Law Society of Scotland

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill

Stage 3 Briefing

19 April 2018

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Civil Justice committee welcomes the Civil Litigation Bill, as legislation that can improve access to justice and has the following comments which we hope are helpful to the Parliament's scrutiny of the Bill at stage 3.

General comments

We provided written evidence to the Justice Committee on the Bill in August 2017[1] and provided supplementary evidence on the subject of claims management companies in November 2017[2]. We are committed to the regulatory objectives of supporting the rule of law and the interests of justice, promoting the interests of consumers and the public interest generally, access to justice and competition in the provision of legal services. We believe that, overall, this Bill will promote these objectives and create a more accessible, affordable and equitable civil justice system.

Success fee agreements

Part 1 of the Bill provides for the regulation of success fee agreements (SFAs). As an option for the funding of civil litigation, we believe that these provisions can promote access to justice. The Bill introduces, at section 4, the ability for Scottish Ministers to cap the level of success fees. This is a protection for clients that will ensure that the level of fees under these agreements is not unduly onerous.

[1] http://www.parliament.scot/S5_JusticeCommittee/Inquiries/CL-LSS.pdf

[2] http://www.parliament.scot/S5_JusticeCommittee/Inquiries/CL-LSSsupplementary.pdf

Future loss

Section 6(4) of the Bill excludes from the scope of any success fee agreement the "any damages for future loss obtained in connection with the claim". This future loss element can relate to compensation for solatium (damages for pain and suffering), wage loss, care, pension loss and any other losses or expenses which an accident victim may incur in the future.

The calculation of future loss is often the most complex and time consuming aspect of a personal injury claim, a fact which was recognised by Sheriff Principal Taylor in his report and when he gave evidence to the Justice Committee at Stage 2 of the Bill. This calculation requires careful consideration by any personal injury lawyer and is frequently the most challenging aspect of any claim. Indeed, in many cases that settle in advance of litigation, a global sum is offered by the defender, not specified whether for previous loss, future loss or other heads of damage. These situations will be particularly difficult to deal with future loss ringfenced from any funding agreement.

To ring-fence future losses from the calculation of a success fee may mean that success fee agreements will not be offered in the higher value cases, as it is simply not economic to do so. We believe that this approach around future loss may diminish the access to justice benefits anticipated from the Bill. The experience of ringfencing future loss in England and Wales reflects this.

The Damages Based Agreements (DBA) regime in England and Wales, established in 2013, did not see significant uptake of this new funding model for personal injury actions. A working group of the Civil Justice Council was established to consider reform to DBAs to make these a more viable funding model for litigation[3]. This working group observed:

> "The underlying concern expressed by the Working Group about the use of DBAs in the personal injury context is that a 25% DBA fee… is simply too low to make the use of DBAs feasible, for anything other than significant personal injury claims — and this is especially so, when the 25% applies only to restricted heads of damage."

The impact on higher-value personal injury actions was also highlighted:

> "For complex and high-value personal injury claims, using DBAs can be equally as problematical, in the view of some members of the Working Group. Frequently, the heads of damage for future losses will be significant, and the costs incurred to prove the recovery of those heads will be high. This means that, even for high-value personal injury claims, the size of the DBA fee could be considerably reduced to the point where the legal representative would find the claim infeasible."

We believe that the main attraction of allowing Success Fee Agreements to become enforceable is to substantially improve access to justice for personal injury actions. If, similar to England and Wales, the

[3] Civil Justice Council, The Damages Based Agreements Reform Project: Policy and Drafting Issues, August 2015 (https://www.judiciary.gov.uk/wp-content/uploads/2015/09/dba-reform-project-cjc-aug-2015.pdf)

restrictions around these agreements make them infeasible – both in terms of remuneration and also in terms of the risk borne by the solicitor in the event of an unsuccessful claim – then the access to justice benefits of these measures may not be fully realised.

