Informing Progress – Shaping the Future

A Response by the Forum of Insurance Lawyers to the SCJC Consultation on the Review of Fees in the Scottish Civil Courts – Fees of Solicitors

November 2017

Informing Progress – Shaping the Future

FOIL (The Forum of Insurance Lawyers) exists to provide a forum for communication and the exchange of information between lawyers acting predominantly or exclusively for insurance clients (except legal expenses insurers) within firms of solicitors, as barristers, or as in-house lawyers for insurers or self-insurers. FOIL is an active lobbying organisation on matters concerning insurance litigation.

FOIL represents over 8,000 members. It is the only organisation which represents solicitors who act for defendants in civil proceedings.

This response has been drafted following consultation with the membership.

Any enquiries in respect of this response should be addressed initially to:

Shirley Denyer, Shirley
Denyer LLP, Technical
Director for FOIL

info@foil.org.uk

FOIL
1 Esher Close
Basingstoke,
Hampshire RG22 6JP

SCJC Consultation on the Review of Fees in the Scottish Civil Courts – Fees of Solicitors

Overarching comments on consultation as a whole

The Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill is presently proceeding through the Scottish Parliament. That proposes to radically alter the landscape of expenses and fees in Scotland, notably by introducing qualified one-way costs shifting (QOCS) and allowing solicitors to enter into damages based agreements (DBAs).

Until such time as the present Bill runs its course and there is an adequate opportunity to review matters after any legislation comes into force, we consider it premature to consult on changes to the Tables of Fees and certainly premature to make any such changes.

At this time, there is no draft legislative indication of the percentage of damages which solicitors may be allowed to take as fee in terms of a DBA. Sheriff Principal Taylor suggested, in his evidence on the present Bill given to the Justice Committee of the Scottish Parliament on 31 October 2017 that regulation of the percentage of damages which solicitors may take as fee under a DBA is best left to secondary legislation. That point underlines the prematurity of the present consultation. Further, the implications of DBAs, if introduced, on additional fees remain to be determined.

With the above in mind, we suggest that this consultation is put on hold until at least one year after the enactment of any legislation to introduce QOCS and DBAs (including secondary legislation on the regulation of DBAs in terms of percentages of damages).

1. Are amendments required to the Tables of Fees to ensure that fees recoverable are proportionate? If yes, please detail the amendments proposed and provide any evidence you may have to support your proposal.

Without detracting from the points made above, we offer here some comments on suggested amendments to the Tables of Fees to ensure proportionality and also to enhance another theme on expenses which has been touched on by all who have given evidence to date on the present Bill, predictability. We take "proportionality" here to be with reference to the value of the claim (as agreed or determined by the court).

It is not unusual, in our collective experience, to see pursuers' judicial accounts at a level of around £8,000 (fees alone) in personal injury cases settled before the pre-trial meeting stage at around £4,000 damages. Expenses can surely not be considered "proportionate" where they are double the principal sum involved.

One way to achieve greater proportionality in "low value" cases (where the damages are £5,000 or less) is to extend the present provisions for percentage

reductions. The following table shows the current provisions in that regard (per General Regulation 14(f)):

Action	Percentage reduction
of a value from £1,000 to £2,500 (excepting personal injury claims)	25%
of a value of less than £1,000	50%

We see no good reason to exclude personal injury claims in the £1,000 - £2,500 bracket from the 25% reduction. Moreover, we consider that the figures to which a percentage reduction should apply should be extended, as shown in the following table:

Action	Percentage reduction
of a value from £4,000 to £5,000	20%
of a value from £3,000 to £4,000	30%
of a value from £2,000 to £3,000	40%
of a value from £1,000 to £2,000	50%
of a value of less than £1,000	60%

In the alternative, to enhance predictability, especially in "low value" claims, we consider that Scotland should be brought into line with England and Wales on "fixed recoverable costs". Those are now embedded in England and Wales, with the UK Government's Permanent Secretary to the Ministry of Justice commenting, on 16 October 2017, that "the next big thing we can do … is to try and extend fixed recoverable costs to as many areas of civil litigation as possible".

A link to the present Ministry of Justice webpage on Fixed Costs is here: https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part45-fixed-costs.

2. Are amendments required to the Table of Fees to ensure that they better reflect the work being undertaken?

We believe one of the most effective control mechanisms to ensure fees reflect the work being undertaken is to be found in the powers invested in the Auditor of Court. Given the procedural changes and introduction of ASPIC and its similarities to Court of Session procedure we believe that the Auditor in the Sheriff Court should have complete discretion when dealing with assessing fees and that the fees shown should be a maximum with the ability to modify downwards. This allows parties to better predict their litigation spend at the outset which is a cornerstone of access to justice.

