

Justice Committee

Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill

Written submission from Andrew Smith QC

Introduction

1. I wish to make representations to the Committee regarding the Bill named above, in respect of reform of civil litigation expenses. I would be delighted to expand on what is said here, or indeed give oral evidence to the committee if asked to do so. My contact details are as noted at the end of this submission.
2. I have some general comments about issues regarding expenses, and would suggest that matters not directly covered in the Bill (but most of which were discussed in the Taylor Report) be introduced as this Bill provides an opportunity to address certain problems that have arisen in practice. I also suggest a few tweaks to the Bill, to ensure that the purpose of the legislation is fulfilled. Finally, I hope that I can provide some insight into the problems that arise in practice and suggest solutions to those problems.

Qualifications and experience

3. I am an Advocate at the Scottish Bar, and have been so since 1988. I took silk (i.e. became a QC) in Scotland in 2002.
4. I am also a practising barrister in England and Wales, qualifying there in 2006. I took silk in England in 2016 and am one of only three QCs who practise in both jurisdictions. As far as I know, only two of us practise in court (the other engaged in planning inquiries); and I am the only one of the three who carries out personal injury and medical negligence work. Personal injury and medical negligence work give rise to the majority of civil claims in Scotland; and therefore to the largest number of issues on expenses. Of course, much of the Bill is directed to that type of claim.
5. My reason for pointing that out is not (I hope) to be taken as blowing my own trumpet, but to indicate that I feel that I have an almost unique insight into the question of expenses (or “costs” as they are known in England). I regularly appear in court in England (and Wales) arguing issues of costs; and as you may be aware, the Civil Procedure Rules (“CPR”) in England have been operating a number of the ideas that are proposed in the Bill (in particular QOCS). There have been problems with the operation of the regimes, and hopefully my experience in England as well as Scotland can assist in trying to avoid the problems arising in Scotland which have been identified and to some extent resolved in that jurisdiction. The CPR practice is constantly under review, and both litigation and legislation have been commonly engaged to iron out the problems. I am a great believer in learning from others’ mistakes and improving upon the system in the light of them. I have also been involved in a costs/expenses application in the Supreme Court (*McGraddie v McGraddie*, no. 2) which sought to carry out a comparison exercise between Scotland and England on recoverability of insurance premiums in litigation. A judgment was

issued by a panel consisting of the President, the Vice President and a Justice on what was recognised to be a difficult problem.

6. In addition to the actual practice under the CPR in court, it may assist to know what the methods are of assessing accounts of costs in England; and consider the benefit of changing or clarifying certain aspects of the current expenses regime in Scotland to make it more efficient and business like. The archaic nature of our system has caused several of my clients who could have litigated in either Scotland or England, to choose the latter. If Scotland is serious about projecting itself as a commercial centre, it has to compete with the southern jurisdiction. Otherwise significant work will disappear. This Bill gives a perfect opportunity to make the system appeal to commerce and industry; and I hope that it will be seen that it is in this spirit that I make the submission.
7. I was also a member of the advisory committee (appointed by the Faculty of Advocates) to Sheriff Principal Taylor's review of expenses.
8. I appear in court regularly and have almost thirty years behind me of arguing expenses motions in courts in Scotland and England. I am familiar with the systems; the law; and more particularly the problems that can arise in practice from clients' perspectives. I would like to think that I work to develop the law, and I make reference below to two cases in particular where the law has been developed in Scotland by my drawing on English experience.
9. I perhaps should declare something of an interest. Apart from the personal desire to securing sufficient by recovery of expenses from the other side, I have been engaged in litigation on a personal basis which in essence has challenged the operation of the office of auditor. Some of the problems that the Bill seeks to change are addressed (I am delighted to say) but others remain. I have also (in my quest to try to make the current office of Auditor more transparent) served various Freedom of Information requests upon the Auditor. Much to my surprise, he refused to produce the information I asked for, maintaining – perhaps correctly – that as he is not part of the Scottish Courts and Tribunal Service, he is not subject to the Act. The information I was requesting was broadly information about what fees he has allowed for various cases in the past. The purpose is to have a ready reckoner of what fees are usually allowed by him for various types of work, so I could advise my clients and colleagues of the range of figures that they should pitch their fees at. But, as I say, that information was not produced to me. Had it been, this would have been extremely useful to clients, solicitors and counsel to introduce predictability in litigation. As I suggest below, a simple solution to this problem is to state that as of the coming into force of the Act, the office of Auditors are part of the Scottish Courts and Tribunal Service. That would mean that the Auditor would be obliged to provide the information that he has on these matters and accordingly go some way to providing that predictability.
10. I am delighted to note the nature of the proposed changes to the operation of that office, which will answer many of the criticisms that I have. I suggest certain improvements to the system that might ensure that the proposals work well. It is regrettable that it will not all apply to the present holder of the office who may continue in office for many years to come.

