

THE GLASGOW BAR ASSOCIATION

RESPONSE BY THE GLASGOW BAR ASSOCIATION TO CONSULTATION:-

Success fee agreements: consultation on Part 1 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018

The Association:

The Glasgow Bar Association is an independent body that for over half a century has been active in promoting, representing and protecting the rights and interests of its members in the practice of law and by extension those of its members' clients and therefore the wider public including the most vulnerable members of society. It advocates on behalf of access to justice. It considers and monitors proposals for law reform and, if necessary, formulates responses to such proposals. In addition the Association operates an extensive professional development programme for members.

Questions

1 Please indicate if you are content with the success fee caps recommended by Sheriff Principal Taylor.

- We consider that the caps at para.21 of the consultation appear to be fair. The concept of the sliding scale in personal injury is clear and understandable not just to lawyers but from a potential litigant's point of view. It is vital that clients know in advance that a specific amount of damages in the case would result in a fixed percentage of that award being paid to his or her solicitors. If this is clear at the outset it is likely a person would be happy to proceed with that clear knowledge of the potential outcome for them if they are successful in their action.
- Sheriff Principal Taylor states at para.19 that he believes a "*proper balance must be struck between sufficient remuneration for solicitors and justice for clients awarded damages*". We agree, and If regulation is based on this statement, and is demonstrably so, then it should be expected to work well in practice.

2 This paper outlines reasons why it may be necessary to prohibit the use of success fee agreements in relation to family proceedings but possibly other kinds of proceedings as well. In order to assist in the drafting of regulations in this regard: we ask three questions.

a. In connection with what types of family proceedings are speculative fee agreements used?

- We do not know.

b. What types of speculative fee agreements are presently used in family proceedings?

- We do not know.

c. Are there any other kind of proceedings which are not appropriate for the use of success fee agreements and particularly damages-based agreements, apart from family proceedings?

- Generally, damages-based agreements do not appear to be appropriate for any claims where an alternative remedy to damages is sought principally (ie the main objective is to get a non-monetary remedy). In some cases it is extremely difficult to quantify the value of success. For example, our members have pursued cases for interdict, non-harassment orders, lawburrows or powers of arrest. These remedies can provide great peace of mind and contentment to pursuers, they can prevent or reduce the anxiety, stress and insomnia caused by a nuisance neighbour or stalker, and there is no doubt that any client would regard this as a success. But quantifying this success in pecuniary terms is practically impossible. Applying a percentage success fee here would be unworkable. Other kinds of action may lend themselves more easily to quantification; those seeking delivery of moveable property are easier to value; it is the value of the property, which is usually stated in an alternative crave. On the other hand, actions seeking orders *ad factum praestandum* are probably unsuited to success fee agreements although such actions often have a pecuniary alternative remedy. Actions seeking anything other than payment, such as multiplepoinding or eviction do not appear to us to be suitable for success fee agreements.
- The reasoning given in the paper in relation to family law is that it is difficult to define success in family proceedings, as a range of different orders may be granted, this is stated at para.31.

3. We are seeking your views on further regulatory provision about success fee agreements.

a. Do you agree with the proposed content of regulations to make further regulatory provision about success fee agreements in Scotland?

- It would appear essential to both the provider and recipient that the success fee agreement be in writing and that it be in consumer friendly terms insofar as that is possible.
- Part (b) on page 18 in reference to the obligation to include the following in a success fee agreement: *“the circumstances out of which the claim arises; and the anticipated damages and/or other civil remedy sought in the claim”*. There is no note of how much detail would be required to describe the circumstances and is it quite possible that at the initial stage of agreement it may be difficult to anticipate the damages. For one thing, in personal injury actions it is common to sue for a sum well in excess of what the court is likely to award (because although a court can award less than is claimed, it cannot award more than that).
- Part (d) also on page 18 states *“A statement that the terms of the success fee agreement take precedence over the providers normal terms and conditions in situations where there is a conflict”*. We think that this is wise, so that the client is in no doubt as to how his or her lawyer will be remunerated.
- It is important that the calculation of a success fee is included in the regulations, part (e) page 18.
- Obligations to provide the same level of service is important in relation to providing regular updates and consultation with clients on any major developments including offers from the defenders, part (k) page 19. Also important is the complaints procedure to be followed where the provider is allegedly failing in its obligation, part (l) page 19. These are essentials to the role of a solicitor, therefore, it would appear important for them to be included in the content of such an agreement.

b. Do you think that any of the material need not be included?

- No, but there is an inherent conflict between keeping a contract simple, brief and intelligible and, on the other hand, covering every single scenario and risk; if a contract is too long and detailed the client may simply not read it.

c. Do you think that there are other areas which should be covered?

- No.

4. Do you agree that the kind of arrangement described in paragraph 43 above should not be permitted in a success fee agreement?

Paragraph 43 states *“In circumstances where the provider has come to the conclusion that the recipient is unlikely to win, the provider may withdraw from the agreement. It is understood that under some existing success fee agreements, the recipient may be responsible for the original provider’s fees and outlays up to the point when the agreement is terminated by the provider, but only if the recipient does ultimately receive a financial benefit from the claim as a result of it being pursued by another provider.”*

- This is a tricky area. And it illustrates the hazards of litigation. A claim may on any objective standard be reasonable but there is no guarantee that it will succeed when put to the test in court. A witness may be disbelieved by the sheriff, throwing the whole case into turmoil. These things do occur, and it is unfair to assume that that is the fault of the client’s legal advisors. Success can sometimes turn on luck rather than skill. The provision in paragraph 43 is reasonable in principle insofar as the original provider may have laid the groundwork and spent time and effort on the case. However, we do not think that the original provider should benefit from any enhancement of his fees under a success fee agreement when he has chosen to refrain from taking the risk of taking the case forward.

5. Do you think that formal Government regulation is required to make it clear that providers of relevant services may not provide legal aid, whether in the form of advice and assistance or civil legal aid, when a success fee agreement is in prospect or in place?

- We are inclined to respond ‘yes’ to this mainly in relation to clarity of the position for potential litigants. However, we appreciate this may be something law firms could stipulate to potential litigants without the need for a formal regulation.

6. Do you think that any change in funding, whether from legal aid to a success fee agreement, or the other way about, requires formal Government regulation in relation to information/notification requirements or case-end formalities?

- For access to justice reasons we believe it is important to ensure that changes in funding should be absolutely clear to the public at all times.

The Glasgow Bar Association
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