

CIVIL LITIGATION (EXPENSES AND GROUP PROCEEDINGS) (SCOTLAND) ACT 2018

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1 – Success Fee Agreements

Section 1 – Success fee agreements

8. This section sets out the definition of a “success fee agreement”, a term to be used to cover all types of speculative fee agreements and damages based agreements. The term is used in the Act on the basis that, in both of these types of agreements, there is a fee to be paid in the event of success (the “success fee”), but no fee, or a lower one, if the action is lost. Both speculative fee agreements and damages based agreements are therefore 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 “legal services” or “claims management services” (both as defined in subsection (2)). The definition of success fee agreements also includes, but is not limited to, speculative fee agreements that fall within section 61A of the Solicitors (Scotland) Act 1980.

Section 2 – Enforceability

9. **Section 2** provides that a success fee agreement, and in particular a damages based agreement, is not unenforceable only because it is *pactum de quota litis* (that is, an agreement by a legal provider to accept a share of the proceeds of the litigation if it is successful, which would, but for this provision, otherwise be unenforceable). This means that solicitors in Scotland will be able for the first time to enter into damages based agreements. Damages based agreements can now be arranged between providers and clients regardless of whether the recipient of the services receives them directly from the supplier (where the arrangement is between a client and their solicitor for proceedings in the sheriff court) or via services arranged by the provider (a solicitor instructing an advocate on the client’s behalf, or a claims management company instructing a solicitor and/or an advocate). Subsection (2) provides that the abolition of the rule against an agreement for a share of the litigation does not affect other grounds under which a success fee agreement may be unenforceable under the law of contract.

Section 3 – Expenses in the event of success

10. This section provides that, where a success fee agreement has been entered into, the provider of the relevant services is entitled to retain any expenses recovered from the unsuccessful party, in addition to the agreed success fee. The agreement may, however, make contrary provision. Subsection (3) qualifies this rule in legal aid cases by providing that this provision is subject to section 17(2A) of the Legal Aid (Scotland) Act 1986, which states that any expenses in favour of any party in any proceedings in

respect of which they are or have been in receipt of civil legal aid shall be paid to the Scottish Legal Aid Board, unless regulations under that section provide otherwise¹.

Section 4 – Power to cap success fees

11. **Section 4** confers powers on the Scottish Ministers, through regulations subject to the affirmative procedure (see section 24(2)), to stipulate the maximum amount of the success fee provided for under a success fee agreement. It is intended that the power will be used to set the maximum amount of the success fee as a percentage of the damages, based on a sliding scale dependant on the size of the damages payment. By virtue of section 24(1)(b), regulations may include different provision for different purposes. The regulations created under section 4 can therefore set different caps for different types of civil proceedings.
12. Subsections (3) and (4) provide that, if another enactment provides for the restriction of the amount of the success fee, the maximum fee that is allowed will be the lower of either the amount allowed in accordance with that other enactment or the amount allowed under the regulations under this section. An example of another enactment restricting the amount of a success fee is the Act of Sederunt (Fees of Solicitors in Speculative Actions) 1992², which allows for a 100% fee uplift in certain cases. More generally, an example of a restriction made in accordance with an enactment would include professional rules made by a legal services or claims management regulator.
13. Subsection (5) provides that a success fee agreement is unenforceable to the extent that it provides for a success fee that is higher than the fee allowed for in regulations made under this section.

Section 5 – Exclusion for certain matters

14. This section sets out that certain types of civil proceedings, which are to be specified by the Scottish Ministers in regulations subject to affirmative procedure (see section 24(2)) may not be the subject of a success fee agreement. Subsection (2) allows different provision to be made for different types of speculative fee agreements and damages based agreements.

Section 6 – Personal injury claims

15. **Section 6** makes provision for success fee agreements in respect of personal injury claims, including death from personal injuries (subsection (1)). Subsections (2) and (3) provide that the recipient of the relevant services (ie the client) is not required to make any payment other than the success fee, except for any sums in respect of insurance premiums in connection with the claim. The provider of the relevant services (usually a solicitor) will be liable to meet the outlays incurred in providing the services (for example, counsel's fees) from any expenses recovered from the defender and the success fee.
16. Subsections (4) and (5) make provision about damages obtained (whether by settlement or by award of the court or tribunal) in respect of future loss. Such damages are not to be included in the amount of damages used to calculate the success fee if they are to be paid by way of periodical payments, but may be included if the damages are paid as a lump sum and the criteria set out in subsection (5) are met.
17. Subsection (5) sets out two circumstances in which a success fee agreement can include a future element of lump sum damages. These are if the lump sum:
 - does not exceed £1 million; or

¹ See regulation 39 of the Civil Legal Aid (Scotland) Regulations 2002.