A thumbnail sketch of how practice operates

11. The briefing papers for the Justice Committee are comprehensive and (not surprisingly) accurate. It may though assist to understand a few realities of litigation and expenses.
12. Litigation is extremely expensive for those who are not rich, or insured, manage to secure funding from a third party funder or obtain legal aid. It is usually beyond the means of those who are “just about managing”. That said, there is a vigorous pro bono unit within the Faculty of Advocates. I have personally taken two cases to the Supreme Court pro bono (successful in both) and regularly take on other pro bono work. I would not like it thought that Advocates and Barristers are only interested in paying work.
13. However, the only way that one can expect the pro bono cases to be presented by counsel and solicitors is where one can ensure that in other cases, if you are successful, then you can be paid what the market rate is. In other words, if I am paid well in a commercial case, I am better able and prepared to take on cases that will not pay at all.
14. I fully accept that the fees which counsel can and do charge are extremely high when compared to ordinary members of the public. But the Bar is truly a meritocracy, and many of my colleagues would frankly rather be doing “paid” work all the time, rather than providing their services free of charge on a regular basis.
15. The usual rule is that whoever wins, has their expenses paid by the loser. It is convenient to refer to the parties as the “paying party” and the other as the “receiving party”.
16. After the court makes the order for payment of expenses, each side will instruct a law accountant (who is someone who is not legally qualified) and has some knowledge of how cases work. They are essentially book keeping experts who know something about the procedures. Interestingly in England there is an entire industry which has arisen about costs: with costs lawyers, costs draftsmen and so on who specialise in such matters.
17. Once the receiving party makes up his account – which can be an extremely lengthy and complex business – he tries to obtain agreement with the other side. Some horse trading will go on, and with luck an agreement will be reached. If it is not, then the account goes to the Auditor (either of the Court of Session, or the Sheriff Court) who is charged with the responsibility of assessing the account. His decision is final and enforceable.
18. Judges and Sheriffs in Scotland do not have training and have little experience in how this stage of a case operates. My own experience is that judges are all too quick (when matters of expenses are discussed) to say “but that is a matter for the Auditor...”

19. Regrettably, there are a number of systemic problems with the office of Auditor. As is noted in the briefing papers, it is a historical office with somewhat uncertain origins. In modern practice, an oral hearing will take place before the Auditor. It is a fairly informal affair, usually with law accountants appearing or sometimes solicitors. Very occasionally counsel or their clerks will attend. My own impression is that the hearing is not only informal, but the decision making process is obscure. Generally no reasons are given for the decision being made, and amounts of expenses are routinely “taxed off” [i.e. cancelled] or reduced in quantification, without any reasons being provided.
20. The auditor will then go away, and some time later (occasionally months) the account will be produced by him with “abatements” marked on the account in manuscript. No reasons are given for his decision; and occasionally he will knock off amounts claimed which have not been challenged. It is verging on impossible to challenge his decision before a judge – the mantra being “is that not just for the auditor in the exercise of his discretion”? The fact that the sum is not recoverable from the other side does not of course mean that the lawyers are not entitled to charge their own client for the fee. Accordingly the lawyers are entitled to impact on the damages obtained, which especially in small value claims is something that most are reluctant to do.

