

SCOTTISH CIVIL JUSTICE COUNCIL
COSTS AND FUNDING COMMITTEE (CAFC)

MINUTES (APPROVED)

PARLIAMENT HOUSE, 4.15PM, MONDAY 6 JULY 2015

Members present: Lord Burns (Chair)
Sheriff Charles Stoddart (Retired)
Sheriff Thomas Hughes (Dundee Sheriff Court)
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)
Kenneth Cumming (Auditor of the Court of Session)
Yvonne MacDermid (Chief Executive, Money Advice Scotland)

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)
Jane MacDonald (Policy and Legislation Branch, SCS)
Susan Brodie (Policy Officer, SCJC Secretariat)

Apologies: Iain Nicol (Solicitor)
Eric Baijal (Solicitor, SCJC member)

Item 1: Introduction, welcome, apologies and private papers

1. The Chair welcomed all in attendance and greeted Yvonne MacDermid as the consumer member of the Committee, to her first CAFC meeting. Yvonne is the Chief Executive of Money Advice Scotland. Apologies were also noted.
2. **The Committee agreed not to publish the following papers: 4.1, 5.1, 6.1, 7.1, 7.1A, 7.1B & 7.1C.**

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: Forward Work Programme

Item 3.1: Update from Scottish Government

4. 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 analysis on responses is due to be completed around the 17 July 2015. Scottish Government plan to hold further events to enable engagement with stakeholders during the summer. The intention is for the Bill to be introduced in October, subject to the government programme being finalised after summer recess which concludes at the end of August 2015.

Item 3.2 SCJC updates

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

Item 4: Work Programme

Item 4.1 CAFC Activity Tracker

6. Susan Brodie spoke to the new activity tracker created to update the Committee on the progress of matters being taken forward of the increasing volume of workload of the Committee. **Members approved the format of the tracker and noted the progress of the actions to date.**

Item 5: Implementation of the Recommendation of the Taylor Review

Item 5.1 Discussion Paper 3 – Expert Witnesses

Timing of Application

7. The Committee discussed the difficulties of obtaining expert witnesses in Scotland within their specified time limits. This led to suggestions of a register of expert witnesses approved by the court, and the pros and cons this generally may have. Members agreed that there were major difficulties associated with such an approach.

8. Discussions also took place regarding procedures other jurisdictions follow. The Committee was informed that England and Wales are currently moving away from the use of joint expert witnesses. The Committee was also informed that the pre-action protocol for low value road traffic claims in England and Wales requires medical reports to be obtained through a non-profit making organisation called MedCo.
9. **The Committee agreed in principle that, in cases other than those subject to case flow management, parties should be required to obtain sanction for the use of an expert witness before the expert is instructed. This is in terms of Taylor recommendation 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.”*
10. Members saw merit in the option of delaying implementation of this and a number of other recommendations so that implementation can be co-ordinated with the introduction of active judicial case management through the rules re-write project. This would allow such applications to be dealt with at an early case management hearing, as Taylor envisaged. However, further discussion of this and the issues raised in paragraphs 18 to 20 of the Paper was deferred pending investigation of a suggestion that CAFC’s work in this area might clash with that of Family Law Committee.
11. **In respect of cases subject to case flow management, members agreed that certification only requires to be obtained prior to a diet of taxation, but that parties should have the option of applying for certification at any stage in the proceedings.**

Judicial Control of Fees

12. Members did not support Taylor’s recommendation that it should be for the judge sanctioning the use of an expert to set a cap on that expert’s recoverable fees. However, there was some support for the idea of a table of expert’s fees. It was recognised that a comprehensive table might not be a practical possibility. However, there was merit in considering whether it would be possible to devise a table that would determine recoverable fees for the most commonly encountered types of expert report. The Committee were informed that SLAB is currently consulting with its stakeholders on the production of a table of fees for expert witnesses. This consultation is due to end in August and Ian Dickson will report back to the

Committee on the outcome of the consultation, at the CAFC meeting of 12 October 2015.

The Test

13. Members of the Committee discussed the test to be applied on an application for certification of an expert witness. Members were content that the test should continue to be one based on “reasonableness”. There was discussion about whether it was necessary to specify separately that the appointment of the expert must be proportionate. It was agreed that it was not clear that a requirement for proportionality would be implied and that this should therefore be specified in the prescribed test.

Item 6: Regulation of Fees

Item 6.1 Reviewing levels of prescribed fees

14. The Chair explained the procedure previously followed by LPAC, to review levels of solicitors’ fees. Discussions followed regarding whether the previous arrangements adequately met the requirement for a transparent review process. In particular there was discussion about the extent of reliance placed on the annual Cost of Time Survey commissioned by the Law Society. **Members agreed a working group would be engaged to review the process and the working group would provide a report to the Committee before next CAFC meeting in October.** Members thanked Ian Dickson for volunteering to lead this working group.
15. **Members also agreed that representatives of SMASO (the Society of Messengers-at-Arms and Sheriff Officers) should be invited to attend the CAFC meeting in November 2015 for the purpose of exploring how best to approach the process of keeping fee levels under review now that SCJC has responsibility for preparing and submitting draft fees rules. Members also agreed that the Secretariat should have preliminary discussions with representatives of providers of shorthand writer services with a view to carrying out a similar exercise at the CAFC meeting in January 2016.**

Item 7: Rules of Court

Item 7.1 Implementation of the Courts Reform (Scotland) Act 2014 – consequential changes to tables of solicitor’s fees

16. Members noted the changes to the Court of Session and sheriff court tables of fees that had been made by Act of Sederunt (Rules of the Court of Session 1994 and Fees of Solicitors in the Sheriff Court Amendment) (Courts Reform (Scotland) Act 2014)

2015 [Paper 7.1B]. It had been prepared by the Rules Rewrite Drafting Team, along with a covering paper [Paper 7.1A]. The draft instrument was approved by correspondence by the Council, who agreed that it should be submitted to the Court of Session for consideration. The Act of Sederunt was duly made on 4 June 2015, and laid on 8 June, and comes into force on 22nd September along with the substantive court rules.

17. Members duly noted papers 7.1A and 7.1B.

18. Following publication of the fees instrument, the Law Society's Remuneration Committee has considered its terms. The Committee has written to the Chair of CAFC raising concerns that the new table does not adequately remunerate the work which requires to be done in relation to cases raised in the new personal injury court. In order to highlight their concerns, they have drafted a suggested Table of Fees accompanied by an introduction and explanatory comments.

19. The Committee agreed to consider the Law Society's Remuneration Committee's concerns and proposed table further at the next CAFC meeting on 12 October 2015, and that a delegation of the Remuneration Committee should be invited to attend part of that meeting to speak in support their proposals and to answer questions. The Committee also directed that the briefing paper to be prepared should include a table comparing current sheriff court fees, current Court of Session fees, and the Law Society's proposed fees.

Item 8: AOCB

Item 8.1 Fees of solicitor advocates in the sheriff court

20. At the last CAFC meeting an issue arose whilst discussing sanction for the employment of counsel in the sheriff court. (CAFC 25 May 2015, Paper 3.1A, under the heading of "The requirement for sanction".) The issue concerned the appropriateness of the arrangement under which, where sanction has been granted, a solicitor advocate carrying out the work can be remunerated as a solicitor advocate, despite not requiring to exercise extended rights of audience. **The Committee agreed to keep this matter under review.**

Item 9: Future Business

Item 9.1 Date of next meetings

Members were asked to note the following dates:

- Monday 12 October 2015
- Monday 16 November 2015
- Monday 18 January 2016
- Monday 21 March 2016
- Tuesday 24 May 2016