We believe that there are certain elements listed below where the fees can be manipulated by pursuers' solicitors to produce a larger account. We have mentioned the issues and suggested amendments.

Precognition fees - It is fair to say that precognitions are particularly problematic for defenders. We regularly see precognitions of the pursuer stretching up to 20 pages for fairly straightforward personal injury actions under £10,000. There was an example given from one of our members of a £750 services claim that also carried with it £3,500 in fees for the precognitions of the service providers. The charge per sheet system can create a level of fee which is disproportionate to the level of claim. As matters currently stand there is no mechanism to prevent pursuer's solicitors carrying out, and being paid for, excessive and disproportionate work. We would recommend the use of one block fee for all precognitions and if that needs to be adjusted to a higher single fee then we would support that.

Production Fee – defender's agents regularly see numerous inventories lodged by pursuers for items that could have been lodged in one inventory. The current structure is such that fees can be deliberately inflated by delaying the disclosure of information. We believe one fee for lodging inventories would encourage early and full disclosure and would also be easier for the court and witnesses at a hearing.

Specification of Documents – pursuers agents routinely enrol unnecessary specifications for Hospital, GP and employment records that have already been recovered via mandate or could be recovered by mandate pre-litigation. Specification should be reserved for when a request for information via mandate has not been complied with.

Process fee – the process fee of 10% which can be added to Sheriff Court personal injury actions over £5000 should be removed. It is not charged in the Court of Session and we see no need or justification for this.

3. Are amendments required to the Table of Fees to reflect changes in practice and/or procedure?

There have been a number of changes in practice and procedure which encourage early disclosure, both pre and post litigation. The fee for hearing limitation has not been modified to reflect the fact that solicitors are now able to charge for work which might previously have fallen within the work carried out under hearing limitation. The exchange of documents, reports etc. is a requirement of the voluntary and compulsory pre action protocols. The rules for commercial, ordinary and personal injury actions are all now designed to encourage disclosure of evidence, agreement of facts and limitation of matters in dispute. Pre–proof conferences and pre-trial meetings are arranged with the purpose of trying to limit matters in dispute. The hearing limitation fee requires to be amended to take account of these changes in practice and procedure.

4. Is there a requirement for a general modification of the level of fees provided for in the Table of Fess?

(i) As noted in the preliminary comments to this response, we consider that it is not possible to answer this question in isolation at this time and that this should be considered only once the expected progression of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill into law takes place. In particular, we consider that the effects of DBAs and QOCS must first be assessed and monitored to allow this issue be properly considered in the round.

(ii) There is also still uncertainty regarding whether and when there will be effective regulation of CMCs and their commercial relationships with solicitors. At the moment we see no justification for any blanket increase in the level of fees provided by the Table of Fees.

(iii) Should DBAs become enforceable and QOCS become operational as anticipated, there may well be an argument for (at least in relation to Pursuers) a downwards modification of the recoverable fees. Otherwise it may be the case that those solicitors acting for Pursuers will effectively receive a windfall payment in recoverable judicial expenses in addition to the DBA fee and the removal of the risk of litigation afforded to them by the operation of QOCS, will lead to an unintended and undesirable imbalance between the parties to a litigation in relation to the recoverable expenses and remuneration of solicitors. The recent introduction of Pursuer's Offers and the penalty faced by Defenders in relation to expenses in that regard adds a further element of risk and burden of expenses on Defenders that does not apply to pursuers and further adds to the imbalance between parties that we perceive to be developing at this time.

(iv) The existing hourly rate provided under the Tables of fees for court work, at £156 per hour, for example, already compares very favourably with the hourly rate that our members are able to charge their clients and we can see no justification for those acting for pursuers being able to routinely recover any more than that, particularly given the anticipated allowance of DBAs and the operation of QOCS.

5. Is it necessary to consider any additional fees that are not currently included in the Table of Fees?

Given the uncertainty surrounding the introduction of the Civil Litigation (Expenses and Group Proceedings) Scotland Bill, which proposes inter alia the introduction of damages based agreements and qualified one-way costs shifting (QOCS), we consider the consultation on the review of Fees of Solicitors to be premature.

The current Tables of Fees makes sufficient provision to cover all work required to be undertaken by Solicitors throughout the duration of a litigated action.