The problems with this approach

21. A number of problems arise with this approach. First, as no reasons are given by the auditor, there is a complete inability to offer a client advice at any stage of the case as to what the auditor might allow by way of fees and expenses at the outset. This leads to a lack of predictability. By analogy, it is a bit like a builder saying that you might get a grant, or a discount, for work to be done. But he cannot say whether you get it and how much it will be if you do. This uncertainty is profound for some clients, and I have no doubt it inhibits litigation.
22. There are essentially (and very confusingly) three scales of expenses that the auditor operates – which are of long history and obscure in their origins - and the court will decide which scale should apply when it makes its expenses order prior to sending the account to the auditor. They are known as
- Party and party
- Agent and client, third party paying
- Agent and client, client paying.
23. The difference between the scales (and these are given incrementally above with the least generous to the most generous) is that the first is assessed on what the auditor thinks is reasonable for the other side to pay. Accordingly, he may reduce the claimed fees quite considerably on a party and party account, again without giving reasons.
24. The last (Agent and client, client paying) is usually awarded where there has been misconduct by the paying party, and the court marks its disapproval by making the higher award. This is assessed by asking the question: if the receiving party was sent this account to pay, is the claimed amount reasonable?

The answer to that question will almost invariably be “yes” and the auditor has very, very little discretion to “tax off” any part of the account.

25. This terminology is out dated and I suggest should be abolished. The English terminology is far easier to understand. The equivalent to party/party is called the “standard basis” and indeed, in Scotland the party/party is standard; and agent/client is called “indemnity basis”, meaning that you are entitled to full indemnity of your costs.
26. The overarching principle in England when assessing accounts (that is absent in Scotland) is that the costs should be “proportionate”. So, if a claim was worth £10,000 and the costs were £100,000, that would generally be seen to be disproportionate. If there is doubt about it being proportionate, on the standard basis then the dispute is resolved from the standpoint of the paying party (who would not doubt say that such was a ridiculous amount of costs); on the indemnity basis, the dispute is resolved from the standpoint of the receiving party (who would no doubt say that he should be paid a lot as the other side had messed him about through the litigation).
27. **I submit to the committee that the opportunity should be taken to legislate by abolishing the archaic and poorly understood differences in terminology. I suggest that as the definitions in England are clear, work well and can be applied in Scotland without difficulty, similar wording could be used. I suggest at the end of this paper the wording of a clause that would give effect to the proposal (see Appendix A).**
28. **I also recommend that in addition to the guidance which it is proposed is published by the Auditor, he is obliged to provide and publish written reasons for his decisions.**
29. This will allow clients and their lawyers to know why amounts were “taxed off”; and encourage consistency as well as predictability. At present it is verging on impossible to have either, absent reasons or guidance. I would also suggest that the provision of reasons would mean that if it was inconsistent with the guidance, it would be capable of challenge before the courts in the right cases. At present, the Auditor is beyond question in his decision making, and this is an unacceptable deficiency for the clients who have to make up the shortfall.

Interim orders for expenses

30. A further feature of the current system is that the receiving party often has to wait for months or years until he is paid by the paying party. For example, during the course of a case the court may award expenses for a particular part of the case; or indeed at the end of the case, it will take several months (perhaps up to a year) for the account to be made up, negotiated or taxed, and then enforced. During that period, if the paying party is an individual (as opposed to an insurance company for example, or a large corporation) there is the risk that the paying party will be unable to pay perhaps through bankruptcy or generally prejudices their assets.

