



Law Society
of Scotland

Consultation response

Scottish Solicitors' Discipline Tribunal; Consultation on Tribunal Expenses

May 2021



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

We welcome the opportunity to consider and respond to the Scottish Solicitors' Discipline Tribunal (SSDT) consultation on Tribunal Expenses.¹

Specific Comments

1. Should the usual scale for awarding expenses in Scottish Solicitors' Discipline Tribunal cases be the agent and client, client paying scale?

Response: Yes, we agree with this approach, which is long established. In line with the comments aligning the Society's statutory role as a regulator to that of a fiduciary/representative capacity, we agree with the view of the SSDT that it would not be appropriate for any new table of expenses to impose block fees upon the parties. We believe that a time and line approach is the most appropriate method and is necessary for the recovery of reasonably incurred time expended in relation to preparing for and presenting the proceedings before the Tribunal.

2. How should units be allocated to charges?

Response: We suggest that the SSDT may find it helpful to refer to the Act of Sederunt (Taxation of Judicial Expenses)², Schedule 1 which provides a table of detailed charges. We suggest that the SSDT should consider this table of charges, which we believe suitably reflects work associated with disciplinary proceedings. The SSDT could for example use this to inform its own assessment of the unit charged or perhaps accept the Schedule 1 table in its entirety. In addition, charges should be allowed per chapter 3.3, 3.4, 3.8 and 3.10 of that same Act of Sederunt.

¹ SSDT Consultation on Tribunal Expenses see: <https://www.ssdtd.org.uk/media/530403/expenses-consultation.pdf>

² Act of Sederunt (taxation of judicial expenses rules) 2019 SSI 2019/75

a. Should reference be made to the last published Law Society's Table of Fees as it is at present?

Response: As the consultation correctly states, the current practice is for expenses to be awarded with reference to Chapter Three of the last published Law Society's Table of Fees for general business, which was abolished in 2005. We do not believe that it is appropriate to place reliance on abolished provisions which may not be accessible, nor understandable, equally to all parties. In addition, reliance is being placed on provisions that do not necessarily reflect modern work practices and which uses dated terminology. Expenses should be calculated and taxed with reference to provisions which are current, clear and accessible. This would promote consistency, certainty and understanding.

b. Should the Tribunal create its own Table of Fees?

Response: We suggest that it would be sensible and appropriate for the SSDT to develop and produce its own table of fees. This should be informed by the Act of Sederunt, as referred to in our response to question 2, and it should expressly provide that the rate may be altered from time to time in line with alterations made to the table of fees within the Act. This would help to ensure clarity and consistency. The table, as set out within the Act of Sederunt, provides what in our view is a comprehensive reflection of the work associated with disciplinary proceeding and therefore would be a good starting point of reference for the SSDT's own table of fees.

However, we would also expect that in developing a table of fees, that the SSDT would consult and engage with relevant stakeholders, including the Society, and consider any submissions made. We would also expect that any increase made would be equally consulted upon.

c. Is there another relevant reference point that would be appropriate?

Response: We do not have an alternative reference point to suggest.

d. Should the unit rate be linked to that set by Act of Sederunt (presently £16.40) or set in some other way?

Response: Yes, we agree that the unit rate should be linked to that as set out within the Act of Sederunt. This ensures the rate reflects modern rates. As stated in response to question 2b above, specific reference should be expressly made within the SSDT's own table of fees which clearly demonstrates linkage and reliance.

A possible alternative, should the SSDT decide against linking the unit rate to the Act of Sederunt, would be for the SSDT to fix a unit rate with reference to an average of Scottish solicitors' commercial

rates and link that unit rate to one of the inflationary indexes, to be reviewed periodically. This would provide consistency, certainty and transparency and go some way to award expenses at a rate that is realistic and reflects the expenses actually incurred.

Additional Comments

As the regulator of the Scottish solicitors profession, we work to ensure adherence to a proportionate, effective and robust regulatory regime which not only maintains the reputation of the profession but, most importantly, protects and promotes the interests of the public. This reflects our statutory duties under the 2010 Act³ and ensures that both the public and the profession can have confidence that in the unlikely event the conduct of a Scottish solicitor falls below that expected, then this will be investigated and, where appropriate, disciplinary proceedings will be brought by the Society before the SSDT who will then independently determine a finding accordingly.

