



Compass Chambers

# DBAs

Preston Lloyd, Advocate

Compass Chambers

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# S1 — Success Fee Agreements

- (1) In this Part, a “success fee agreement” is an agreement between a person providing relevant services (the “provider”) and the recipient of those services (the “recipient”) under which the recipient—
  - (a) is to make a payment (the “success fee”) to the provider in respect of the services if the recipient obtains a financial benefit in connection with a matter in relation to which the services are provided, but
  - (b) is not to make any payment, or is to make a payment of a lower amount than the success fee, in respect of the services if no such benefit is obtained.

# S1 – Success Fee Agreements

- (2) In this section—
- “claims management services” means services consisting of the provision of advice or services, other than legal services, in connection with the making of a claim for damages or other financial benefit, including—
  - (a) advice or services in relation to—
    - (i) legal representation,
    - (ii) the payment or funding of costs associated with making the claim,



# S1 – Success Fee Agreements

- (b) referring or introducing one person to another,
- (c) making inquiries,
- “legal services” means services consisting of the provision of legal advice, assistance or representation,
- “payment” includes a transfer of assets and any other transfer of money's worth,
- “relevant services” means legal services or claims management services provided in connection with a matter—
  - (a) which is the subject of civil proceedings to which the recipient is a party before a Scottish court or tribunal, or
  - (b) in relation to which such proceedings are in contemplation,
- “Scottish court or tribunal” means a court or tribunal established under the law of Scotland.



# S1 – Success Fee Agreements

- (3) In this Part, the following terms, in relation to a success fee agreement, are to be construed in accordance with this section—
- “payment”,
- “provider”,
- “recipient”,
- “relevant services”,
- “success fee”.



## S2 - Enforceability

- (1) A success fee agreement is not unenforceable by reason only that it is a pactum de quota litis (that is, an agreement for a share of the litigation).
- (2) Subsection (1) does not affect any other ground on which a success fee agreement may be unenforceable.

## S3 - Expenses in the event of **success**

- (1) This section applies where the recipient of relevant services under a success fee agreement—
- (a) is awarded expenses in civil proceedings concerned with a matter to which the agreement relates, or
- (b) agrees with another person that the recipient is entitled to recover expenses from that person in relation to such a matter.

## S3 - Expenses in the event of **success**

- (2) Unless the success fee agreement provides otherwise—
- (a) the provider is entitled to recover and retain the expenses so far as those expenses relate to the relevant services provided by the provider in relation to the matter, and
- (b) the amount of the success fee to be paid under the agreement is not affected by the amount of expenses recovered and retained by the provider.



## S3 - Expenses in the event of **success**

- (3) Subsection (2) is subject to section 17(2A) of the Legal Aid (Scotland) Act 1986 (which makes provision for circumstances in which expenses recovered are to be paid to the Scottish Legal Aid Board).

## S4 – Power to cap success fees

- (1) The Scottish Ministers may by regulations make provision for or about the maximum amounts of success fees that may be provided for under success fee agreements.
- (2) Regulations under subsection (1) may specify maximum amounts or provide for them to be determined in accordance with the regulations.



## S4 — Power to cap success fees

- (3) Subsection (4) applies where the maximum amount of the success fee that may be provided for under a success fee agreement is restricted—
  - (a) by provision made in regulations under subsection (1), and
  - (b) by, or in accordance with, another enactment.
- (4) The maximum amount of the success fee that may be paid under the agreement is the lower of the amounts allowed for by, or in accordance with, the enactments mentioned in subsection (3)(a) and (b).
- (5) A success fee agreement is unenforceable to the extent that it provides for a success fee of an amount that is higher than the maximum amount allowed for by virtue of this section.

# S5 - Exclusion for certain matters

- (1) A success fee agreement must not be entered into in connection with a matter which may be the subject of civil proceedings of a description specified by the Scottish Ministers in regulations.
- (2) Regulations under subsection (1) may relate to all success fee agreements or to success fee agreements of a description specified by the Scottish Ministers in the regulations.



# S6 – Personal Injury Claims

- (1) This section applies to a success fee agreement entered into in connection with a claim for damages for—
  - (a) personal injuries, or
  - (b) the death of a person from personal injuries.
- (2) The agreement must provide that the recipient of the relevant services is not liable to make any payment (including outlays incurred in providing the services) to the provider in respect of the services, apart from the success fee, regardless of whether any damages are obtained.
- (3) In subsection (2), “outlays” do not include any sums paid in respect of insurance premiums in connection with the claim to which the agreement relates.



# S6 – Personal Injury Claims

- (4) The agreement—
- (a) may provide that any damages for future loss obtained in connection with the claim (the “future element”) will be included in the amount of damages by reference to which the success fee is to, or may, be calculated (the “relevant amount of damages”) if the future element is within subsection (5), but
- (b) otherwise, must provide that any future element will not be included in the relevant amount of damages.



## S6 – Personal Injury Claims

- (5) The future element is within this subsection if it is to be paid in a lump sum and—
  - (a) does not exceed £1,000,000, or
  - (b) exceeds £1,000,000 and—
    - (i) the provider had not advised the recipient to accept that the future element be paid in periodical instalments, and
    - (ii) the condition in subsection (6) is met.



# S6 — Personal Injury Claims

- (6)The condition is—
- (a)in the case where the damages are awarded by a court or tribunal, that the court or tribunal in awarding the future element 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,
- (b)in the case where the damages are obtained by agreement, that an independent actuary has, after having consulted the recipient personally in the absence of the provider, certified that in the actuary's view it is in the recipient's best interests that the future element be paid as a lump sum rather than in periodical instalments.
- (7)The agreement is unenforceable to the extent that it makes provision contrary to subsection (2) or (4).