31. Currently the Scottish courts have (at least in commercial cases) developed a practice (only followed as far as I know in about four cases in the past three years and not before) whereby the judge can award a specific sum by way of interim expenses which is a proportion of those expenses over all.
32. I should say that the first case in Scotland in which this was done (Martin & Co, Petitioners) was one of mine; having seen the invariable practice in England to make interim awards of costs, I thought that the logic demanded that it be applied in Scotland too. Lord Drummond Young allowed the motion, and it has been allowed in other cases more recently (I may say that at the time of writing all bar one were cases I was involved in.)
33. So, you may ask: if it is now proper to do so, then why legislate?
34. The answer to that question has many facets.
35. First, it may be that the competency of such motions will be challenged - although I doubt that it could be in the light of the judgments of Lords Drummond Young and Bannatyne. Lord Bannatyne allowed a motion of that kind in the recent case of Higherdelta v Covea Insurance. But there is an important difference between Lord Drummond Young and Lord Bannatyne in their decision as to when such a motion can be allowed: Lord Drummond Young said that "special circumstances" are required; Lord Bannatyne said that they were not, and the implication is that they should be routine. Thus there is perhaps some doubt about why the motion should be allowed and when. This anomaly can be resolved by the suggested text appended to this submission.
36. I attach at Appendix B a short passage from the English case upon which I relied which explains the utility of such orders; and as both of the above named judges accepted, the logic can equally apply to Scotland.
37. Again, I suggest the wording of a section in the Act at the end of this submission.
38. Finally, there is doubt as to whether the approach of the commercial court (all of the motions that have been granted have been commercial actions) would apply to non commercial cases such as personal injury claims. Legislation would clarify that matter.
39. If I may give one example. I represent the pursuer in a case involving allegations of professional negligence against two doctors. Shortly before the proof (i.e. the trial) on liability, the defenders admitted liability. The client was awarded expenses of the case insofar as it related to liability. Only the quantum of damages has yet to be determined.
40. Because the account of expenses is complex with some work relating to liability, some to quantum, and some for both, it is proving impossible to have the account determined as the wheat cannot be separated from the chaff. I am, though, entitled to insist that my client pays my fees immediately; but as I know that he cannot do so without remortgaging his house. I have therefore deferred the fees until the end of the case. The dates we have for the end of the case could be in

as long as two years time. Meantime, I must pay tax on the fee as rendered even though I will not be paid for years; and to defray that outlay, I am entitled to charge him interest at 8% over base rate.

41. But, in the light of recent Inner House authority, the client cannot charge the other side interest on the debt as owed. [I deal with the question of interest in the next section]. Thus – as Lord Bannatyne held – it is only fair and just that the debtor should have to pay an interim order for expenses but, by its nature, this will only be a proportion of the expenses. The receiving party is thus out of pocket; and the paying party has the benefit of the money in his bank for years with no incentive to pay.

Interest on expenses

42. Personally I find it surprising how long counsel and solicitors have to wait for payment of their fees. I cannot imagine any other business operating as we do. I have had in the past fee notes which were up to fifteen years old, upon which I can charge no interest.

43. The problem, insofar as counsel are concerned, was to some extent redressed in legal aid accounts. I personally took action against the Scottish Legal Aid Board (Andrew Smith QC v Scottish Legal Aid Board) and it was held that the Board were liable to pay interest under the late payment of commercial debts legislation. This has led to the Board speeding up payments (for obvious reasons).

44. However, that decision will almost certainly not apply to cases which are not legal aid.

45. The problem in many ways can be cured easily by legislating to the effect that interest should be applied at the court rate as from the date of the order for expenses until payment. This would incentivise early payment and once again in England this is routine. It gives the clear impression of a business like and efficient court. It is good for commerce; and brings us into line with England and Wales.

Summary assessment of expenses

46. In small value claims in England, the judges (generally District Judges or Circuit Judges sitting in the County Courts) will carry out a rough and ready summary assessment of costs at the end of the case. At least 24 hours prior to a hearing, each party must submit a summary of their costs and the judges – once they decide who is getting their costs – then go straight to costs assessment.

47. In complex cases, the system follows the Scottish one (albeit with an interim payment) but it is sent to the taxing master or costs judge for a “detailed assessment”.

48. Judges in Scotland – as I say above – don’t usually understand expenses. That said, the English judges having been trained and worked up experience are able to deal with such matters quickly and easily. Thus a party obtains a costs order

immediately at the end of the case and most litigants would rather a quick assessment, even if it is a bit less than they had previously expected.