² An "Act of sederunt" is a type of delegated legislation passed by the Court of Session to regulate civil procedure in the Court of Session, the Sheriff Appeal Court and the sheriff court.

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- exceeds £1 million and, first, the services provider has not advised the recipient to accept that the future element be paid in periodical instalments but, second, the condition in subsection (6) is satisfied.

Otherwise, the success fee agreement must provide that any future element will not be included in the relevant amount of damages used for the calculation of the success fee.

18. Subsection (6) sets out the condition referred to in subsection (5)(b)(ii). This is that either the damages are awarded by a court or tribunal which has stated that it is satisfied that it is in the recipient’s best interests that the future element be paid as a lump sum rather than in periodical instalments or, where the damages are agreed, it is certified by an independent actuary that it is the actuary’s view that it is in the recipient’s best interests that the future element be paid as a lump sum rather than in periodical payments. The actuary must have consulted the recipient personally without the provider being present. As the solicitor has a financial interest in whether damages are awarded as a lump sum or a periodical payment, and, as periodical payments can only be ordered with the agreement of the pursuer, the solicitor must not have advised the client to accept a periodical payment and must not be present in any interview with the actuary.
19. Subsection (7) provides that a success fee agreement is unenforceable to the extent that it makes provision contrary to subsections (2) or (4).
20. Subsection (8) confers a power on the Scottish Ministers who may, through regulations subject to the affirmative procedure (see section 24(2)), adjust the sums specified in subsection (5)(a) and (b).
21. Subsection (9) explains what is meant by “personal injuries” in this section. That term includes diseases as well as physical or mental impairment.
22. Subsection (10) defines an “actuary” for the purposes of section 6.

Example
A child has suffered cerebral palsy as a result of clinical negligence. The child will require lifelong care. The damages awarded by the court, or agreed in a settlement by the parties, will be intended to provide for the lifetime care of the child. If it is agreed that the future element of the damages (covering the lifelong care) will be paid by periodical payments, these sums will not be included in the calculation of the solicitor’s success fee.
It is, however, apparently rare for periodical payments to be agreed. Sheriff Principal Taylor indicated that periodical payments will only be in contemplation if the level of damages is expected to exceed £2 million. Such cases happen rarely in Scotland.
It is therefore more likely that the future element of damages will be paid as part of a lump sum. This will therefore be liable to be included in the calculation of the solicitor’s success fee. The question of whether the future loss is compensated by means of a lump sum or by periodical payments presents a potential conflict of interest as the solicitor will be significantly better remunerated if the pursuer receives a lump sum.
The solution in section 6(4) to (6) is that there should be some form of independent scrutiny of the settlement where the lump sum exceeds £1,000,000 and the solicitor has not advised the family of the child suffering from cerebral palsy that the future element of the damages be paid in periodical instalments (in which case it would not be included in the calculation of the success fee).
In terms of the independent scrutiny required, if the child’s damages are awarded by a court or tribunal, the court or tribunal must state that it is satisfied that it is in

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the child's best interests that the future element of the damages should be paid as a lump sum rather than in periodical instalments.

If, however, the child's damages are agreed by settlement of the case, an independent actuary must certify – after consulting the family without the solicitor being present – that, in the actuary's view, it is in the best interests of the child that the future element of the damages covering the lifelong care be paid as a lump sum and not in periodical instalments.

Section 7 – Form, content etc.

23. This section makes provision for the form and content of success fee agreements. Subsections (1) and (2) provide that agreements must be in writing and must specify the basis for determining the success fee. Subsections (3) and (4) confer powers on the Scottish Ministers, through regulations subject to the affirmative procedure (see section 24(2)), to make further provision about the form and content etc. of success fee agreements, which may include the elements specified in the list in subsection (3). Such regulations may add text to section 7 or modify text that has been added by regulations.