

**BRODIES LLP RESPONSE TO SCOTTISH CIVIL JUSTICE COUNCIL CONSULTATION ON THE  
REVIEW OF FEES IN THE SCOTTISH CIVIL COURTS: FEES OF SOLICITORS**

**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.**

**Lower value personal injury and property damage actions**

We consider that amendments are required to the Tables of Fees applicable to lower value personal injury and property damage actions in order to ensure that fees recoverable in such cases are proportionate.

Proportionality, in the context of recoverable judicial expenses, has generally been raised as an issue in lower value actions for damages arising out of personal injury or property damage. The judicial expenses payable by an unsuccessful party may be disproportionately large when compared with the principal sum awarded by the court or agreed between parties to settle the claim.

In our view the lack of a link between the value of an award and the expenses recovered can be problematic. The problems are most acute in lower value damages claims, particularly personal injury claims:

- An unsuccessful defender in a claim with a relatively low value may be faced with paying expenses which match or exceed the principal sum.
- It does not encourage early resolution and economic handling of claims.
- Where solicitors acting on behalf of a pursuer are remunerated by retention of recoverable judicial expenses the solicitor's fee for acting in lower value cases is often out of proportion to the complexity or value of the claim.

At present, the value of awards of judicial expenses in personal injury cases does not ordinarily vary in line with the value of the claim. The actual level of recoverable expenses will vary depending on the procedure used to pursue the claim but, otherwise, the value of the sum awarded is not a relevant factor in assessing the recoverable expenses.

The paragraphs of the sheriff court General Regulations applicable to expenses in summary cause and simple procedure cases do contain provisions which link calculation of judicial expenses to the value of the claim. However, although those provisions are applicable to claims for property damage, they do not apply to all personal injury claims. We comment further on this aspect below. In any event, the current provisions are confusing.

## **Commercial actions**

The issue of proportionality in the sense described above is less significant in commercial disputes where, as was highlighted in Sheriff Principal Taylor's Report, a more common concern is that recoverable expenses lag behind the true cost of commercial litigation. In such cases the issue is whether the recoverable expenses are proportionate to the real cost of litigation as opposed to the value of the claim. Sheriff Principal Taylor recommended various solutions to the problem in commercial cases and suggested pilot projects might be used to trial those solutions. We are not aware that any such trials have been attempted and we have not seen proposals for reform. We consider that the SCJC should re-visit the issue.

## **Proportionality in lower value personal injury/property damage claims: the current position**

We act regularly for parties in personal injury and property damage cases where the differential between the sum awarded/settlement figure and the recoverable expenses is significant.

Our own analysis of recent cases in which we have been involved suggests that recoverable judicial expenses exceed the value of the claim in the majority of lower value personal injury and property damage claims.

The following summaries are based on settlements/awards in the last 12 months.

### **Claims with settlement value up to and including £3000**

- The average (mean) principal sum was £1769 and the average expenses payable to the pursuer were £3241.
- In 23% of cases the expenses figure was equal to or less than the principal sum while expenses exceeded the principal sum in 77% of cases.
- On average (mean) expenses were 199% of the principal sum.
- The median percentage figure was 139% with the range being from 10% to 759%.

### **Claims with settlement value exceeding £3000, up to and including £5000**

- The average (mean) principal sum was £4103 and the average expenses payable to the pursuer were £5322.
- In 31% of cases the expenses figure was equal to or less than the principal sum while expenses exceeded the settlement sum in 69% of cases.
- On average (mean) expenses were 131% of the principal sum.
- The median percentage figure was 122% with the range being from 35% to 250%.

### **Claims with settlement value exceeding £5000, up to and including £10000**

- The average (mean) principal sum was £6772 and the average expenses payable to the pursuer were £7822.
- In 35% of cases the expenses figure was equal to or less than the principal sum while expenses exceeded the principal sum in 65% of cases.
- On average (mean) expenses were 116% of the principal sum.
- The median percentage figure was 106% with the range being from 41% to 535%.

### **Proportionality in lower value personal injury and property damage actions: proposals**

One possibility might be to introduce a system of fixed fees in lower value claims with exceptions at the discretion of the sheriff only where complex issues of fact or law are involved. That would be a significant departure from the current arrangements but would serve to ensure both proportionality and predictability of recoverable expenses.

Alternatively, in both simple procedure and summary cause procedure there are already measures in place which seek to achieve proportionality between recoverable expenses and the principal sum. That is currently dealt with in two ways:

- For claims below £3000 in simple procedure (those which would formerly have been “small claims”) there are statutory limits on the level of expenses that a sheriff can award. Those limits are subject to limited exceptions.

