

## **EXECUTIVE NOTE**

### **THE CIVIL LEGAL AID (SCOTLAND) (FEES) AMENDMENT REGULATIONS 2007 SSI/2007/14**

The above instrument will be made in exercise of the powers conferred on Scottish Ministers by sections 33(2)(a) and (3) and 36(1) and 2(a) of the Legal Aid (Scotland) Act 1986. This instrument is subject to the negative resolution procedure.

#### **Policy objectives- reform of civil legal aid**

This instrument is being introduced to update the Table of Fees for solicitors laid down in chapter 1 and II of Schedule 6 to provide solicitors with increased fees for more detailed and complex cases. The Civil Legal Aid (Scotland) (Fees) Regulations 1989 ('1989 Regulations') – the principal Regulations – have been amended on a number of occasions including by the Civil Legal Aid (Scotland) (Fees) Amendment Regulations 2003 ('2003 Regulations') which came into force on 1 October 2003. The 2003 Regulations made a number of reforms to the way in which solicitors were paid for civil legal aid work. It was agreed as part of the implementation of the 2003 Regulations that they were to be monitored to ascertain how the reforms were working. In response to the recent publication of the Report on Monitoring of Civil Legal Aid Reforms and following representations made by both the Scottish Legal Aid Board (SLAB) and the Law Society of Scotland (LSS), this instrument makes a number of changes to address the concerns that have been expressed. The policy intentions in respect of these changes is to provide:-

- greater flexibility in the way that the fees operate in contentious and complex cases and
- to remunerate solicitors properly for certain specific types of work where the amendments made in the 2003 Regulations were considered to be inadequate to reflect current court practices.

#### **Policy objectives- increase to summary cause fees**

This instrument is being introduced to provide for an increase in the fees for solicitors laid down in Chapter III of Schedule 2 to the 1989 Regulations in respect of summary cause proceedings (where actions are in respect of value of such claims lies between £750- £1500). Summary cause procedure has changed quite radically since 2002 to take account of new court procedures when private finding arrangements were changed. The equivalent table of fees for legal aid was not changed which has meant that the differential between private and legal aid rates was substantial requiring the table of fees to be revised. Summary cause cases tend to involve persons in the low income bracket, examples being council tenancies, welfare and debt where access to justice needs to be maintained. The instrument provides for a 21% increase in solicitors' fees in line with the increase in civil fees that was brought forward by the 2003 Regulations.

#### **Consultation**

There has been full consultation on the detail of these changes in this instrument with both the LSS and SLAB. Both have approved the terms of this instrument. These changes are

welcomed by the profession as it will ease difficulties that have arisen with the current operation of the 1989 Regulations as amended.

**Purpose: reform of civil legal aid**

The instrument amends the 1989 Regulations to update the Table of Fees in Chapters I and II of Schedule 6 – concerning undefended and defended sheriff court cases - to provide solicitors with increased fees for more detailed and complex cases. Areas where the fees are being amended include:

The Tables of Fees were considered to be too restrictive in difficult or contentious family actions. Additional payments are being provided in cases that involve complex financial disputes and negotiations for pension splitting arrangements or contentious contact.

In cases where a legal aid certificate has been granted but no action raised, the original intention of the fee structure was to encourage solicitors to apply for legal aid as a last resort in order to settle a case. Defenders however frequently only negotiate once when the pursuer has a legal aid certificate. Solicitors receive no remuneration for negotiation under the present system. Before they can be paid for this work an action would require to be raised to force the issue, which action might otherwise turn out to be unnecessary. A fee rate is now included to allow payment to be made for work that has resulted in a negotiated settlement or where the outcome or disposal resolved issues to the respective clients' satisfaction.

In some cases, courts do not always fix procedural hearings for lodging of defences. Proceedings progress by a series of hearings as with Child Welfare Hearings in respect of issues that would normally be covered in other cases by way of written defences and adjustments. The instruction fee has now been adjusted to provide for system of payments to reflect such work carried out in the circumstances even if it is not required to be in written form.

