FACULTY OF ADVOCATES

RESPONSE

by

FACULTY OF ADVOCATES

to

CONSULTATION PAPER ON EXPENSES AND FUNDING OF CIVIL LITIGATION IN SCOTLAND BILL

INTRODUCTION

1. The Faculty of Advocates is Scotland's independent referral bar. The Lord President has described the essential qualities to which the Faculty of Advocates is dedicated in the following terms: "a commitment to excellence, a commitment to scholarship and learning, a commitment to the noblest ideals of professional conduct and, above all, a commitment to justice for all in our society"[1].

2. The Faculty makes available to the people of Scotland a cohort of skilled advocates, with a wide range of expertise. Every one of those advocates is available for instruction on behalf of anyone who may require advice on a

[1] Remarks on the introduction of the new Dean of Faculty 5 February 2014.

matter of Scots law or representation in the Scottish courts[2]. In particular, every advocate is available to appear on behalf of any litigant in any court or tribunal in Scotland, as well as the UK Supreme Court and the Court of Justice of the European Union. Solicitors in large firms and small, urban or rural, may supplement and enhance the service which they provide to their clients by the instruction of Counsel. The bar promotes access to justice, the quality of justice and equality of arms, throughout Scotland.

CHAPTER 1: PROPOSALS ARISING FROM SHERIFF PRINCIPAL TAYLOR'S REVIEW

A. Speculative Fee Agreements

3. Advocates have been representing clients on a speculative fee basis for many years, particularly in relation to personal injury litigation. This has enabled litigants to pursue successful claims, which would otherwise have been unaffordable. By enabling ordinary men and women who have sustained injuries to secure high quality and skilled representation at no cost to them, the willingness of counsel to act on a speculative fee basis has promoted access to justice and equality of arms. In particular, in cases where counsel has been instructed, the "David and Goliath relationship" between claimants and defenders is mitigated.

4. Under existing rules, the percentage increase that counsel may recover in speculative cases is capped at 100%[3]. In practice, many counsel do not ask for any percentage increase at all, and simply accept the amount recovered by

[2] The "cab-rank rule" means that an advocate may not, without good cause, refuse to accept instructions to act on behalf of any litigant if a reasonable fee is tendered.
[3] Act of Sederunt (Fees of Advocates in Speculative Actions) 1992/1897

way of an award of judicial expenses for counsel's fee, on the basis that any increase would, in practical terms, require to be met by the pursuer from the amount recovered. This reflects the extent to which counsel act on a speculative basis in the public interest and in the interests of clients, and not their own. In these circumstances, the Faculty has no objection to Recommendations 42 to 44 of the Taylor Review.

5. Further consideration should be given to the proposal that unrecoverable outlays, including counsels' fees, should be met by the solicitor from the solicitor's "success fee". Any sum awarded by way of judicial expenses in respect of counsel's fee will be recovered from the paying party in the ordinary way. The application of this limit could disadvantage advocates who have done necessary work but whose fees are not recovered as part of the award of judicial expenses. An example would be an advocate who drafts an amendment. The expenses of an amendment procedure are often awarded against the party which requires to amend, and the cost of the amendment may, accordingly, not be chargeable to the defender and will not, then, be included in the judicial account. Requiring the solicitor to bear any unrecoverable costs of this sort may discourage the instruction of counsel even if that is appropriate.

6. Consideration should be given to the way in which success fees are to be calculated and ascertained in the event of a "global settlement". The proposal that there be a cap on recovery assumes that the successful litigant receives not only an award of damages but also an award of judicial expenses. The sum recovered by way of judicial expenses will be paid to the legal team (solicitor and counsel) with the percentage increase payable out of the

damages being an addition, in part to meet the expenses that are not covered by the legal award. However, defenders may propose settlement on a 'global' basis – in other words, they make an offer of a single amount to cover both damages and expenses and without specifying the split between damages and expenses. There may need to be some procedure provided to enable an equitable identification of the allowance for judicial expenses included in the global settlement, in order that the success fee can be calculated.