These absolute statutory limits do not apply to personal injury actions which are currently dealt with under summary cause procedure. They will not apply to personal injury claims made under the proposed simple procedure personal injury special claims rules.

- For claims of a value of £2500 or less, where an award of expenses is made which allows recoverable expenses to be assessed in terms of the General Regulations and either Chapter IV or V of the Table of Fees, reductions of 25% (for a claim value between £1000 and £2500) or 50% (for a claim value below £1000) are applied when assessing the account of expenses.
- The reduction of 50% is applicable to summary cause personal injury claims below £1000 but the deduction of 25% does not apply to summary cause personal injury claims worth between £1000 and £2500.
- The equivalent reductions apply to all simple procedure cases. It is not clear whether the position will change once the special claims rules are introduced.

- In summary cause cases the appropriate reduction is applied to the solicitor's fees chargeable under Chapter IV [General Regulation 14(f)] whereas in simple procedure the reduction is applied to the "expenses" [General Regulation 3A]. The reason for the difference is not clear to us. The wording should be consistent.

We would suggest that a similar approach might be adopted in all lower value personal injury/property damage sheriff court cases.

- An appropriate sliding scale of reductions applied to judicial accounts would result in recoverable expenses varying in line with the value of the claim.
- Full Chapter IV or (when applicable) Chapter V expenses would be recovered only where the value of the claim exceeds a set level.

The adoption of a sliding scale would, in the absence of the introduction of a system of fixed judicial expenses, introduce a greater degree of proportionality as between the value of a claim and the sums recoverable in expenses in lower value personal injury/property damage claims.

#### **Meaning of "value of the claim"**

- Use of a sliding scale will place greater emphasis on the meaning of "value of the claim". The General Regulations should define this term.

In our submission the value of the claim should be the sum awarded or the settlement figure, as opposed to being a reference to the sum sued for.

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

If yes, please detail the amendments proposed and provide any evidence you may have to support your proposal.

### Commercial actions in the Court of Session

As presently framed the block fees in the Tables of Fees do not adequately recognise the way in which higher value, particularly higher value commercial litigation in the Court of Session, is now conducted.

The issue was considered in The Report of the Scottish Civil Courts Review when reviewing submissions received from the Professional Remuneration Committee of the Law Society of Scotland [Chapter 14 para 41]

*“Rate of recovery in commercial cases*

*41. Like other respondents, the Committee expressed concern about the shortfall between ‘party and party’ and ‘agent and client’ expenses in commercial cases. It had been hoped that an amendment made in April 2008 to Rule 42.9 of the Court of Session Rules might help to address this issue. The previous rule only permitted the time of one solicitor to be charged on a ‘party and party’ basis. This did not reflect the fact that most commercial firms work in teams and that several lawyers of varying degrees of seniority and different areas of expertise may be involved in the conduct of a case. The amendment deleted the reference to taxing the account as if the whole work in the cause had been carried out by one solicitor. However, the amended rule only applies to accounts which are drawn up on a time and line basis. There is a view that the amendment has not (as yet) had a significant impact. This may be because a high proportion of accounts are still being drawn up on a block fees basis, although views on this issue differed.*

As the above extract indicates, although the requirement that the auditor tax an account as if all work has been carried out by a single solicitor has now been removed, the block fees in the Tables of Fees applicable to the Court of Session do not reflect the reality of modern litigation.

Even where a judicial account is prepared on a time and line basis to reflect the involvement of more than one solicitor at a particular stage of the action, it is extremely difficult to predict the extent to which such charges will be allowed at taxation.

Almost all commercial cases of significant value are now conducted by a legal team which will vary in size and composition depending on the nature and value of the case. Different solicitors with differing levels of experience will be involved at different stages of proceedings. Sometimes it will be necessary or appropriate for more than one solicitor to be involved in carrying out work and we consider that the time involved for each should be properly reflected in the expenses recoverable.

- Consideration should be given as to how the Tables of Fees might be amended to ensure that sums recoverable by way of judicial expenses do not lag behind the true cost to the client of commercial litigation.

- In order to promote the aim of predictability in recoverable expenses we consider that the Table of Fees should make specific provision in this regard rather than leave matters entirely to the Auditor's discretion.

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

**If yes, please detail the amendments proposed.**

#### **Sheriff court General Regulations**

We are aware from minutes of previous meetings that the terms of the sheriff court General Regulations are already being considered by the Costs and Funding Committee. We are of the view that amendment is required.

The General Regulations have developed over time and been the subject of frequent amendment. Our experience is that many court users, including solicitors, find the General Regulations confusing.