It is crucial that there is no perceived deterrent to the Society exercising its statutory power, and the Society should not be fettered in its regulatory responsibility, to bring disciplinary proceedings in the appropriate circumstances. It is for this reason that we believe that in the event the SSDT finds in favour of the respondent solicitor, then the starting point should be no order for expenses. This is in line with the decision in the case of *Baxendale – Walker v Law Society*⁴, supported by the Court of Appeal judgment in *CMA v Pfizer Inc and another*⁵ and reflects the position that a statutory regulator (such as the Law Society of Scotland), is entrusted with wide and important disciplinary responsibilities which are undertaken as a statutory duty and for the protection, and in the interests, of the public.

The SSDT in acting within its discretion in relation to the awarding of expenses, in the absence of an express rule, should have regard to the Society acting in the public interest. The starting point of no order for expenses to be made against the Society in carrying out its regulatory role should only be departed from for good reason. For example, where there is shown to be unreasonable conduct on the part of the Society and disciplinary proceedings have been improperly brought, or the successful respondent solicitor is likely to suffer financial hardship if an expenses order is not made, or for any other reason which is specific to the

³ Legal Services (Scotland) Act 2010 section 1

⁴ *Baxendale – Walker v Law Society* [2007] EWCA Civ 233

⁵ *Competition and Markets Authority (Respondent) v Pfizer Inc and another* [2020] EWCA Civ 617. The Supreme Court is to consider the Court of Appeal decision and central to this appeal is the decision in *Baxendale – Walker v Law Society*. See *Competition and Markets Authority (Respondent) v Flynn Pharma Ltd and another* (Appellants) UKSC 2020/0113.

proceedings in question which may justify the default starting point to be departed from and for expenses then to be awarded at the tribunal's discretion in either part or whole. Where expenses are to be awarded in appropriate circumstances, these should be determined by reference to the appropriate table of fees which the SSDT is looking to develop and is the subject of this current consultation.

The importance of ensuring that the Society can perform its regulatory functions free from financial consequences should its decisions be successfully challenged, is crucial to maintaining public confidence in the legal profession. It is important to recognise that disciplinary tribunal proceedings, which are brought reasonably, properly and in the public interest, are clearly distinct from a civil litigation matter brought before the courts and that exercising a regulatory function places the Society in a different position to that of a party to ordinary civil litigation matter. The SSDT hears matters relating to disciplinary proceedings which are brought by the Society in fulfilment of its statutory obligations and in the public interest. The SSDT is performing a disciplinary, statutory, and regulatory function when determining those matters and should not be reliant on customs or process regarding the awarding of expenses and developed for a different judicial forum.

This important distinction, between the SSDT and the civil courts, is one that has also been recognised by the Scottish courts and the judiciary. We respectfully refer to the Opinion of Lord Ericht that '*...the Tribunal is under no obligation to adopt the same conventional line on expenses as the Scottish civil courts*'⁶. Therefore, it is our view that it is not appropriate for the SSDT to award expenses on the same bases as those awarded in civil litigation actions (i.e. expenses awarded against the losing litigant).

To award expenses against the Society for proceedings appropriately, reasonably and correctly brought, in accordance with its regulatory responsibilities, before the SSDT also effectively penalises the Scottish solicitor profession as a whole. The Scottish solicitor profession reflects the size of the Scottish jurisdiction and is significantly smaller than, for example, the solicitor profession in England and Wales. Any expenses awarded against the Society will therefore impose a greater and disproportionate cost burden on those Scottish solicitors who steadfastly adhere to and respect the standards of conduct expected by the public, who will ultimately bear the real cost burden.

From a public perspective there may also be a perception that the regulator will be reluctant to bring disciplinary proceedings were there to be a risk of expenses being awarded if unsuccessful. Although we emphasise that the reality of this is unlikely, the public may view this as a real possibility, which would therefore undermine confidence in the solicitor profession and undermine the regulatory regime.

