



Law Society
of Scotland

Consultation Response

Consultation on the Review of Fees in the Scottish Civil Courts : Fees of Solicitors

27 November 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Civil Justice Sub-committee welcomes the opportunity to consider and respond to the Scottish Civil Justice Council consultation: Consultation on the Review of Fees in the Scottish Civil Courts : Fees of solicitors. The Sub-committee has the following comments to put forward for consideration.

Background

This consultation response has been prepared by the Society's Civil Justice Committee ("the Committee").

The Committee is made up of many civil litigation practitioners who regularly represent pursuers, defenders, local authorities, banks and insurers appearing in all of the civil courts which operate throughout Scotland. Members of the Committee deal regularly with litigation cases of the type being considered by this consultation and are very familiar with the many issues that arise for solicitors from running a civil litigation caseload across the court system in Scotland. Although the members of the Committee represent both pursuers and defenders and they do have some conflicting views in certain instances, the response submitted represents a common consensus view on behalf of all solicitors where that is possible.

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General Comments

The Committee of the Law Society of Scotland welcomes the opportunity of commenting on the Scottish Civil Justice Council's paper on the issue of fees payable to solicitors operating in the Scottish civil courts referred to in that paper.

In very general terms, the Committee understands and accepts that as a matter of public policy it is crucial that courts are adequately funded while also ensuring that access to justice is maintained for parties involved in any litigation.

On the more specific question of fees recovered by solicitors in civil litigation, it is important to recognise that the manner in which claims are pursued is developing constantly and that the work carried out by solicitors bringing claims on behalf of clients now involves significantly more work at the pre-litigation stage than has traditionally been the case. The Committee believes that it is important that the Table of Fees reflects that. Solicitors involved in litigation face increasing pressures in providing good service to clients and the fees that are recovered for doing that need to be accurate and updated on a regular basis. As an absolute minimum requirement, the Committee considers that fees should keep track of inflation to ensure that the true rate of recovery is not gradually eroded with time.

From previous research carried out in this area, the Committee is aware that the level of recovery of judicial expenses in civil litigation is usually at least 50 per cent of the total of the actual cost of running litigation (in some instances the recovery level is higher and can sometimes get closer to 80 per cent but this depends on a number of factors and varies from case to case). For solicitors and their clients, this automatically presents a challenge as there is an immediate gap between what will be recovered if the action is successful and what will have to be paid to achieve that and there has to be an arrangement in place to fund that gap.

From the Committee's experience, there is a concern that the amount of funding needed to make up the difference between the two figures is increasing year on year, particularly as the majority of cases see a level of recovery of judicial expenses much closer to the 50 per cent end of the range set out. If that process has been correctly identified and continues, there is a very real risk that this will disincentive potential pursuers and could actually lead to situations where claims which could succeed if litigated may not even be raised and leave parties without access to a remedy.

For solicitors dealing with civil litigation, it is well known that the fees recoverable as judicial expenses have not increased for several years and that has meant that the true rate of recovery has actually fallen slightly

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during that period in real terms. Against a background where there is a real prospect of court fees payable when running litigation being increased to match inflation, it would be unfair if there was not - as a minimum acceptable level - a similar increase in recoverable judicial expenses.

An increase above inflation would be welcomed by solicitors but there are reasons why that may not be practical and the Committee's principal position is to maintain a fair playing field. Solicitors already carry responsibility for having to pay court fees as the case goes on and carrying a debit balance for their clients pending recovery of expenses at the end of the case and it is important that there is not a further burden placed on them.

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Specific Comments

1. Are amendments required to the Table of Fees to ensure that fees recoverable are proportionate?

In the Committee's view, while perhaps not intentional, the current system already has a large degree of proportionality built into it and that reduces the need for any amendment. In any litigation, the existence of a taxation of an account of recoverable expenses provides protection for parties when considering this and an auditor is able to reflect the peculiarities of a case in making a decision on any account.

The Committee considers that there are currently differences between Court of Session work and Sheriff Court work and in personal injury work (about 90% of which is in the Sheriff Court) that does have an impact for solicitors. Going forward, a much bigger issue is inconsistency between different Sheriffdoms in how judicial expenses are decided upon but the Committee recognises that is very difficult to control.

Underlying all of this is a recognition that any claim, regardless of value, requires a basic amount of work to carry out investigation and research at the start. How much work needs carried out doing that does not increase on a proportionate scale reflecting the value of the claim and that is not something that will be corrected by any adjustment to the Table of Fees.

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

As mentioned in 1 (above), there is a concern for solicitors that the current Table of Fees does not reflect the work undertaken, principally work at the outset of any litigation. For solicitors, the difficulty they face is that much of that work is not recoverable by way of judicial expenses and therefore needs to be funded by clients. Reference has already been made to the concerns that raises in our general comments (above).

Specifically there is a concern about the figure for the instruction fee. In ASPIC, a fee of £78 is included for drafting an initial writ and on any reasonable view, that is totally inadequate given the amount of work involved in what is after all the principal document to get a litigation underway.

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For parties involved in opposed motions in ASPIC, it would be fairer if the flat fee currently used for motions was dropped and the fee accurately reflected the length of the motion itself and the amount of time spent by solicitors waiting to be heard (in some circumstances, this can be considerable).

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

With the huge increase in communication between solicitors and clients by email which means solicitors spend far more time communicating with clients than they would by phone or letter, the current process fee - set at 10 per cent on top of total fees - has arguably become unrealistic and outdated and should be reviewed.

Beyond that, further reference is made to the Committee's earlier comments about the amount of work involved at the outset of a claim (including pre-litigation) and the proportionate disconnect between that and the value of the claim.

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

Further reference is made to (a) the true level of work carried out by solicitors pre-litigation and at the outset regardless of the value of the claim (b) a minimum of an inflationary increase on a regular basis to avoid a gradual erosion of the value of judicial expenses in real terms.

As previously mentioned, it is accepted that a level of protection is offered to the paying party by the taxation process.

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

The Committee has no proposals for any additional fees to be included in the Table of Fees.

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