7. In the light of the foregoing the Faculty answers Question 2(iii) as follows: A cap is an existing part of the arrangement for speculative fees. Subject to the need for some mechanism to deal with 'global offers' and the possible effect of recommendation 45 of the Taylor Review mentioned above, reduction in the level of the cap is unlikely to have an adverse effect on advocates because they do not, in practice, generally, take the uplift. The Faculty is not in a position to assess the impact on other parties: while on the face of it, the introduction of lower caps would favour pursuers, the question of whether the caps will affect the willingness of solicitors to act on a speculative basis would require further analysis.

B. Damages Based Agreements

8. The Faculty recognises that Damages Based Agreements ("DBAs") are already a feature of civil litigation in Scotland. There is, so far as the Faculty is aware, no evidence that these have been problematic to date and no reason to believe that solicitors and advocates, who are already regulated by the Law Society and the Faculty of Advocates, would abuse these agreements.

Permitting solicitors and Advocates to act on the basis of fees calculated as a percentage of the award has the potential to enhance access to justice.

9. The Code of Conduct for European Lawyers, to which the Faculty adheres states as a basic principle that: "A lawyer shall not be entitled to make a pactum de quota litis" (paragraph 3.3.1). A "pactum de quota litis" is an agreement to act in return for a fee based on a proportion of the sum awarded. The Commentary explains that an unregulated agreement for contingency fees is contrary to the proper administration of justice because it encourages speculative litigation and is liable to be abused. However, the Code goes on to states that this does not include an agreement that fees be charged in proportion to the value of the matter handled by the lawyer if this is in accordance with an officially approved fee scale or under the control of the competent authority having jurisdiction over the lawyer.

10. The Faculty accordingly takes the view that the key requirement, if DBAs are to be permitted, is that they should be appropriately regulated. There are two issues which would require to be regulated. The first is the question of whether the amount which may be taken by way of DBA should be limited by a cap on the percentage or otherwise; and this should, as the Scottish Government proposes, be dealt with through legislation. The second is the management of the potential conflicts of interest which may arise in the context of cases in which the lawyer involved is to be remunerated under a damages based agreement. Guidance in this regard would be a matter for the relevant professional body – in the case of solicitors, the Law Society of Scotland; in the case of advocates, the Faculty of Advocates, subject to approval by the Lord President.

11. At present, the Faculty's Guide to Professional Conduct prohibits an advocate from making a pactum de quota litis: paragraph 8.3.10 of the Guide to Conduct. Any change to the Faculty's Guide to Conduct may be made only with the approval of the Lord President. The Faculty's Professional Standards Committee has been asked to consider: (i) whether or not to recommend that a change be made, if permitted by law, to this provision; and (ii) in the event that such a change should be made, the formulation of appropriate guidance on any potential conflicts of interest which may arise. If the Faculty does decide that a change should be made to the Guide, the Lord President would require to consider whether or not to approve that change.

12. In these circumstances, the Faculty invites the Scottish Government to provide that any rule of law which would prevent solicitors or advocates from (in the case of solicitors) entering into a DBA or (in the case of an advocate) agreeing to act on the basis that the fee will be calculated as a proportion of the amount recovered is of no effect; thus leaving it, in the case of the Faculty, to the Faculty itself, subject to approval of the Lord President, to decide whether or not the Faculty should alter its Guide to Conduct in this respect.

13. On the basis that, for the reasons set out above, there is a public interest in the proper regulation of DBAs, if they are to be permitted, it is a matter of concern that the Scottish Government does not propose to regulate claims management companies. It would be a curious state of affairs if the regulatory provisions applicable to DBAs were to apply only where such agreements are

entered into by professionals operating within the regulated legal profession, and not when they are entered into by unregulated entities.

14. There are two matters which the Faculty suggests will require further consideration:

14.1. It will be necessary to consider how the legislative restrictions applicable to DBAs would apply in circumstances where counsel is instructed and both solicitor and counsel act on the basis of a DBA.

14.2. The proposal to exclude periodic payments from DBAs could distort settlements by creating an incentive for the pursuer's lawyers to seek a lump sum settlement, even if a settlement involving periodic payments would otherwise be desirable. This exclusion should be revisited. If periodic payments are included within the scope of DBAs, it will be necessary to consider how the relevant limits would be applied.

