

Draft Regulations laid before the Scottish Parliament under section 24(2) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, for approval by resolution of the Scottish Parliament.

DRAFT SCOTTISH STATUTORY INSTRUMENTS

2020 No.

**COURT OF SESSION
SHERIFF APPEAL COURT
SHERIFF COURT
SCOTTISH COURTS AND TRIBUNALS SERVICE**

The Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (Success Fee Agreements) Regulations 2020

Made - - - - 2020
Coming into force - - 27th April 2020

The Scottish Ministers make the following Regulations 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(1) and all other powers enabling them to do so.

In accordance with section 24(2) of that Act, a draft of this instrument has been laid before and approved by resolution of the Scottish Parliament.

Citation, commencement, interpretation and application

1.—(1) These Regulations may be cited as the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (Success Fee Agreements) Regulations 2020 and come into force on 27 April 2020.

(2) In these Regulations, “the 2018 Act” means the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018.

(3) These Regulations apply to success fee agreements entered into on or after the date on which these Regulations come into force.

Success fee cap

2.—(1) Subject to section 4 (power to cap success fees) of the 2018 Act, a success fee agreement must not require the recipient of relevant services to pay to the provider a success fee which, including VAT, exceeds the maximum amount provided for by these Regulations (“the success fee cap”).

(2) The success fee cap is determined by reference to the financial benefit obtained by the recipient (“the financial benefit”).

(3) In a matter that is, or could become, a claim for damages for personal injuries⁽²⁾ or the death of a person from personal injuries, the success fee cap is—

- (a) in respect of the first £100,000 of the financial benefit, 20%,
- (b) in respect of the amount of the financial benefit over £100,000 but not exceeding £500,000, 10%,
- (c) in respect of the amount of the financial benefit over £500,000, 2.5%.⁽³⁾

(4) In a matter that is, or could become, the subject of proceedings before an employment tribunal, the success fee cap is 35% of the financial benefit.

(5) In any other matter to which these Regulations apply, the success fee cap is 50% of the financial benefit.

(6) Where in connection with the same matter a recipient receives relevant services from more than one provider, whether under one or more success fee agreements, the success fee cap applies to the total amount payable by the recipient to those providers.

Exclusion for family proceedings

3.—(1) A damages-based agreement must not be entered into in connection with a matter which is or may become the subject of family proceedings.

(2) In paragraph (1)—

- (a) “damages-based agreement” is a success fee agreement under which the success fee is determined by reference to the amount of financial benefit obtained by the recipient,
- (b) “family proceedings” has the same meaning as in section 135 of the Courts Reform (Scotland) Act 2014⁽⁴⁾.

(3) Nothing in paragraph (1) is to be construed as restricting the use of other types of success fee agreement.

Terms of a success fee agreement

4.—(1) A success fee agreement must—

- (a) include details of the matter, claim or proceedings, or parts thereof, to which the success fee agreement relates,
- (b) specify the type of civil remedy which the recipient seeks,
- (c) include a description of the work to be carried out by the provider,
- (d) provide that in the event of a conflict with the provider’s standard terms of engagement, the terms of the success fee agreement take precedence,

⁽²⁾ In these Regulations, “personal injuries” has the same meaning as in section 6 (personal injury claims) of the 2018 Act.

⁽³⁾ Section 6 (personal injury claims) of the 2018 Act makes provision for which damages may be included in the calculation of the financial benefit obtained.

⁽⁴⁾ 2014 asp 18.

- (e) specify the basis on which the amount of any fee potentially payable under the success fee agreement is to be determined,
- (f) oblige the provider to consult with the recipient on any significant development including, but not limited to, the receipt of an offer of settlement,
- (g) specify whether or not the provider intends to retain any expenses which are awarded to the recipient in civil proceedings or which it is agreed with another person that the recipient is entitled to recover⁽⁵⁾,
- (h) explain how to access the relevant procedure for dealing with complaints about the provider or providers,
- (i) set out the circumstances in which the provider may, as a consequence of the recipient's conduct, terminate the agreement prior to the resolution of the matter to which it relates and require payment from the recipient for services provided prior to termination,
- (j) provide that where the recipient terminates the success fee agreement prior to the resolution of the matter to which it relates, the recipient will normally be liable to pay for services provided prior to termination, and
- (k) provide details of the fee which would be charged by the provider and any other sums which would be payable by the recipient to the provider, in the event that the provider or recipient terminates the agreement prior to the resolution of the matter to which it relates.

(2) If the success fee agreement provides that any fee potentially payable may be subject to change without further agreement, such as in the case of periodic increases to hourly rates charged by the provider, the success fee agreement must provide that changes will be notified to the recipient in writing as soon as reasonably practicable.

(3) In a matter that is, or could become, a claim for damages for personal injuries or the death of a person from personal injuries, the success fee agreement must provide that the provider is liable to pay where—

- (a) a court makes an award of expenses in consequence of proceedings being conducted in the manner described in section 8(4)(a), (b) or (c) of the 2018 Act, and
- (b) the court indicates that the conduct concerned was that of the provider and not the recipient.

Failure to comply with requirements

5. A success fee agreement is unenforceable to the extent that it makes provision which is materially contrary to section 7(1) or 7(2) of the 2018 Act or these Regulations.

St Andrew's House,
Edinburgh
Date

Name
Authorised to sign by the Scottish Ministers

(5) Section 3 (expenses in the event of success) of the 2018 Act makes provision for the provider's entitlement to recover expenses, in addition to the success fee.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations set out a number of requirements applying to success fee agreements.

The term “success fee agreement” is defined in section 1 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (the “2018 Act”) and covers all types of speculative fee agreements and damages-based agreements. Both speculative fee agreements and damages-based agreements are types of “no win, no fee” agreements, entered into in connection with actual or contemplated civil proceedings. 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. Success fee agreements concern “relevant services”, which are defined in section 1(2) of the 2018 Act to be one of “legal services” or “claims management services”. The definition of success fee agreement also includes speculative fee agreements that fall within section 61A of the Solicitors (Scotland) Act 1980 (c.46).

Regulation 2 caps the success fee which providers of relevant services can charge recipients of those services under a success fee agreement. In all cases, the cap is determined by reference to the financial benefit obtained by the recipient in respect of the matter. There are specific caps for matters which are or could become a claim for damages for personal injuries and for matters which are or could become proceedings before an employment tribunal. A single cap applies to all other matters to which these Regulations apply.

Regulation 3 prohibits the use of damage-based agreements in family proceedings.

Regulation 4 sets out a number of requirements relating to the terms of a success fee agreement, in order to ensure that agreements are offered on a relatively standard basis and can be readily compared by potential recipients of relevant services. For example, the success fee agreement must make clear the basis on which the amount of any fee potentially payable under it is to be determined. It must also set out the circumstances in which the provider may, as a consequence of the recipient’s conduct, terminate the agreement prior to the resolution of the matter to which it relates and require payment from the recipient for services provided prior to termination. Examples of circumstances the success fee agreement might include are where the recipient fails to provide adequate instructions, fails to attend any medical or expert examination without reasonable excuse or rejects the provider’s opinion about making a settlement with their opponent, such opinion having been arrived at objectively and in good faith.

It remains open to the provider and recipient of relevant services to agree further terms. To continue the above example, the success fee agreement may set out other circumstances in which the provider may terminate early and require payment from the recipient.

Regulation 5 provides that a success fee will be unenforceable to the extent that the requirements in these Regulations are not complied with. Non-compliance with these requirements may also have consequences for providers under the regulatory regime which is applicable to them.