Working group

We have also established a working group to consider issues around success fee agreements, which has included the development of a model fee agreement, which will again provide protection to clients considering this route for funding litigation. In addition, there is also the existing framework of regulation that provides protection to clients. For instance, there are general duties around acting in the client's best interests, avoiding conflict of interest, providing terms of engagement. Fees can be assessed for reasonableness by an auditor of the court, or challenged by way of complaint. We believe that the model fee agreement is likely to ensure a consistent and equitable approach to success fee agreements once introduced, though we may consider rules or guidance if required. Equally, there are powers for Scottish Ministers at section 7 of the Bill to specify through regulations the way in which these agreements can be formed or terminated, their form or content, and how disputes can be resolved.

Expenses in civil litigation – Qualified One Way Cost Shifting

Section 8 of the Bill introduces qualified one-way cost shifting (QOCS), as recommended by the Taylor Review. This provides claimants in personal injury actions with protection from an award of expenses if their claim is unsuccessful. We had some concerns around the circumstances in which this protection would be removed, though amendments made to the Bill at stage 2 largely address these, in particular, the change from "behaves in a manner which the court considers falls below the standards reasonably expected of a party in civil proceedings" to "behaves in a manner which is manifestly unreasonable in connection with the proceedings" at section 8(4)(b).

Expenses in civil litigation – Pro Bono Costs Orders

We support the introduction of pro bono (or legal volunteering) costs orders in section 9 of the Bill. Equivalent powers in England and Wales see funds provided to the Access to Justice Foundation. We understand that in the 2015-16 financial year, funds from this scheme generated around £120,000 in that jurisdiction.

Group proceedings

We supported the introduction of group proceedings, which we believe will offer improved access to justice, allowing a number of parties to bring legal action collectively. We supported the introduction of an 'opt in' system, though the Bill has since been amended to allow either 'opt in' or 'opt out' as a mechanism for proceedings. We believe that this approach may require a degree of caution. There are some types of case that would be wholly unsuitable for an 'opt out' process, such as historic abuse cases. The large pool of litigants in 'opt out' proceedings also makes representation, negotiation and case management more challenging.

The practical working of this new group procedure will be established by rules of court, though we highlight three considerations:

- Jury trials – these are specifically excluded from group proceedings (section 17(9)). The proposed arrangement could be useful if it operates up to the point of determining liability but there has to be greater flexibility on the settlement of each claim for each and every member of the group. Parties currently have the right to choose jury determination or not, and we believe this power should be retained.
- Expenses in group actions - the question of how issues of expenses in group actions will be dealt with has not been considered in the Bill. We also note that there are no provisions in the Bill relating to legal aid, though the recent independent review of legal aid has recommended that public funds are available for group proceedings, a proposal that may be taken forward separately.
- Flexibility - the system used in England and Wales for group litigation has proved to be very difficult for solicitors and is too strict. Any system for group actions needs flexibility and experience suggests that if the position is properly explained to the court, both sides have an adequate opportunity to put their case to the court. As a result, once all parties have been heard, a middle ground has been possible and that is a pattern that should continue.

Review of operation of Act

We welcome the provisions at Part 4A of the Bill, requiring a review of the Act five years following Royal Assent. We believe that the provisions contained in the Bill will improve access to justice, a formal review process can assess this and any further improvements required could then be brought forward. Equally, there are powers delegated in the Bill, either to Scottish Ministers through regulations, or to the court to make rules that could be used in the intervening period to make improvements if required.

Claims management companies

The current Bill does not address the issue of claims management companies (CMCs), though their regulation was an issue considered by the Taylor Review. An amendment to the Financial Guidance and

Claims Bill has addressed this issue with the result that law firms, alternative business structures under the Legal Services (Scotland) Act 2010 and CMCs will be regulated by the Law Society of Scotland, approved regulator under the 2010 Act or Financial Conduct Authority respectively.

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