POLICY NOTE

THE CIVIL LITIGATION (EXPENSES AND GROUP PROCEEDINGS) (SCOTLAND) ACT 2018 (SUCCESS FEE AGREEMENTS) REGULATIONS 2020

SSI 2020/110

The above instrument (the "Regulations") is made in exercise of the powers conferred by section 4(1), 4(2), 5(1), 5(2) and 7(3) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 ("the 2018 Act").

Purpose of the instrument. The regulations will regulate success fee agreements in Scotland, cap success fees under those agreements and provide that some kinds of success fee agreements will not be available for family proceedings. Success fee agreements are "no win, no fee" agreements which enable potential litigants to raise a legal claim which they may not otherwise be able to pursue due to the potential cost, particularly if they are not eligible for legal aid.

Background

The 2018 Act received Royal Assent on 5 June 2018. It provides a framework for the implementation of the recommendations of the Review of the Expenses and Funding of Civil Litigation[1] carried out by Sheriff Principal James Taylor which require primary legislation. The overarching aim of the 2018 Act is to increase access to justice by creating a more accessible, affordable and equitable civil justice system for Scotland that:

- makes the costs of civil action more predictable;
- increases the funding options for pursuers of civil actions; and
- introduces a greater level of equality to the funding relationship between pursuers and defenders in personal injury actions.

The Regulations implement Part 1 of the 2018 Act which concerns success fee agreements.

Policy Objectives

Success fee agreements

The Regulations provide for the regulation of success fee agreements in Scotland. The term "success fee agreements" covers both speculative fee agreements and damages based agreements. A speculative fee agreement is a type of 'no win no fee' funding arrangement in terms of which an enhanced fee will normally be charged in the event of success and is calculated either with reference to the fee element of the judicial expenses payable by the unsuccessful party or by reference to the hourly rate agreed by the solicitor and client. This contrasts with damages based agreements whereby the success fee is calculated as a percentage of the client's damages or recovered funds. In both types of agreements there is to be paid, in the event of success, a 'success fee', but no fee (or a lower one) if the action is lost. In other words, both speculative fee agreements and damages based agreements are

1 https://www.gov.scot/Publications/2013/10/8023

types of 'no win, no fee' agreements, entered into in connection with actual or contemplated civil proceedings. Success fee agreements concern "relevant services" which are defined to be one of either "legal services" or "claims management services".

The 2018 Act treats both speculative fee agreements and damages based agreements as "success fee agreements" and the success fee will be a percentage of the damages awarded or agreed. In Scotland success fee agreements offered by solicitors have until now been in the form of speculative fee agreements, but following implementation of Part 1 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, solicitors will also be able to offer damages based agreements. Claims management companies will also continue to offer damages based agreements. Except in the case of personal injury cases, success fee agreements may also be entered into on a 'no win, lower fee' basis.

Solicitors have indicated that potential litigants appear to like the simplicity and predictability of success fee agreements based on a set percentage of the damages achieved since they pay nothing up front (the provider of the relevant services will bear the costs of the outputs of raising the action and will seek to recover those costs from the other party). Litigants rarely, if ever, retain 100% of damages achieved since, even if they are in a position to finance the action themselves, they will have to pay the cost of their legal representation and set that off against the damages received. The recipient of relevant services under a success fee agreement is therefore, in the event of success, in the same position as a self-financing litigant. Without success fee agreements, if litigants are not in a financial position to raise proceedings by any other means (for example, if they are ineligible for legal aid), they would receive 100% of nothing, since they may be unable to litigate at all. Increasing the availability of success fee agreements will therefore increase access to justice.

Success fee cap

The objective of capping success fees is to increase options and provide a greater level of certainty for claimants entering into success fee agreements so that they are able to find the best value representation to meet their needs. It will, in particular, increase access to justice for those who are unable to fund an action themselves yet do not qualify for legal aid (the "excluded middle").

The 2018 Act defines "success fee" as the payment which is – in the event of success – to be made to the "provider" (the solicitor or claims management company) by the "recipient", namely the person who receives legal services or claims management services under the success fee agreement.

In considering whether there should be a cap on the success fee which can be charged by solicitors or claims management companies, Sheriff Principal Taylor believed that a "proper balance must be struck between sufficient remuneration for solicitors and justice for clients awarded damages".

A member of the advisory panel to Sheriff Principal Taylor's Review, which contained representatives of both pursuer and defender/insurer interests, indicated that the success fee caps recommended "were the outcome of long and detailed debates leading to a fully considered compromise".

Regulation 2 sets the following caps on success fees as recommended by Sheriff Principal Taylor.

Type of case	**Cap (all caps include VAT)**
Personal injury cases	Up to 20% of the first £100,000 of damages Up to 10% for the next £400,000 Up to 2.5% of damages over £500,000
Employment Tribunal cases	Up to 35% of the monetary award recovered
Commercial and all other actions	Up to 50% of the monetary award recovered

Sheriff Principal Taylor stressed that these percentage caps should be maxima. There is clearly a danger that, in time, these caps may be viewed as the going rate, and not maxima. He argued, however, that from the evidence before him, that it was likely that with members of the public becoming increasingly aware of different funding mechanisms, that competition will determine the actual rates used.