49. I therefore suggest that provision is introduced to allow for summary assessment of expenses in the Scottish Courts.

Particular suggestions of the Bill with suggestions on problems and how to avoid them

Success fees

50. The Faculty of Advocates has professional rules making it a disciplinary offence to enter into an agreement with payment being made of a proportion of damages. However, that rule may of course be abolished at some stage in the future.
51. The wording of this section of the Bill would mean (in the event of a change in the Faculty's rules) that both the solicitor and the advocate could enter into an agreement (separately) for payment of a success fee thus doubling the amount that can be recovered. I suggest therefore that it is made clear that the "provider" of legal services means both solicitors and counsel, and the cap is the overall cumulative cap on the percentage.
52. The following points can perhaps be catered for in the Regulations envisaged under clause 7.
53. I note that there are no provisions in place for the situation where a solicitor or counsel withdraws from acting, or the client "sacks" the representatives. Does the agreement subsist? This might be capable of being contained in the agreement itself, but may be worth considering as a part of the legislation.
54. I also would suggest that the provider is under an obligation to tell a client that other solicitors may take on the case without charging a success fee. There are some clients I have come across who had a completely winnable case (e.g. where an insurer had already admitted liability, or they were a passenger in a road traffic accident.) The worst advocate or solicitor in Scotland would struggle to lose such a case; yet, they may find themselves in the offices of a solicitor who negotiates to take 20% of their damages when the solicitor next door would not charge any success fee. I suggest that there should be a statutory obligation on the provider to explain in cases where the prospects of success are high, that other solicitors may take the case without charging any such fee. It may also be sensible to legislate to the effect that the percentage taken must be assessed having regard to the risks of losing the case. Solicitors are used to making risk assessments; and they should have to justify why a high percentage of damages is to be taken if the case is likely to be successful. This avoids the "low hanging fruit" argument, and the clear conflict of interest that exists between a solicitor wanting a high percentage and not advising his yet client that another solicitor would be prepared to take the case on without that impact on the damages, must be obvious.

Part 2, Clause 8: Qualified one-way costs shifting (QOCS)

55. Generally this concept, which has been alive and well in England for about two years, is welcome (at least if one is a pursuer).
56. I am concerned about the “workability” of this part of the Bill. As is clear, it envisages a situation where - provided the claim is presented in an “appropriate manner”- then he is protected from an award of expenses against him if he loses. So far, so good.
57. However, Clause 8(4) defines “appropriate manner”. Three criteria are stated. The first two, though, present problems in how they might operate and could lead to extensive appeals and hearings.
58. The first – where the party “makes a fraudulent misrepresentation” in the claim is, I fear, too wide to be practicable. There are few cases where a pursuer does not make a claim that he was injured more seriously than he was. I emphasise that I am not condoning exaggeration, but inevitably judges reject evidence as being overstated, or just wrong. Theoretically that is a fraud. Does it mean that if I was to say that my income was £x, and it was discovered that I had claimed a business expense that was overstated, I lose the protection of the rule?
59. Lord Reed presented a paper in conference entitled “Lies, damned lies: the dishonest litigant” in which he acknowledged that litigants do tell lies, but that does not mean that they should lose the case. His opinion was that only if the claim itself was fundamentally dishonest, should it be met with sanctions.
60. Accordingly, I can see ample scope for argument that if a judge finds against one party on any matter, if they ought really to have known the truth, then this was “a fraudulent misrepresentation”.
61. In a recent case I had, the pursuer stated that he could not drive since the accident. It turned out that he had driven since the accident. If he had driven but once, or having told a doctor that he could not play golf when he had done so once for two holes, should he lose the protection?
62. The second provision appears to me to be impossible to judge. On one view, if that provision is there, why do we need the first (fraud, above) as the standard reasonably expected of a party in civil proceedings is that they do not commit fraud and again, I question how this is supposed to be worked.
63. The solution?
64. The problem is dealt with in England by developing the concept of “fundamental dishonesty” relating to QOCS – very much as Lord Reed discussed it. There is a growing jurisprudence in England on this concept. It is thought to be something that goes to the heart of the case: the fabricated accident, the person claiming not to be working when they are in fact working, the person fabricating their business accounts. This is contrasted with just plain “dishonesty” – the submitting

a claim for a mobile phone damaged in an accident, when it was not actually repaired.