15. In the light of the foregoing the Faculty would answer the questions in the consultation as follows.

Question 6: At present solicitors can offer DBAs through claims management companies that they control. Allowing solicitors to offer DBAs directly simply reflects the practical reality, while opening up the facility to all solicitors and not just the limited number prepared to operate claims management offshoots.

Questions 8, 9, 10, 11 and 13: Caps are an existing part of practice in relation to speculative fees and hence they do not affect the ability of potential pursuers to secure representation. Equally it has to be said that the Faculty is not aware of any existing abuse. The market appears, so far as the Faculty is aware, to work in a competitive manner without complaint.

Question 7: It is difficult to predict the impact of DBAs on advocates because advocates have not had experience with them to date. However, if the rules are being relaxed it would make sense to create a regime which would permit the Faculty, if it considered it appropriate, and had the approval of the Lord President, to permit Advocates to act on the basis that the fee will reflect a percentage of the damages.

Question 12: So far as the Faculty is aware, the existing market works well with no present evidence of abuse. This is probably because of the involvement of solicitors in claims management companies and, although not directly regulated, are operated by regulated professionals. The concern is that the reform may give an incentive to claims management companies who are not otherwise regulated, to intervene in the Scottish market. The remedy would be to regulate those companies; not to add to the existing regulatory burden on the legal profession when there is no present evidence of abuse by members of the legal profession.

Question 14: Without prejudice to answer 12, it would make sense that the same rules should apply to all DBAs irrespective of the identity of the provider.

Questions 15 and 16: Currently advocates may not to be aware of the terms of the DBA that pursuers agree. Advocates are not party to the agreements and the terms of these agreements are not ordinarily disclosed to them because they are commercially confidential to the claims management company. If the claims

management company breaches the rules there ought to be a sanction but it would go too far to render the entire agreement voidable. What entitlement would an Advocate have to payment of his or her fees if he or she has acted in good faith, charging proper fees and in complete ignorance of the breach by the claims management company? Rather than render the DBA voidable, it would suffice to prohibit the charging of fees inconsistent with the cap, giving the pursuer the right to recover the excess above the cap in the unlikely event of breach. With solicitors and advocates such a rule would be readily enforceable via the existing regulatory regime. If a gap exists it is in the case of unregulated claims management companies and takes us back to answer 12.

Questions 17 and 18: There is a concern that differentiating between past and future loss would introduce a perverse incentive to delay settlement. In the absence of evidence of abuse it would be preferable to apply caps which relate to the aggregate award of the damages and without differentiating between types of award.

Questions 19-21: The Faculty would support a Code of Practice. This should be enforceable against Claims Management Companies, for the reasons set out above.

C. Qualified One-Way Cost Shifting

16. The Faculty does not have an objection in principle to the introduction of qualified one-way cost shifting ("QOCS") in personal injuries actions. Two observations, however, should be made.

17. The first comment relates to the test for disqualifying a party from the benefits of QOCS. It is accepted that this test should be a high one but further consideration needs to be given to how that is expressed. It would be an unnecessary complication to include 'Wednesbury unreasonableness' as a ground of disqualification. While that term is well understood in the context of judicial review of administrative action, it would require precise definition if it were to be adopted in the very different context of the behaviour of a party to a personal injuries action. It would be better for the legislation to be more specific on the test to be applied. It is submitted that a party should only be disqualified on account of fraud, abuse of process or where a motion for summary dismissal has been successful.

18. The second comment relates to the potential for one way cost shifting to lead to abuse of defenders who are uninsured and of limited means but not eligible for legal aid. Such persons could be effectively held to ransom if they have no prospect of recovering the costs of a successful defence. It is suggested that QOCS should be available only in respect of claims against public bodies and defenders who are insured.

19. In the light of the foregoing the Faculty would answer the questions in the consultation as follows.

Questions 22-24: It is not clear to the Faculty that QOCS will significantly increase access to justice but the Faculty has no objection in principle.

