5th World Bar Conference

The Advocate as Commercial Operator

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The objective of Lord Justice Jackson's review was to promote access to justice at proportionate cost. The underlying problem is, of course, the cost of legal services; or to be blunt, the level of fees charged by lawyers for the conduct of litigation. How are we responding?

Since most litigation is a bipartisan affair, consideration of funding has two dimensions: (1) payment of the client's own legal expenses; and (2) liability to the opponent in the event of failure.

The client's own legal expenses

In a bygone age things were so much simpler, with the Scottish Advocate being viewed simply as an independent officer of the Court with no contractual right to payment but, instead, paid an honorarium. That is how the world was viewed in 1876 at the time of the classic statement by ***Lord President Inglis*** in ***Batchelor v Pattison & Mackersy*** (1876) 3 R 914 at page 918:

> "An advocate in undertaking the conduct of a cause in this court enters into no contract with his client, but takes on himself an office in the performance of which he owes a duty, not to his client only, but also to the court, to the members of his own profession, and to the public. From this it follows that he is not at liberty to decline, except in very special circumstances, to act for any litigant who applies for his advice and aid, and that he is bound in any cause that comes into court to take the retainer of the party who first applies to him. It follows, also, that he cannot demand or recover by action any remuneration for his services, though in practice he receives honoraria in consideration of these services. Another result is, that while the client may get rid of his counsel whenever he pleases, and employ another, it is by no means easy for a counsel to get rid of his client. On the other hand, the nature of the advocate's office makes it clear that in the performance of his duty he must be entirely independent, and act according to his own discretion and judgment in the conduct of the cause for his client. His legal right is to conduct the cause without any regard to the wishes of his client, so long as his mandate is unrecalled, and what he does bona fide according to his own judgment will bind his client, and will not expose him to any action for what he has done, even if the client's interests are thereby prejudiced. These legal powers of counsel are seldom, if ever, exercised to the full extent, because counsel are retrained by consideration of propriety and expediency from doing so."

Update to today and we find that "honorarium" is defined in the Shorter Oxford Dictionary as: "A (voluntary) fee, [especially] for professional services nominally rendered without payment". The fact that the word "voluntary" appears in parenthesis and that the dictionary refers to the services being rendered free only on a nominal basis, suggest that there is an unhealthy element of fiction in the description.

Many aspects of ***Batchelor*** are now of historical interest only. Not the least of these is the decision in the case, which was that an Advocate could not be liable in negligence for his conduct of a civil litigation**.** It is probably now the case that a Scottish Advocate may be liable in negligence for his conduct of a civil case, though Advocates retain immunity in relation to criminal cases: ***Wright v Paton Farrell*** 2006 SC 404. However, even in the criminal field convicted persons can, and do, appeal successfully against conviction on the ground of incompetent representation and that includes failure by the Advocate to conducts the defence in accordance with his client's instructions : see ***B v HMA*** 2009 SLT 284.

What I want to look at, though, are the current regulatory arrangements regarding fees.

The traditional rule does have certain benefits for the Scottish Advocate. Not the least of these is the consolation that the honorarium is not contingent upon success. The Advocate has the same right to payment, win or lose.

Where an Advocate is engaged under Legal Aid there is a statutory right to payment under the Legal Aid (S) Act 1986, section 33(1), and as long ago as 1980 it was established that in some circumstances there can be a right to receive interest in the event of delayed payment of fees: ***Drummond v Law Society of Scotland*** 1980 SC 175.

That was carried further by the European Union Directive 2000/35/EEC on combating late payment in commercial transactions. Article 1 of that Directive makes provision for interest to be payable on " all payments made as remuneration for commercial transactions" (Article 1); with "commercial transactions" being defined, in Article 2, as meaning "transactions between undertakings or between undertakings and public authorities which lead to the delivery of goods or the provision of services for remuneration". That Directive was implemented in the UK by the Late Payment of Commercial Debts (Interest) Act 1998, through the mechanism of a statutory right to interest as "an implied term in [the] contract" (section 1(1)). Aficionados of the traditional view of an Advocate as the independent officer of the Court with no <u>contractual</u> right to payment may have struggled to see that new right extending to the advocate but the point was put beyond doubt by the addition of a section specifically devoted to advocates: section 2A, added by paragraph 2(3) of the Late Payment of Commercial Debts (S) (Regulations) 2002 (SSI 2002/335):

> "The provisions of this Act apply to a transaction in respect of which fees are paid for

> professional services to a member of the Faculty of Advocates as they apply to a contract for the supply of services for the purpose of this Act."

This amendment came unsolicited by the Faculty of Advocates but reflected the considered conclusion of the Scottish Executive that European authorities would view Advocates as being engaged in "commercial transactions" through the provision of services for "remuneration", a term which happily spans contractual payments and honoraria.

The newly acquired right to interest has been used by at least one Advocate but it is not regularly deployed perhaps because Advocates in Scotland are in the privileged position that they claim payment of their fees from their instructing solicitors who, if effect, act as guarantor of the client. Payment may be delayed but at least it is relatively assured and it would press the privilege too far to ask the solicitor to bear the risk of not only liability for the principal amount but also interest. None the less, the very fact that Advocates may be making such a calculation is testament to the fact that they are acting commercially, judging whether it is more in their interests to have an assured, if late, payment of the principal fee, relative to the risk of causing solicitors to withdraw from the general fees agreement and causing Advocates to have to seek payment directly from the client.

This commercial dimension to feeing goes to the heart of one of the points that Lord Justice Jackson discusses, which is "no win, no fee" agreements.