It should be noted that since the cap is inclusive of VAT, no more than 20% is deducted from the client's first £100,000 of damages in a personal injury case, but the solicitor receives a success fee of considerably less. So, for example, if a client is awarded £100,000, the success fee is set at 20% and VAT remains at 20%, then the client receives £80,000 in damages, the solicitor receives £16,667 and VAT is paid at £3,333. Counsel's success fee (plus VAT) and any outlays not recovered from the other side in the judicial account of expenses must be met out of the £16,667 received by the solicitor.

Regulation 2(4) and (5) provide the success fee caps recommended by Sheriff Principal Taylor for, respectively, employment tribunals and other cases.

Regulation 2(6) makes it clear that only one success fee can be paid even if there is more than one provider of relevant services (for example, both a claims management company and a solicitor) and the success fee cap applies to the total amount payable by the recipient of those services, regardless of whether such services are provided under one or more success fee agreements.

Family proceedings

Sheriff Principal Taylor, when considering success fee agreements, concluded that damages based agreements in particular were not suited to all types of litigation. Sheriff Principal Taylor noted in his Review that damages based agreements were not available for family proceedings in England and Wales and recommended that they should also not be available for family actions in Scotland. He argued that it was much more difficult to define success in family proceedings since the court may require to make a range of different orders dealing with various aspects of, for example, matrimonial breakdown aside from purely financial matters and 'success' may therefore be divided. It does not therefore seem appropriate that damages based agreements, which are predicated on the provider of the relevant services taking a percentage of damages awarded or agreed, should be used in such cases.

The Faculty of Advocates submitted evidence to the Justice Committee during the Bill's Parliamentary stages that speculative fee agreements were sometimes used in family proceedings and argued that this funding option should not become unavailable to litigants.

The Scottish Government fully agreed with Sheriff Principal Taylor's recommendation that damages based agreements should not be used in family proceedings. The 2018 Act therefore gave Scottish Ministers' power to make regulations so as to specify what kinds of litigation should be capable of being dealt with by certain kinds of such agreements. This was intended to permit consultation on what should be included in regulations to ensure the correct result is reached for family proceedings. In the event, very few responses were received in relation to these questions and so the regulations simply exclude the use of damages based agreements from family proceedings. The power will allow for future proofing since the regulations can change as practice changes.

The policy objective is therefore to prohibit the use of damages based agreements in family proceedings and this is achieved by Regulation 3.

Terms of a success fee agreement

Regulation 4 seeks to ensure that success fee agreements are offered on a relatively standard basis and can readily be compared by potential recipients of relevant services. The aim to make the costs of litigation more transparent and predictable, thereby increasing the confidence of recipients of relevant services. To this end, Regulation 4 sets out a number of requirements to do with the content of success fee agreements. It remains open to the provider and recipient of relevant services to agree further terms.

The Scottish Government is mindful that a degree of regulation will be provided by the professional rules of the Law Society of Scotland (for solicitors) and of the Financial Conduct Authority (for claims management companies) and general consumer protection legislation will also apply, for example a "cooling off period" may apply under the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013.

The proposed requirements in the draft regulations are therefore relatively light touch, but if it emerges over time that the initial affirmative regulations are not sufficiently robust, then it will open to Ministers to make more prescriptive affirmative regulations.

Commencement and application

The Regulations come into force on 27 April 2020 and apply to success fee agreements entered into on or after that date.

Consultation

The Scottish Government consulted on aspects of Part 1 of the 2018 Act, specifically on caps on success fees (section 4), possible exclusions from success fee agreements (section 5) and success fee agreements more generally (section 7) in 2018-19. The consultation can be viewed on the Scottish Government website at:

https://consult.gov.scot/justice/success-fee-agreements/

The analysis of consultation responses can be viewed on the Scottish Government website at:

https://www.gov.scot/publications/success-fee-agreements-scotland-consultation-part-1-civil-litigation-expenses-group-proceedings-scotland-act-2018-analysis-consultation-responses/pages/2/

The Government consulted on the legislative proposals in 2015. The consultation can be viewed on the Scottish Government website at:

https://www.gov.scot/Publications/2013/10/8023/5

The analysis of consultation responses can be viewed on the Scottish Government website at:

https://www.gov.scot/Publications/2015/08/6159/3

Impact assessments

A Business and Regulatory Impact Assessment (BRIA) for the Bill was published on the Scottish Government website at:

https://www.gov.scot/Publications/2017/06/7388

An Equality Impact Assessment (EQIA) for the Bill was published on the Scottish Government website at https://www.gov.scot/Publications/2017/06/9266/1 and the Bill was found to have no significant effects in relation to the protected characteristics.

No other impact assessments are required in respect of these Regulations.

Financial effects

The financial effects of the 2108 Act were set out in the Financial Memorandum for the Bill:

http://www.parliament.scot/Civil%20Litigation%20(Expenses%20and%20Group%20Proceedings)%20(Scotland)%20Bill/SPBill14FMS052017.pdf

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