⁶ *Tasmina Ahmed-sheikh v Scottish Solicitors' Discipline Tribunal and Council of the Law Society of Scotland* [2019] CSOH 104

Therefore, we believe that an order for expenses should not ordinarily be made against the Society on the basis that costs follow the event where the Society has been unsuccessful in the proceedings, the costs will impact the wider profession, and the Society should not be viewed as an ordinary civil litigant.

We recognise and understand that disciplinary proceedings can be very stressful for the respondent solicitor facing uncertainty as to the outcome and the possible financial consequences regarding expenses. We therefore suggest that it would be helpful and provide a degree of certainty if the SSDT was to develop and publish accessible guidance indicating factors that would cause it to depart from the starting point of no order for expenses. We understand that each disciplinary matter is unique as to its circumstances and it is perhaps not possible to be prescriptive in relation to factors for consideration. In addition, we recognise that a prescriptive approach would dilute the SSDT discretion. However, general guidance would be helpful and would go some way to manage the expectations of all parties to the proceedings.

If the proposition that expenses should not automatically be awarded against the Society is accepted, then we suggest that the SSDT include in that guidance circumstances in which it would award expenses against the Society. For example:

- The SSDT should consider providing guidance of factors it will consider when determining if the respondent solicitor will suffer financial hardship if no award for expenses is made and which would therefore support expenses being awarded against the Society either in part or full.
- The SSDT could also provide guidance outlining factors it will consider to determine whether the Society has acted inappropriately in bringing disciplinary proceedings to the extent that expenses would be awarded against the Society either in part or full. Such guidance could consider the interests and protection of the public, whether the Society acted in good faith or in a vexatious or frivolous manner and whether it was reasonable for Society to have pursued the unsuccessful disciplinary action.

Similar guidance has been published, for example, by RICS' Regulatory Tribunal⁷ and the SSDT may find this helpful in developing its own guidance on expenses awarded by the tribunal. Section 3 of the RICS Tribunal Guidance contains good examples of factors it will consider in deciding whether to award expenses and the

⁷ Guidance on costs orders imposed by RICS' Regulatory Tribunal – See: <https://www.rics.org/globalassets/rics-website/media/upholding-professional-standards/regulation/rics-1215-guidance-on-costs-orders.pdf>

amount, if any. This includes the financial position of the individual subject to the disciplinary action (at Section 4). The SSDT may also find it helpful to consider the provisions section 18 of the Legal Aid (Scotland) Act 1986, which sets out particulars of items that should be disassociated from any calculations when considering financial circumstances.

We recognise that by introducing a starting point of no award for expenses and accompanying guidance would be a significant change for the tribunal. Therefore, we would suggest and be supportive of a SSDT consultation and further engagement and discussion with stakeholders. This would help to ensure that any proposals are fully informed and have considered the interests of all parties. We would welcome the opportunity to work collaboratively with the SSDT in this regard.

In addition to our regulatory duties, we also have an obligation to promote the interests of the solicitors' profession in Scotland⁸. We proactively represent the interests of our members and are sympathetic to solicitors who have been vindicated by the disciplinary proceedings and recognise that in defending those proceedings the solicitor will have incurred significant cost. However, we are aligned from both our regulatory and representative perspectives that no order for expenses should automatically be made against the Society in unsuccessful proceedings except where the Society acted inappropriately, in bringing or conducting the proceedings. In those instances, it will be appropriate for the SSDT to award expenses in favour of the respondent solicitor.

In addition to our comments above, we would also suggest that the SSDT takes this opportunity to consider clarifying that the current wording relating to expenses for representation before the tribunal refers to solicitor representatives, i.e. those entered on the Roll of solicitors and holding a current practising certificate.

The current wording is ambiguous, and we are aware of one matter that is currently with the Auditor of Court to determine how an award of expenses should be calculated for a non-solicitor representative. The 'solicitor representative' in this matter was retired, no longer on the Roll of solicitors and did not hold a practising certificate. Therefore, representation was provided by a non-solicitor.

It would be helpful, from a certainty and clarity perspective, for the SSDT to consider providing guidance as to who qualifies as a 'solicitor representative'. We believe that this should only be an individual who satisfies those requirements set out within the Solicitors (Scotland) Act 1980.

⁸ Section 1(2)(a) Solicitors (Scotland) Act 1980



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