Question 25 and 26: In paragraph 76 it is mentioned that most defenders are insured. That statement necessarily identifies those who will be disadvantaged:

uninsured defenders, at least if they are not publicly funded. Applying QOCS to claims against private individuals and commercial entities that are uninsured would expose those defenders to the inevitable loss of the legal expenses that they incur defending themselves. They could face ruin and could be held to ransom, to make some payment to an unmeritorious pursuer. It is suggested that QOCS should be available only in respect of claims against public bodies and defenders who are insured.

Question 27: Reference is made to paragraph 17 above.

D. Counsels' Fees

20. The Faculty acknowledges that the development of a table of recoverable fees in relation to counsel's fees would enhance transparency, at least as regards recoverable costs and the Faculty does not oppose legislation giving the SCJC power to develop a table of fees for counsel. The Faculty offers the following observations. A table of fees is liable to promote rigidity rather than flexibility in fees. There is a risk that the specified recoverable rates may become, in practice, the minimum rate. Equally, if the table is not kept regularly under review, there is a risk that the fees which counsel may reasonably command in the market come to exceed those allowed under the table. This would undermine the aim of full cost recovery. In practice, it may be difficult to specify in tables appropriate or fair rates for particular items of work. By way of example, the work and time which is involved in drafting a summons varies enormously: there is the world of difference between a simple writ of a relatively common type where the information provided is in short compass

and, say, a complex summons for the purposes of drafting which counsel has required to assimilate several boxes of papers.

21. The Faculty agrees that the SCJC would be the appropriate body to develop a table. However, it is not correct to say that the SCJC includes "representatives" of the Faculty. There are members of the SCJC and its Committees who are advocates; however, they serve on the SCJC as individuals and not as representatives or delegates of the Faculty. It would accordingly be necessary for there to be full consultation with the Faculty, before any table is promulgated.

Solicitor Advocates

22. It would be appropriate for solicitors who exercise rights of audience in the Court of Session by virtue of section 25A of the Solicitors (Scotland) Act 1980 ("solicitor advocates") to be subject, in relation to work done in exercise of those rights, to the same table as counsel.

23. Every solicitor has both a right to conduct litigation and a right of audience in the sheriff court. A solicitor who appears in the sheriff court does not require to have or to exercise any rights of audience under section 25A of the Solicitors (Scotland) Act 1980. In these circumstances it is not necessary – and would be inappropriate - for solicitor advocates to be included in the table of recoverable fees for counsel in the sheriff court.

24. By contrast, an advocate does not have a right to conduct litigation in the sheriff court and may, accordingly, appear in that court only on the instruction of a solicitor or other professional who has the right to conduct litigation there. Further the fees of counsel are recoverable only if sanction for the employment of counsel has been granted, whereas a solicitor may appear in the sheriff court without any requirement for sanction. It is accordingly necessary to have a separate table for counsel's fees in the sheriff court.

25. The Faculty accordingly answers Questions 31 and 32 in the affirmative.

26. In relation to Question 33: (a) it would be appropriate for solicitors who exercise rights of audience in the Court of Session by virtue of section 25A of the Solicitors (Scotland) Act 1980 to be subject, in relation to work done in exercise of those rights, to the same table as counsel; however (b) it would be unnecessary and inappropriate for such solicitors to be included in the table of fees for counsel in the sheriff court.

27. Question 34: Yes, but it is essential that the Council should have an obligation to consult with the Faculty.

28. Question 35: The primary benefit of a table of fees will be to enable parties to form a more reliable estimate of the legal expenses that they will recover from their opponent in the event of success; or put another way, that they may have to pay in the event that they were to lose. The table of fees will, of course, be of little relevance to a defender affected by QOCS. The impact of the table will primarily be on counsel. The intent is to set the level of fees that may be recovered in a judicial account from the opponent. There is a risk that

the prescription of a table could: (i) lead to rigidity; and/or (ii) undermine the objective of full cost recovery. Some care will have to be taken in devising the detail. Firstly, the understanding is that the table of fees should be set by reference to fees that are charged in practice. There should be an obligation to conduct a periodic review; otherwise the table will become out of date and lead to a substantial shortfall in the recovery of the legal expenses recovered. Secondly, the combination of this proposal and other reforms (principally the cap on fees recoverable from personal injury damages) needs careful consideration. In that regard it is necessary to note that there can be a wide range of fees charged by different advocates.

