APIL SCOTLAND

NOTES ON REVIEW OF EXPENSES AND FUNDING OF CIVIL LITIGATION IN SCOTLAND

Background

The Review was established in March 2011 under the chairmanship of Sheriff Principal Taylor.

A reference group of advocates, solicitors, academics, insurers, amongst others was appointed along with a review team to assist the Sheriff Principal.

Once the original consultation document was launched in November 2011, a high level of activity ensued. More than 50 meetings were held by the review team with a variety of stakeholders including firms of solicitors, across all disciplines, not just PI but others including family and commercial. There were meetings with representative organisations such as APIL as well as a number of public meetings across Scotland.

The result – a 334 page report produced in September 2013, with 85 recommendations.

The Recommendations – main themes

Access to Justice

Equality of Arms

No compensation culture in Scotland.

Jackson in a kilt? Not really. Some of the conclusions are similar or identical but arrived at by a different route. Taylor makes it clear that there are a number of significant differences in Scotland.

These are simply recommendations at this stage. It remains to be seen what view the Government and Civil Justice Council take in relation to implementation.

Referral Fees

Taylor has accepted the practical reality that they exist. He accepts that they can assist with access to justice. The crucial aspect is that there is transparency, and that there is regulation.

The main recommendations are:

- Only regulated bodies should be entitled to charge a referral fee.

- A regulator of Claims Management Companies is to be established

- Solicitors obliged to provide referred clients with written statement which –
  a) lists all potential factors which a responsible referring agency might consider relevant when making referral and
  b) indicates whether such factors played part in the selection of particular solicitor

- Relevant factors include –
  a) particular skill possessed by solicitor
  b) has there been any quality control audit of solicitor
  c) is audit result available to client?
  d) basis upon which solicitor to be remunerated if legal costs to be met by referring agency e.g. BTE policy
  e) statement should indicate that services may be available elsewhere from non-panel firm

- Statement to set out means by which referring agency obtains its business.

- Referring agency obliged to provide solicitors with such information as necessary to allow solicitors to fulfil their obligations.

- Cold calling by CMCs and those acting on their behalf to be banned.

- Obligation on solicitors to satisfy themselves CMC does not obtain clients by cold calling.

- No attempt to regulate amount of referral fees

Damages Based Agreements

- They are to become enforceable

Who may enter into them?

- Solicitors, regulated CMCs, and Taylor recommends that Faculty change its rules to allow counsel to enter into them.

He makes recommendations re the appropriate level of deduction.

- The maximum amounts in PI cases will be:

  20% of the first £100K

  10% between £100k and £500K

  2.5% on anything above £500K

- Interestingly, he recommends a different maximum for employment cases – at 35% - and for commercial cases – at 50%.

In commercial cases, given the disparity between actual costs recovered and actual cost incurred, he recommends the concept of no-win lower fee ie solicitors receive enhanced fee if successful, presumably in addition to success fee as well as lower fee if lose.

He recommends deduction can be made from future losses – different from Jackson.

- If the future loss element is more that £1m, solicitor will require to obtain either the approval of the court or a report from an independent actuary certifying that it is in the best interests of the pursuer that damages should be paid as a lump sum rather than a periodical payment order, before a deduction can be made from the future loss element.

- Actuary to meet pursuer outwith presence of solicitor and cost met by solicitor.

Some other factors on DBAs:

- Judicial expenses are to be retained

- Counsel's fees and unrecovered outlays are to be met out of the success fee

- 14 day cooling off period after client enters into DBA

- No general increase in the awards of damages as happened in England and Wales.

Speculative Fee Agreements

- Same deductions as DBAs
- Judicial Expenses retained
- Unrecovered outlays to be met out of success fee
- Can't have both DBA and SFA

Miscellaneous Matters

- Simple procedure. It was welcome to see that Taylor has specifically highlighted the issue of PI cases within the simple procedure, excepting it from his recommendation that in these case, expenses be fixed.

  An example of his commitment to access to justice though I do wonder whether there will be a fight on this given the arrangements in England & Wales. Also it contrasts with the silence in the Courts Reform Bill.

- Sheriff Court accounts to be lodged within four month period – same as Court of Session
- Interest to run on judical accounts – at judicial rate from 28 days after account lodged
- Summary assessment and expenses management – this is being introduced as pilot scheme in commercial cases and question whether it will be extended to PI cases in the course of time.

Counsel's fees.

- Test for sanction is to remain the same ,ie ie based on difficulty or complexity, or importance or value of the claim with test of reasonableness

This contrasts with the Courts Reform Bill proposals which suggested that it would only be in exceptional circumstances that sanction would be granted.

Remains to be seen what will transpire.

Taylor is encouraging the development of a body of caselaw to assist in setting out the parameters as to when counsel can be instructed.

However, returning to the theme of equality of arms, he makes it clear that the resources of both parties ought to be taken into account, and that "no party gains an undue advantage"

In accordance with the concept of predictability, Taylor has made recommendations re the timing of applying for sanction.

- In PI cases, this can be at any stage, and he acknowledges that this may well be at the conclusion of the case, bearing in mind the case flow system of management.

- There is to be a duty to advise the other side if counsel is to be instructed.

- He has also made recommendations about when cancellation fees can be charged and at what level.

Contrast that with the case management model, where the recommendation is that sanction ought to be applied for at the outset, that generally costs of counsel can only be recovered from the date of sanction and rates are fixed at the outset.

Is this a sign of things to come?

<u>QOCS – Qualified One Way Costs Shifting</u>

Major plank of report – meant to be significant lever in providing access to justice

- This will provide protection to pursuers in PI and Clin Neg actions.

- Essentially it means that in the event the case is lost, save in certain enumerated sets of circumstances, the pursuer will not be responsible for the defender's expenses.

- The protection will apply to appeals.

- One area to consider carefully is where there are elements of the claim which are either non PI in nature, or where the head of claim is not for the benefit of the pursuer.

  Essentially what is at issue here is credit hire.

  However, what about recoverable sick pay, or medical expenses that need to be repaid? Or indeed services?

  Don't think this will be included but worthwhile looking at experiences elsewhere.

The exceptions to QOCS are:

- Fraud

  To be decided on a balance of probabilities

- Abuse of process

  This is a delibarate attempt to deceive the court. The two examples given in the report involve some pretty bad behaviour on the part of the pursuers in each action.

- Summary disposal of case

  Where a case is dismissed summarily, ie at debate or an equivalent hearing, the protection is lost. This is a case that is so weak that it should never have been brought.

  However, the defenders need to take the point at the appropriate stage .If they seek to argue at a later stage that the pursuer should lose the benefit of QOCS, the fact they didn't seek summary disposal at the appropriate time can be founded on.

- Conducting the case in an unreasonable manner

  Meant to be a high test and so should be Wednesbury unreasonableness.

Tender

- Trumps QOCS – logical otherwise defender would have no way to protect their position.

- However, and different from England & Wales, if a pursuer fails to beat a tender, the recommendation is that any liability of the pursuer be limited to 75% of the damages awarded, ie the pursuer will keep 25% of his or her damages.

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APIL EC December 2013