the recovery of court fees it simply reinforces two key points that would apply in any jurisdiction:

- The courts do expect to see court fees included within an account of expenses as taxed, providing they have actually been paid; and
- Recovery should not be claimed where no payment was made.

27. With regard to that second bullet point; paragraph 25 of the judgment made it clear that Mr Keating had not paid the £8,000 in court fees included within his estimate of taxed expenses, as he had qualified for an exemption on the basis of his financial situation.

Fee exemptions for environmental law cases:

28. Paragraph 35 of the Keating judgment includes the following statement:

So far, PEOs in Scotland appear only to have regulated legal expenses, and have not extended to an exemption from court fees.

29. That should be read as a suggestion for the Scottish Government to at least consider introducing fee exemptions. In that regard the Scottish Government recently promulgated the Court of Session etc. Fees Order 2022¹ which now addresses that gap in policy. From 1 July 2022 onwards a Fee Exemption will be available for the environmental law cases raised within the Court of Session.

¹ <https://www.legislation.gov.uk/ssi/2022/185/schedule/1/made>

30. In practice, the availability of that fee exemption means that as an applicant will not need to pay a court fee in the first place they will have no need to subsequently seek recovery. That does reduce the relevance of discussions on this 'perceived' uncertainty with the recovery of court fees.

31. The secretariat should draft a relevant web page to help reinforce to party litigants the key elements expected within an account of taxed expenses.

32. The secretariat should draft a response to the ACCC outlining why applicants are not exposed to additional risk with recovery of court fees.

Item 5: AOB:

33. There were no other matters raised.

Item 6: Date of next meeting:

34. The next meeting will be scheduled in due course, in accordance with business priorities.

**Scottish Civil Justice Council Secretariat
May 2021**