65. I would respectfully suggest that the problems with the current wording can be avoided by adopting the English concept of fundamental dishonesty, which I think is what is being driven at in the Bill. My concern is that the wording gives a lot of scope for lawyers to argue about what it is.
66. For completeness, (4)(c) is perfectly clear and in my opinion workable.
67. There is a further English provision which may be usefully imported. The protection afforded by QOCS is lost if the defendant makes an official offer (a "Part 36 offer", of which the Scottish equivalent is a "tender") which the claimant fails to beat.
68. As presently drafted, a pursuer could have the protection of QOCS; an offer is made, say, of £100,000 with his expenses to the date of the offer. He does not take it, but ultimately is awarded £50,000. He has the protection against an adverse award of expenses with the way the Bill is currently drafted.
69. In England, he would have to pay the other side's costs from the date of expiry of the offer (usually 21 days to consider it) but his liability in costs is limited to the amount of damages he gets.
70. Tenders in Scotland are extremely useful for tactically making offers which will cause a pursuer to stop and have a serious think about whether he is prepared to risk going ahead and if he fails to beat the tender, not only have to pay his own expenses but the other side's. As drafted, the Bill will take that away, and there will be little incentive to settle and even a small chance of beating a tender would be run as the down side is massively reduced. I can envisage a lot more cases being run with the attitude that one can be a little more "gung ho" when an offer comes in.
71. I recognise that some of the exceptions may kick in contained in (4). However, I would think it would be hard to say that if a pursuer acts on advice that he is not acting reasonably. Judgments like that are hard to make in the run up to trial and to advise upon. This clause, unless it introduces a "failing to beat the offer" clause, will encourage litigation to proceed when it is perhaps lacking in substance.

Part 3, Clause 13: Auditors of Court

72. I have made extensive comment about the office and function of auditors. I am generally pleased with the thrust of the legislation, but would make the following observations and suggestions.
73. In the briefing paper, the Scottish Government indicates that it has itself paid over £100,000 to the current Court of Session Auditor on an annual basis. This is no doubt derived from knowledge of cases where the Scottish Government has been a paying party in a taxation. The paying party has to pay the Audit fee, currently

5% of the account of expenses submitted. It may help to illustrate one of the problems as follows.

74. A pursuer wins a case. His account of expenses is £300,000 (a not unusual sum). The audit fee at 5% is £15,000. That is so whether the account is assessed at £10 or £300,000. That is so whether there is all £300,000 in dispute or only one minor part of the account. Therefore, if only £25,000 is in dispute, the auditor charges the entire audit fee.

75. For the purposes of the challenge I had presented to the courts regarding the auditor's decision in a case of mine, I thought it would be interesting to know among other things answers to the following questions:

“4. (i) The amount of total receipts obtained by the Auditor in respect of taxation fees.

(ii) The amount of those fees which was paid in respect of taxations which did not in fact proceed.

(iii) The net receipts by the Auditor after deduction of all office costs and expenses (viz. net receipts)

(iv) The number of days upon which the office of the Auditor was engaged in business as such.

This information is sought for the past five years.”

76. What I was seeking to do was to recover information on what is essentially the income of the auditor for the past five years. This information is important as the public is probably paying this sum to a single individual – either through fiscal taxation, or insurance premiums. However, the auditor refused to provide me with that information under the Freedom of Information (Scotland) Act.

77. I think it can reasonably be expected that the audit fees per annum are, if not in excess of £1m per annum, they are very close to it. This sum has to be paid for, ultimately by the public. In England, as the taxing masters are employees and not in essence freelancing, the maximum amount of the equivalent of the audit fee is £6,000. The usual amount for say a £200,000 account is about £3,000. These sums are eminently manageable in the context of litigation.

78. I presume that the auditor refused to provide information to the Government about the amount of his income, as he did to me. But, as a public servant and member of the college of justice, one would think that accountability means that he should so account to the public who pay for his service, and frankly have no option but to have him assess controversial accounts. I wonder what other public official, who in essence operates a monopoly for his services, can refuse to divulge his income.

79. It is unclear to me why the audit fee is set at 5%, especially when it is unclear what the income is for the auditor in total. To borrow a word from above, it could

well be disproportionate to the service provided. I respectfully suggest that a review is undertaken immediately of the value for money of this fee which again is completely out of kilter with the fees in England.