## S6 – Personal Injury Claims

- (8) The Scottish Ministers may by regulations substitute another sum for the sum for the time being specified in subsection (5)(a) and (b).
- (9) In subsection (1), “personal injuries” include any disease and any impairment of a person's physical or mental condition.
- (10) In subsection (6)(b), “actuary” means an Associate or Fellow of the Institute and Faculty of Actuaries.



## S7 – Form, Content etc.

- (1) A success fee agreement must be in writing.
- (2) A success fee agreement must specify the basis on which the amount of the success fee is to be determined.



# S7 — Form, Content etc.

- (3)The Scottish Ministers may by regulations make further provision about success fee agreements including in particular provision about—
  - (a)their form and content (including their terms),
  - (b)the manner in which they may be entered into,
  - (c)their modification and termination,
  - (d)the resolution of disputes in relation to such agreements,
  - (e)the consequences of failure to comply with the requirements of subsection (1) or (2) or the regulations,
  - (f)the application of this Part, or any provision made under it, where a recipient receives relevant services from more than one provider in connection with the same matter.
- (4)Regulations under subsection (3) may modify this section so as to—
  - (a)add text to it,
  - (b)modify any text added under paragraph (a).



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QOCS

Bruce Langlands, Advocate

Compass Chambers

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# QOCS

- Qualified One Way Cost Shifting
- Introduced by Section 8 of the Civil Litigation (Expenses and Group Proceedings)(Scotland) Act 2018.
- Why QOCS?
- Implementing the Taylor review – aiming to improve access to justice.



# QOCS

- What is QOCS?
- An exception to the general rule that expenses follow success – in personal injury actions (inc clinical negligence).
- Post-QOCS, if a pursuer fails, they will not meet the defender's expenses – in either the case or an appeal in respect of the case.



# QOCS

- Exceptions (the interesting bit)
- To benefit from QOCS, a pursuer must conduct the proceedings in an appropriate manner.
  - S8(1)(b).



# QOCS

- “Appropriate Manner”
  - defined in s4
- Pursuer loses the benefit of QOCS if:
- They make a fraudulent representation or otherwise acts fraudulently in connection with the claim or proceedings;
- Behaves in a manner which is manifestly unreasonable;
- Conducts the case in a manner the court considers to be an abuse of process.





# QOCS

- All nice and clear?
- What constitutes a fraudulent representation?
- Does the whole case have to be fraudulent, or just one element?
- How will courts differentiate between fraudulent conduct and ‘over-egging the pudding’?
- Is there a difference / does it matter?



# QOCS

- What constitutes ‘manifestly unreasonable’?
- What will amount to an ‘abuse of process’?
- We won’t know until cases start going before the courts.
- Until then, all of these issues are ‘up for grabs’.



# QOCS

- What can defenders do?
- Find a way to attack the pursuer's conduct (s4).
- Think about cases where the pursuer's conduct has been criticised before and expenses have been modified. Will provide a good benchmark post-QOCS.



# QOCS

- Argue there was a failure of the pursuer to disclose evidence and engage in discussions
  - *Gibson v Menzies Aviation* [2016] SLT (Sh Ct) 179
  - *Devine v Laurie* [2016] GWD 40-172
- Argue the litigation itself was unnecessary
  - *Zdrzalka v Sabre Insurance* 2019 Rep. LR 6
- Argue the claim is fundamentally dishonest
  - *Grubb v Finlay* [2017] CSOH 81



# QOCS

- What can pursuer's do to retain QOCS?
- Act reasonably at all times – avoid sharp practice.
- Engage with defenders and disclose evidence at the earliest opportunity.
- Comply with the CPAP. Will be hard to say conduct has been unreasonable if you've complied with it.
- Remember, any conduct today which is likely to result in a modification of expenses is also likely to constitute an exception to QOCS.



# QOCS

- Present position
- Not yet in force. Requires rules of court to be finalised.
- Understand that has now happened.
- Rules specifically make clear that QOCS will be disapplied by a Tender, albeit the defender can only recover post-Tender expenses.



# QOCS

- The Personal Injury Committee of the Scottish Civil Justice Council has decided that QOCS will still apply if a defender is uninsured or carries a large policy-excess.
- Also determined that no specific rule is required about a pursuer abandoning a case. In such a case, the court should assess the conduct of the pursuer and determine whether the case ever had any merit and if not, whether that triggers a s4 exception to QOCS.



# QOCS

- What may happen post-QOCS?
- Insurers may be more likely to settle weak claims because it's cheaper than proceeding to Proof and winning.
- If there's late acceptance of a Tender, will defender's write off the post-Tender expenses because it's cheaper than the risk of running to Proof and the pursuer beating the Tender.





# QOCS

- Will Tenders become lower and drive down settlement awards?
- Not difficult to envisage. If a pursuer post-QOCS is proceeding without a funder (which may be more likely to happen), will the pursuer risk fighting a Tender?



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# Contact

**Compass Chambers  
Parliament House  
Edinburgh  
EH1 1RF**

**DX 549302, Edinburgh 36**

**LP 3, Edinburgh 10**

**[www.compasschambers.com](http://www.compasschambers.com)**

**Preston Lloyd,  
Advocate**

**Mobile: 07739 639 133**

**[preston.lloyd@compasschambers.com](mailto:preston.lloyd@compasschambers.com)**

**Bruce Langlands,  
Advocate**

**Mobile: 07710 659 887**

**[bruce.langlands@compasschambers.com](mailto:bruce.langlands@compasschambers.com)**