- The use of the term “taxation” to cover both taxation and assessment is one example where the terminology currently used in a regulation which is of general application can cause confusion.

The General Regulations should now be fully revised and updated. Terminology used in the Regulations should be consistent with the relevant rules of court and it should be clear to court users how and when each regulation applies.

- It might be useful to divide the regulations into distinct sections and group regulations together appropriately.
- Although some of the regulations are of general application, others deal only with specific forms of procedure. For clarity, it might be appropriate to group regulations according to the chapter of the Tables of Fees to which they relate.
- Individual regulations which are to apply to more than one chapter of the Tables of Fees might be repeated as necessary with appropriate changes in terminology.

#### **Commercial actions in the Court of Session**

The procedures adopted in the Commercial Court of the Court of Session have changed considerably over the years and have required solicitors to carry out work which is not obviously covered by the applicable Table of Fees. Although the Auditor of the Court of Session has the power to increase block fees to take account of additional work we consider that it would be more appropriate to create a specific Chapter in the Table of Fees for use where an action has been dealt with in the Commercial Court.

In introducing a new chapter to deal with commercial actions it is appropriate to increase the sums recoverable in a judicial account to more accurately reflect the fees incurred by litigants involved in commercial litigation in the Court of Session.

#### **Pre-litigation fee**

- A specific fee should be created to cover work carried out in advance of litigation.

**Error! Unknown document property name.**

For example, correspondence attempting to identify and resolve issues including exchange of documentation, witness statements, the instruction of expert reports, alternative dispute resolution, etc. This fee would be separate from the existing fee for work carried out in contemplation of the litigation itself.

#### **Written notes of argument and statements of facts or issues/proposals for further procedure**

- The recoverable fee should be increased significantly.

The existing Table of Fees allows recovery of sums in respect of these matters but the sums set out in the table do not reflect the importance/significance of these documents and the input required from solicitors.

#### **Preliminary and procedural hearings**

- The recoverable fee should be substantially increased.

The Table of Fees should recognise the significance of these hearings in the context of a commercial action.

#### **Precognitions, affidavits, witness summaries/statements**

- The sum per sheet which is allowed at present is not a proper reflection of the amount of work which is required to obtain and lodge these documents.

The ordering of the preparation and lodging of witness statements/affidavits in commercial actions is now the norm. In most cases the statement or affidavit will stand as the witness's evidence in chief. The preparation, review with the witness, collation of documents referred to and lodging of statements/affidavits is extremely time consuming.

The central role of affidavits and statements and their importance should now be recognised in the Table of Fees.

#### **Electronic bundles and electronic presentation of evidence**

- The work involved in the preparation of working bundles of pleadings and productions for use during the course of a commercial action and the preparation of joint bundles of productions and authorities for proof should be properly reflected in the new Chapter.
- The need to prepare electronic versions of bundles – sometimes to sit alongside hard copies – is now an established part of commercial litigation and the table should reflect the additional work which is involved in ensuring compliance with current requirements.

Our experience has been that the court will sometimes require parties to provide the court with an operator to manage the electronic bundles/presentation of evidence during proof.

**Error! Unknown document property name.**



- The need to provide, instruct and prepare an operator (usually a trainee or qualified solicitor) for that role should form a proper charge in a judicial account.

### **Alternative approach to recoverable expenses in commercial actions**

If the creation of a separate chapter for commercial actions in the relevant Table of Fees is not considered appropriate then an alternative might be to introduce a general uplift on recoverable fees in Court of Session Commercial Court proceedings. A minimum uplift might be prescribed with discretion to allow a higher percentage if the court/auditor considers it appropriate.

The relationship between this form of uplift and the existing provisions for allowance of an additional fee would need to be considered.

Commercial procedure in the sheriff court may also benefit from an uplift in recoverable fees. Most commercial disputes with a value of £100,000 or less must now be litigated in the sheriff court. An enhancement in recoverable judicial expenses would encourage the use and development of sheriff court commercial procedures

### **Other entries in the Tables of Fees**

#### **Fee for lodging inventory of productions**

The chapters of the Tables of Fees make provision for payment of fees for each inventory of productions lodged by a party. That encourages the lodging of multiple inventories.

- In lower value claims it is more appropriate to provide for a single fee to cover the lodging of productions irrespective of the number of separate inventories lodged.

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

We do not consider that a general, across the board increase in fees is required although we would not oppose an increase in line with inflation for higher value claims.

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

**If yes, please detail the additions proposed and provide any evidence you may have to support your proposal.**

The only additional fees we consider require to be added to the Tables of Fees are in respect of commercial procedure (see above)

Brodies LLP 16 November 2017