

SCOTTISH CIVIL JUSTICE COUNCIL
COSTS AND FUNDING COMMITTEE (CAFC)

MINUTES (APPROVED)

PARLIAMENT HOUSE, 4.15PM, MONDAY 25 MAY 2015

Members present: Lord Burns (Chair)
Sheriff Charles Stoddart (Retired)
James Mure QC
Ian Dickson (SLAB)
Stephen O'Connor (Manager of the Expenses and Funding of Civil Litigation Bill Team, Scottish Government)
Alan Rogerson (Claims Manager, Aviva & PIC member)
Iain Nicol (Solicitor)
Eric Baijal (Solicitor, SCJC member)

Personal Injury Committee members present until item 4 : Sheriff K Mackie (Edinburgh Sheriff Court & PIC member)
Amber Galbraith, Advocate (PIC member)
Maria Maguire QC (PIC member)
Ronnie Conway (Solicitor Advocate & PIC member)
Gordon Keyden (Solicitor & PIC member)
Fraser Simpson (Solicitor & PIC member)

In attendance: Gillian Prentice (Deputy Principal Clerk of Session)
John Thomson (Deputy Legal Secretary to the Lord President)
Inez Manson (Deputy Legal Secretary to the Lord President)
Anne Hampson (Policy Officer, SCJC Secretariat)
Susan Brodie (Policy Officer, SCJC Secretariat)

Apologies: Jane MacDonald (Policy and Legislation Branch, SCS)
Lindsay Montgomery (Chief Executive, SLAB)
Kenneth Cumming (Auditor of the Court of Session)
Sheriff Thomas Hughes (Dundee Sheriff Court)

Item 1: Introduction, welcome, apologies and private papers

1. The Chair welcomed all in attendance and thanked the members of the Personal Injury Committee (PIC) who were in attendance to share their views on the matters outlined in Paper 3.1A (sanction for counsel) and Paper 3.1B (additional fees), and in particular to discuss their application to personal injury actions. They were also invited to provide any comments they may have on the draft rules for the determination of the value of an order (exclusive competence). Apologies from members were noted.
2. **The Committee agreed not to publish the following papers: 3.1A, 3.1B, 3.2A and 3.2B.**

Item 2: Minutes of previous meeting

Item 2.1: Minutes of previous meeting [Paper 2.1]

3. **The Committee approved the minutes of the previous meeting.**

Item 3: Joint Meeting with Personal Injury Committee (PIC)

Item 3.1: Implementation of the Recommendations of the Taylor Review [Papers 3.1A & 3.1B]

4. John Thomson addressed **Papers 3.1A and 3.1B.**

The CAFC and members of the PIC (collectively, “the Group”) discussed the two papers in turn.

Discussion Paper 1 – Counsel and solicitor advocates

The Timing of the Application for Sanction

5. The Group discussed the difficulties of trying to decide an appropriate stage at which an application for sanction should be made. It was considered that flexibility would be necessary, rather than specifying a particular point in the proceedings by which an application must be made. There was a concern that specifying a particular point might lead to a deluge of early applications for sanction. PIC members stated that, for PI case flow actions, their preference would be for sanction to be dealt with by motion rather than by building a fixed hearing for this purpose into the PI rules. The Group discussed how pre-action protocols would theoretically assist in the procedure of applying for sanction for counsel at an early stage in proceedings, but noted that pre-action protocols may not be in force until late 2016. In the meantime, applying for sanction at an early stage in proceedings may prove to

be difficult. In principle CAFC members were in favour of sanction for the employment of counsel having only prospective effect. However, they considered that the process requires flexibility to enable the court to make a decision based on the merits of each individual action. They therefore agreed that setting a time limit for seeking sanction would be arbitrary. It should instead be possible to apply for sanction at any time, but the granting of retrospective sanction should be dependent on the sheriff being satisfied that cause had been shown for the failure to apply for sanction in advance. It was agreed that the requirement for advance sanction should not apply in relation to cases subject to case flow management.

