

Response from the Society of Solicitor Advocates to the Scottish Civil Justice Council's Consultation on the Review of Fees in the Scottish Civil Courts - Fees of Solicitors

The Society of Solicitor Advocates ("the SSA") is a voluntary organisation formed to promote excellence in advocacy before the Scottish courts and to represent the interests of solicitor advocates in Scotland.

Solicitor advocates are solicitors who have been granted extended rights of audience before the superior courts in Scotland – the Court of Session in civil cases, the High Court of Justiciary in criminal cases – and the Supreme Court in London. They are also recognised as specialist pleaders in the sheriff courts. There are over 300 practising solicitor advocates, about half of whom have rights of audience in the Court of Session. In civil cases, solicitor advocates practice in all varieties of case – public and administrative law, family, personal injury and commercial.

The SSA considers that the following fundamental principles should apply when addressing fees of solicitors in the civil courts:

- Both the value of the claim and the extent of the legal work undertaken are relevant factors when considering the level of fee which should be recoverable.
- The costs, or potential costs, of litigation should not be prohibitive.
- A successful pursuer should, so far as possible, be kept free from expense.

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

There does, of course, already exist an element of proportionality in the Table of Fees given the different tables which exist for Court of Session, Sheriff Court Ordinary and Summary Cause/Simple Procedure actions. For the most part, these fees are reflective of the value of the claim - from those actions with a value over £100,000 generally being raised in the Court of Session and attracting higher fees, to those under £5,000 being raised under Summary Cause/Simple Procedure in the Sheriff Court.

However, as above, the SSA does not consider that the value of a claim is the only, or indeed the critical measure, of the level of fee which should be recoverable. In this regard,

we believe that the actual legal costs incurred by a client should have a bearing on the judicial expenses which they are entitled to recover if successful.

We understand that, particularly in commercial actions, the recoverable judicial expenses may be disproportionately low when compared to the actual legal costs incurred by the successful party. There is frequently a shortfall between the rates which would be recoverable on an agent/client, client paying basis and those recoverable on a party/party basis. This issue was, of course, raised in both the Report of the Scottish Civil Courts Review and Sheriff Principal Taylor's Review of Expenses and Funding of Civil Litigation in Scotland. We would therefore welcome any amendment which seeks to minimise the gap between a client's actual legal costs against those they are able to recover by way of judicial expenses.

Although not directly relevant to the proportionality question, to aid with predictability of costs in lower value cases, it would be sensible to have a clear definition of the "value of the claim" within the General Regulations – that is, either the sum awarded/agreed or the sum sued for.

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

As above, the fees awarded under the Tables of Fees may not reflect the actual work undertaken, particularly in a commercial action. The SSA suggests there should be provision within the Tables of Fees to reflect the additional work which is often required in a commercial action – such as the framing of witness statements/affidavits for lodging, given those are being increasingly used as a witness's evidence in chief. This provision should apply to commercial actions in both the Sheriff Court and Court of Session – particularly as more and more commercial actions are now raised in the Sheriff Court following the increase in its privative jurisdiction to £100,000 and of course, the related expansion of commercial courts at Sheriff Court level.

Further, at a time where considerable emphasis is being placed on parties to progress claims pre-litigation (including the development of pre-action protocols), to resolve or at least restrict matters in dispute prior to litigation, the SSA considers the Table of Fees for pre-litigation costs should be proportionate to the increased levels of work which are now carried out by solicitors pre-litigation, therefore ensuring that solicitors recover an appropriate sum which reflects the work undertaken.

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

The SSA would suggest that the Tables of Fees should be amended to reflect the ever greater reliance on technology in litigation and increasing requirements imposed by the courts to produce pleadings and productions in electronic form. Such requirement often sits alongside a requirement for documents in hardcopy. Consideration should therefore be given to reflect that additional work in the Tables of Fees.

Further, in certain types of case such as Chapter 42A personal injury actions and commercial actions in the Court of Session, parties are now expected to, or are directed to, produce Joint Bundles of Productions and Authorities. This requires additional work between the parties, and it is suggested there should be an allowance in the Table of Fees to reflect that as well.

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

There has been no increase in the level of fees since March 2014. We see sense in increasing the level of fees in line with inflation. That would go a little way towards reducing the gap between agent/client and party/party rates highlighted in the response to question 1 above.

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

The SSA has no proposals for any additional fees not currently included, other than as above in relation to commercial actions.

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