CHAPTER 2: PROPOSALS ARISING FROM LORD GILL'S SCOTTISH CIVIL COURTS REVIEW

A. Multi-Party Actions

29. The Faculty agrees that there is a need for a better system of case-management procedure for mass litigation. Recent experiences such as the prisoner's "slopping out" cases highlight the extent to which the existing system may lead to unnecessary cost and expense of having to raise multiple separate actions. There is therefore general support for enhancing the existing system (i.e. Option 1), and also for a more full "class-action" procedure (i.e. Option 2), but on an "opt-in" basis only. The Faculty would not support an "opt-out" scheme; there is a risk that this would promote unnecessary litigation.

30. In practice, multi-party disputes are managed ad hoc, usually by sisting cases to await a decision in the case which happens to be the most advanced, or which has been identified as a "lead" case. In such circumstances, the principal problem is practice is that it is necessary for each claimant to raise an action in order: (a) to interrupt the prescription or limitation period and (b) to have his or her claim considered in the management and resolution of the wider claim. Claims may well be raised in different courts – indeed, the increase in the exclusive competence of the sheriff court is liable to exacerbate this, since there is no longer the option for multiple individual cases which have a common issue to be raised in the Court of Session. This gives rise to costs in drafting a writ for each claimant and the payment of court fees for every action, even though the vast majority are liable to be sisted to await the outcome of the lead case or cases.

31. There is a need not only to give the courts powers effectively to case-manage a limited number of cases that can decide the common issues in dispute but also to reduce the need to commence unnecessary actions for every pursuer with a common claim. Where a limited number of claims forming a part of a wider class of claims is proceeding in court, consideration should be given to amending the rules on interruption of limitation and prescription to protect potential claimants whose claims are not selected as the test cases and who currently have to go to the trouble and expense of commencing and sisting actions to await the outcome of the test cases. Some form of registration system for associated claims should be introduced.

32. Consideration should be given to the interaction between the procedures for multi-party actions and the exclusive competence of the Court of Session. It

may well be appropriate for a multi-party action to be dealt with in the Court of Session, even if each individual claim is within the exclusive competence of the sheriff court (and the "lead" case within that competence).

33. In the light of the foregoing the Faculty would answer questions 36-40 and 46 in the consultation as follows. There would be merit in a combination of Options 1 and 2. Option 1 on its own presupposes that multiple actions have been raised and then the court is managing the totality of the actions in some way. As explained that can put parties to the expense of drafting unnecessary writs and paying court costs unnecessarily in many actions which are being raised simply to avoid a time bar and without any intention to pursue every one of them to a conclusion. In situations where there are multiple claims with a common base (for example arising out of the one incident or deriving from the use of a single product), a procedure should be devised to enable all claimants to be registered in order to minimise the number of actions that have to be raised. Where test cases are required, the court should have power to manage them effectively to ensure that the decisions reached in those case do resolve the issues that arise in the class as a whole.

34. Question 41: The Faculty does not favour Option 3. It has the danger that claims are pursued on behalf of those who are so disinterested as neither to claim themselves nor to opt-out. Legal action on behalf of the disinterested is objectionable in principle.

35. Questions 42-45: provided the 3rd party body was representing claimants who had opted-in there would be no objection in principle to them being publicly funded. The complexities arise primarily in the context of opt-out

arrangements, not the least being what should happen to payments recovered that are not, in the event, claimed. It seems objectionable in principle to require a defender to pay compensation ostensibly for the loss suffered by a putative pursuer if the damages are not going to go to that pursuer.

B. Auditor of Court

36. Questions 47 and 48: The Faculty agrees that the office of Auditor of Court should be a salaried judicial office.

C. Conduct of Legal Representatives

37. Question 49 - There is no objection in principle to the court having the power to make legal representatives personally liable for expenses occasioned by their own conduct, provided that the test is appropriately framed and applied.