Sanctioning the cause or sanctioning work

6. The Group considered that the 'normal' situation should be for parties to apply for sanction of the cause as a whole (rather than specific pieces of work). Otherwise, there is a risk that parties might make numerous separate applications for sanction of pieces of work in cases where they are not confident about their prospects of obtaining sanction of the cause as a whole. However, the Group also noted that flexibility would be required, in that there may be occasions where it is appropriate to apply for sanction of specified items of work. The situation regarding SLAB not providing legal aid for sanction for solicitor advocates within a sheriff court action was raised but not discussed in detail. **It was agreed that the sheriff should have the choice of either sanctioning the cause as suitable for the employment of counsel, or sanctioning specified items of work. Where the cause has been sanctioned it should be for the auditor to determine if the employment of counsel for any particular item of work was reasonable. It should be possible for a party who has been refused sanction to renew the application at a later stage, but where the cause has been sanctioned in advance it should not be possible for the opposing party to apply to have the sanction recalled on a change of circumstances.**

Simple Procedure

7. The Group discussed the possibility of sanction for counsel being applied for in cases brought under the new simple procedure. It was considered that if sanction for counsel was applied for, it would be questionable whether the case should continue under simple procedure. **Ultimately, the Group concluded that in these circumstances, it would be more appropriate for the case to be remitted to the ordinary cause and that the fees of counsel should therefore not be a recoverable outlay under the simple procedure.**

Other recommendations

The Group also discussed recommendation 22 (limit on recoverable counsel's fees to be set by sheriff when sanction granted), recommendation 23 (provision of information to opposing party), and recommendation 24 (cancellation fees). **Members agreed that they did not favour the implementation of recommendation 23, that recommendations 22 and 24 should not be acted on meantime, but that these recommendations should be revisited in the event of the Court of Session being given the power to regulate the fees of advocates and solicitor advocates.**

Discussion Paper 2 – Additional Fees

8. The Group strongly felt that an early decision on additional fees is even more difficult to achieve than an early decision on sanction for counsel – particularly without pre-action protocols. Members of the PIC expressed the view that Sheriff Principal Taylor's recommendations on additional fees tended to focus on commercial actions. Discussions also took place regarding the percentage level and cap of an additional fee. PIC members stated that in personal injury cases, the percentage uplift is often higher than 100% (150% or 200% in some cases). **Members of the CAFC agreed that the status quo for additional fees should be retained for all actions other than commercial actions. CAFC agreed to consult further with the Consultative Committee on Commercial Actions (CCCA).**

Item 3.2 Exclusive Competence

9. The Chair confirmed that the draft rules for exclusive competence were considered and approved by the SCJC at its meeting of 11 May 2015. The PIC members did not express any particular views on the draft.

Item 4: Forward Work Programme

Item 4.1 Update from Scottish Government

10. Stephen O'Connor provided an oral update from the Scottish Government. In particular, he advised that the consultation on Expenses and Funding of Civil Litigation Bill closed on 24 April 2015 and approximately 40 responses were received. Responses will be published online on 29 May 2015. The intention is for the Bill to be introduced in October, subject to volume of business in the parliamentary committee.

Item 4.2 SCJC update

11. Susan Brodie provided an oral update on the activities of the SCJC and SCJC Secretariat.

Item 5: Committee Remit and Membership

Item 5.1 Update of Remit

12. John Thomson addressed the paper headed **Costs and Funding Committee Remit**. John informed the Committee that the revised remit of the CAFC was approved by the SCJC at its meeting of 11 May 2015. **This was noted by the Committee members.**

Item 5.2 Matters arising from revised remit

13. In addition to the revised remit, John brought to the Committee members' attention the need for this Committee to undertake a review of the fees of additional categories of person – such as Messengers at Arms and Sheriff Officers and shorthand writers. **The Committee agreed to discuss this at the next CAFC meeting in July, for which John would produce a discussion paper.**

Item 5.3 Committee Membership

14. The Chair informed the members that the SCJC has approved the appointment of a consumer member to fill the vacancy created by Julia Clark's departure from CAFC. The Secretariat is at present corresponding with a nominee.

Item 6: AOCB

15. The Chair revisited the question, first put to the Committee at its January 2015 meeting, of sheriff court auditor representation on the Committee. **The Committee members agreed that as the Auditor of the Court of Session was now a member, this would be adequate for the time being.**

Item 8: Future Business

16. **Future meeting dates are:**

- **Monday 6 July 2015**
- **Monday 12 October 2015**
- **Monday 16 November 2015**

All meetings set down for 4.15pm start, in Parliament House however, no video conferencing services available on Monday 16 November 2015.

Scottish Civil Justice Council Secretariat

3 June 2015