80. The lack of transparency is a problem with the current auditor as a position. It would appear to be correct that he is not subject to the Freedom of Information (Scotland) Act as he is not (currently) part of the Scottish Courts and Tribunal Service. That anomaly can be cured easily by stating in this Bill that as from the coming into force of the Act, the office of Auditor shall be part of the Service. To permit the current incumbent to fall outside the Service, and being entitled to refuse to disclose information as to cost to the public and information about his practice in taxations, is unbecoming of a modern, open and fair administration of justice.

81. I therefore suggest that as from the coming into force of the Act, the Auditor of the Court of Session shall be part of the Scottish Courts and Tribunal Service.

82. I wish to make clear that should this be enacted, I would then seek to re serve my notice under the Act. This would then permit a review of whether the 5% charge is reasonable in the circumstances. I suggest the following:

83. That the Bill should specify that the audit fee should be set at figures which are not related to the value of the account but to specific fees which are subject to adjudication by the auditor.

84. Finally, the Committee may be interested to note that the Auditor is not registered under the Data Protection Act. Accordingly, he falls between the two most important pillars of openness in public life. No one has the right, apparently, to have access to his decision making process and reasoning.

Group proceedings

85. I welcome the introduction of this provision. The detail will no doubt require careful consideration in the rules to regulate, but in principle this is a long overdue provision.

Conclusion

86. I am pleased to offer the above comments in trying to assist the committee in its consideration of the new Bill. As I have said at the outset, I would be pleased to provide further information if requested to do so. I wish the committee the best of luck in this rather tricky exercise!

Andrew Smith QC, MCI Arb
Advocate and Barrister
5 September 2017

Suggested additional clauses for the Bill

1(1) When making an award of expenses, the court shall specify whether the award is to be made on the “standard” or “indemnity” basis.

(2) In assessing the account of expenses, the Auditor shall allow any fee or outlay which is reasonable and proportionate having regard to the nature and conduct of the whole litigation.

(3) If there is any doubt as to whether a fee or outlay is reasonable or proportionate, if the account is assessed on the standard basis, that doubt shall be resolved from the standpoint of the paying party.

(4) If there is any doubt as to whether a fee or outlay is reasonable or proportionate, if the account is assessed on the indemnity basis, that doubt shall be resolved from the standpoint of the receiving party.

(5) Any rule of law or practice which assesses accounts on a party and party basis, or an agent and client basis, is hereby abolished.

2(1) Upon the court making an order for payment of expenses in any cause before it, the court shall, unless it is unjust to do so, make an order for an interim payment of a reasonable proportion of the expenses which are likely to be found due upon taxation or agreement.

(2) The order made shall specify the amount that shall be paid; the period within which it shall be paid; and shall state that if the order is not complied with, interest at the judicial rate of interest shall accrue as from the end of that period until payment.

(3) Upon the court making an order for payment of expenses under this section, unless it is unjust to do so shall order that interest shall accrue on the amount of expenses ultimately found due and payable (whether by agreement or on taxation) at the judicial rate of interest.

(4) Interest due in terms of subsection (3) of this section shall take due account of any interim payments made whether under subsection (1) or otherwise.

3(1) As from the date when this Act comes into force, the offices of Court Auditors shall be part of the Scottish Courts and Tribunals Service.

Interim orders for expenses

Extract from Mars UK Ltd v Teknowledge Ltd [1999] 2 Costs LR 44

“I now turn to the second issue, whether or not there should be an order for interim payment. The first thing to do is to consider what the general rule should be, interim payment or not. There is no guidance given in the Rules other than that the court may order a payment on account. There is no guidance in the Practice Direction. So I approach the matter as a question of principle. Where a party has won and has got an order for costs the only reason that he does not get the money straightaway is because of the need for a detailed assessment. Nobody knows how much it should be. If the detailed assessment were carried out instantly he would get the order instantly. So the successful party is entitled to the money. In principle he ought to get it as soon as possible. It does not seem to me to be a good reason for keeping him out of some of his costs that you need time to work out the total amount. A payment of some lesser amount which he will almost certainly collect is a closer approximation to justice. So I hold that where a party is successful the court should on a rough and ready basis also normally order an amount to be paid on account, the amount being a lesser sum than the likely full amount.”