38. The formulation of the test has to be sufficiently rigorous as to respect two constitutional principles: (i) promoting access to justice; and (ii) the right of citizens to have their disputes determined by a public court. In order to promote access to justice lawyers are required to pursue unpopular and seemingly unmeritorious cases and should not be deterred from so doing by the risk of personal liability. The mere fact that a case seems to a judge to be hopeless is not sufficient to render a lawyer liable to a wasted costs order because it may have been the professional duty of a lawyer to pursue the action. This was explained by Lord Bingham in *Ridehalgh v Horsefield* [1994]

Ch. 205 at pp. 233-234 and affirmed by the House of Lords in *Medcalf v Mardell* [2003] 1 AC 120: see Lord Bingham at para. 13 and Lord Hobhouse from para. 51, at which he discussed the constitutional imperative of promoting access to justice. Experience under the Human Rights Act has shown that some of the most significant changes in the law in recent times have come about because certain lawyers have been willing to persist in unpopular arguments even in the face of initially adverse rulings from courts. Unless the test is set at a level that recognises the public interest in promoting access to justice there is a risk that the introduction of this jurisdiction could have a chilling effect on the legal profession to the detriment of the public. There are also practical considerations in support of this strict interpretation, not least of which is the danger that exposing the lawyer to a risk of liability in expenses introduces a conflict of interest between the lawyer and his client. Moreover, as *Medcalf* itself shows, the lawyer may be unable to defend himself because of the need to respect client confidentiality.

39. Question 50: The impact will depend on the test that is applied. The form of words used in the proposal is derived from the corresponding English rule in section 51(7) of the Senior Courts Act 1981, which gives the court the power to make an order where there has been any "improper, unreasonable or negligent act or omission". However, those words have been construed very restrictively, and actually mean a breach of a lawyer's duty to the court[4]. The English experience is that the test "any improper, unreasonable or negligent act or omission" does not mean what it says. That being so, it would be better to enact wording that properly reflects the test that the court should apply – otherwise the statute is simply misleading. The test has been discussed and explained in a Privy Council case *Harley v Mcdonald* [2001] 2 AC 678 in terms

[4] See *Blackstone's Civil Practice 2014*, pp. 1120-1

which build on the duties which lawyers owe to the court: reference is made to Lord Hope at paras. 45-47. The test of liability for a wasted costs order is whether there has been a serious dereliction of duty to the court: Lord Hope at para. 55. That test has been applied in Scotland in *Hamilton v Merck* [2012] CSOH 144. Lord Drummond Young's opinion in *Hamilton* explains why a test of improper conduct (which may carry a connotation of a breach of professional discipline) or negligence is not appropriate in this context: para. 15. *Hamilton* concerned a claim for expenses against a solicitor. The same test can be applied to solicitors and advocates.

40. It is submitted that there are two practical issues that must be taken into account. Firstly, the lawyer may be unable to defend himself without breaching client confidentiality, in which case there should be no liability: *Medcalf v Mardell*. Secondly, there is a potential downside, referred to in Lord Bingham's observation in *Medcalf* at para. 13 – namely, that there is a risk that the existence of such a power will increase the costs incurred and result in satellite litigation. In England there are now members of the Bar who specialise in costs awards. The policy question is whether there is sufficient need for this additional remedy to outweigh those practical considerations.

CHAPTER 3: LEGAL AID PROVISIONS

Legal Aid for Legal Persons

41. Questions 51-52: the Faculty is supportive of legal aid extending to all legal persons, with common financial eligibility criteria applying to all.

Funder of Last Resort

42. Question 53: Although the Faculty does not resist the proposition that SLAB should have power to assess the availability of other funding mechanisms when considering an application for civil legal aid, there is some concern about the practical implications of what is proposed. It is agreed that SLAB should have power to test that the party seeking legal aid meets the financial eligibility criteria and that the party does not have ready access to alternative funding (for example, via a Trade Union or insurance policy). However, to introduce a statutory statement that SLAB is the funder of last resort could have unintended consequences, particularly when combined with other reforms. What attitude will SLAB take to a pursuer in a personal injury case who has the protection of QOCS? Could SLAB's policy lead to undue pressure on the legal profession to pursue speculative actions?