Progress fees are paid as a case progresses through its procedures to its conclusion. Progress is reflected in the block fees which are paid when the proof or debate stage is reached. However, where solicitors do not complete all the work comprised in a particular block fee, under the present situation, they cannot claim the fee for that block in respect of the work that they have actually carried out. The situation can also arise where interim orders are granted in cases where no further work follows. Despite having completed some of the work, no payment will be due to the solicitors. The system now provides for specific payment in these circumstances where the work undertaken by a solicitor was reasonable and necessary in all the circumstances of the case even where no settlement is achieved but an outcome or disposal is reached where a solicitor can show a significant negotiations have taken place involving a significant level of discussion and work is documented.

There are inconsistencies in the way that Child Welfare Hearings are handled in different parts of the country. The regulations ensure that solicitors are paid for the work done whether Child Welfare Hearings or diets of proof are set. The current regulations now provide for further and distinct preparation fee in respect of all Child Welfare hearings. The fee will be paid for the first hearing at a higher level with a lower fee for all further hearings so that preparation needed for such further hearings can be included in the fee.

**Block Court Fee:** The current regulations require solicitors to aggregate court time where such aggregation does not properly remunerate solicitors for the time engaged in court. A solicitor in advocacy work in three courts can be paid the same as he would be paid for 30 minutes in one court. As multiple cases require solicitors to review and prepare in respect of more files as well as travelling this was not considered to provide reasonable remuneration. Aggregation will now be replaced by the introduction of a minimum court fee payable for each 15 minutes of time spent waiting in court.

**Exemption:** A number of types of cases are treated as exempt where fees are chargeable on a detailed basis allowing a higher fee and flexibility than fees provided under the blocks. These categories are being extended to include proceedings arising in respect of division and sale of heritable property, Mortgage Rights Act, registration and enforcement of a decree and work in connection with letters of inhibition.

**Travel:** The regulations amend payment for travel time and the restriction that travel time is only payable for all travel after the first 10 miles travelled in each direction is taken away.

**Payments for peremptory or procedural court diets:** A mechanism is provided within the Table of Fees to ensure that payment can be made in respect of a diet that does not fall into the other categories in the Table of Fees. The operation of Rule 19 of Chapter II of Schedule 6 of the 1989 regulations in relation to certain cases commenced but not concluded before 10th February 2007 is preserved. This concerns the waiting fee in cases where a solicitor has conducted any hearing listed in paragraph 5 of Chapter II of the table of fees before 10<sup>th</sup> February 2007.

Other changes include:-

The maximum percentage by which the Board may allow a fee additional to the fees prescribed for sheriff court defended cases where it is satisfied that any of the circumstances specified in Chapter III of that Schedule exists is increased from 40 to 50. Such cases will include complex financial disputes, complex pensions sharing arrangements and for contentious contact disputes. This is made available through the insertion of paragraph 4(k) and where a fee is made available for all work in connection with peremptory diets through the insertion of paragraph 4(l).

A new Chapter I of Schedule 6 is substituted providing for fees in undefended sheriff court actions and including notes on the operation of the chapter (regulation 6 and the Schedule to the Regulations).

The new Chapter I makes amendments to provide, at Part I, that a fee is payable for all of a solicitor's work in negotiating cases where, as a result of that negotiation, no court proceedings are raised. Part II of the Chapter (previously Part I) omits the reference to actions for adherence and aliment which were abolished by the Family Law (Scotland) Act 2006. The inclusive fees in Part III (previously Part II) are, in the main, increased and drafting changes are made consequential on the reduction of the minimum periods of non-cohabitation as a ground of divorce brought in by the Family Law (Scotland) Act 2006.

**Application clause:** The regulations apply only to fees for work done and outlays incurred on or after 10 February 2007. In relation to proceedings commenced and not concluded before 10 February 2007 where on that date work in respect of a fee is payable under Chapter III of

Schedule 2 or Chapter 1 or II of Schedule 6 to the 1989 Regulations has not come to an end then the fee for that work shall be in accordance with the payments in this instrument. This will ensure that the changes could be brought in as soon as possible but it is appreciated that this will provide a retrospective element. As all the changes either bring in increases in the fees payable or bring no change at all then there will be no detriment or loss to the solicitors in respect of the retrospective application of this instrument.

**Purpose- increase to summary cause fees**

Chapter III of Schedule 2 is amended to provide for a 21% increase in the fees for solicitors in respect of summary cause proceedings.

**Financial Implications**

The overall cost of these reforms has been estimated by SLAB to be £870k per annum.

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