There has been statutory regulation of "no win, no fee" in Scottish legal practice since 1990. That regulation is under the umbrella of section 36 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 and subordinate legislation following on from it: Rule of Court 42.7(1), for solicitors, and, for advocates, the Act of Sederunt (Fees of Advocates in Speculative Actions 1992 (SI 1992, No. 1897). As the title of the Regulation applicable to Advocates makes clear, members of the legal profession who agree to work on a "no win, no fee" basis are truly speculating with greater or lesser risk depending on the client's prospects of success and they are permitted to compensate for that risk by entering in to an agreement with the client to charge an uplift of upto 100% of the ordinary fee in the event of success.

It is possible for members of the legal profession to enter into a speculative fee agreement in any type of case but it is most commonly done in personal injury cases. Indeed, in that field of practice it has come to replace Legal Aid as the principal source of funding. It is beneficial because it promotes access to justice for accident victims irrespective of means but it has to be stressed that that objective is achieved through rewarding lawyers for the risks that they run. The volume of personal injury work and the propensity for claims to be settled diminish the risk overall. The odd loss is more than compensated by success in the majority of cases, particularly bearing in mind that advocates are free, in the first

place, to accept or decline instuctions to act on a speculative basis.

Speculative fees are less popular in more bespoke work, such as commercial litigation and judicial review, and it is easy to see why. The isolated nature of the case and the likely peculiarity of the issue, make the commercial gamble less attractive.

In Scottish practice any uplift is a private matter between the client and his or her legal team and is not passed on to the opponent. The unsuccessful opponent pays only the conventional judicial expenses with the uplift coming, effectively, out of the damages.

The link to damages, at least as the ultimate source of payment, gives rise to a subtle point. The pactum de quota litis (the prohibition against a member of the legal profession being remunerated on the basis of a proportion of the damages or other sum recovered) continues to apply in Scotland, and that for the reason that would have resonated with Lord President Inglis 130 years ago: to avoid "stirring up and too much eagerness in pleas". That is, bluntly, that lawyers might pursue unmeritorious cases motivated by the prospect of personal gain.

"Speculative fees" do not breach the pactum di quota litis simply because the uplift is proportionate to the normal judicial fee and not proportionate to the sum in dispute. In fact the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 was the product of a conscious choice to link remuneration to the work done and not to the potential gain to the client.

The Law Society of Scotland, as regulator of the solicitor branch of the profession, sought to reinforce that choice by bringing proceedings against the first Scottish commercial claims handling company, Quantum Claims, to prohibit fee charging based on a percentage of the damages. The Law Society's locus derived from the fact that it was a solicitor (Mr. Lefevre) who was the founder of, and driving force behind, Quantum. As recorded on page 462 of the 1999 volume of the Journal of the Law Society of Scotland**,** those proceedings were compromised between the parties on a very narrow interpretation of the pactum de quota litis, as prohibiting a charge for legal services "upon the basis <u>both</u> that fees are to be a proportion of, and are to be recoverable out of, the monies obtained on settlement of the claims", was unlawful. The operative word "both" is emphasised and it and it will be readily appreciated that the compromise was a dead letter. For all practical purposes the damages will be the only source of payment of the fee but the prohibition (as defined in that settlement) strikes only at a contractual agreement in advance to deduct the fee from the damages, and not at a tacit, administratively convenient arrangement whereby the client is in fact paid net at the end of the case.

History now provides a more principled justification for that empty compromise. The fact is that it has come to be recognised that the pactum has its practical limitations and,

perhaps more importantly, limited justification.

The practical limitation is that it applies only to solicitors and advocates while rendering legal services in that capacity. In particular it does not apply to solicitors acting as claims consultants in commercial companies, even commercial companies that may eventually feed contested claims in to their firms for litigation by them as solicitors: ***Quantum Claims Compensation Specialists v Powell*** 1998 SC 316. Thus it can, and does, happen that Scottish solicitors, acting as claims consultants, will sign up accident victims on a percentage basis, negotiate the claim and, if necessary, switch capacity and, as solicitor, litigate it to a conclusion.

This paradoxical outcome is a reflection of the limited justification for the prohibition. It is viewed as a strictly limited exception to the more general principle of freedom of contract. However, the value of the judgment of the Court of Session in the ***Quantum Claims*** lies in its strong affirmation of the scope for freedom of contract in the provision of legal services as an integral part of promoting access to justice. ***Lord Prosser,*** delivering the Opinion of the Court, emphasised (at page 319):

> "...the basic principle, that parties of full legal capacity may enter into whatever contract they please, provided that the contract is not made illegal by statute or by some rule of common law. The prohibition against a *pactum de quota litis* is thus a restriction upon the normal freedom of contract. And more specifically, in the context of claims and litigation, neither statute nor common law imposes any bar upon third parties and claimants "getting together", with an agreement that the third party will handle and perhaps fund pursuit of the claim, if necessary by litigation, in return for a percentage share of what one may call the winnings. Indeed, it may be of considerable importance to a claimant, if he is to be able to vindicate his claim effectually, to obtain assistance of this kind, and to grant to the third party, in return for the risk and expenditure undertaken, a percentage share, and perhaps a substantial percentage share, of what is eventually recovered. In principle, and in general, bargains of this type are not regarded by the law as obnoxious, or requiring any curtailment of the normal freedom in contract. (One may note in passing that where such a bargain has been entered into, other legal obligations or liabilities may arise—for example, those which affect a *dominus litis*. But that is a different matter, not affecting the general freedom to contract.)"

It is worth highlighting the key proposition: "it may be of considerable importance to a claimant, if he is to be able to vindicate his claim effectually, to obtain assistance of this kind". This is very much a means whereby clients can secure legal services to which they would not otherwise have access and, being part of the private bargain between the client and the claims handler, liability for the percentage fee falls on the client and cannot be passed on to the unsuccessful opponent (normally an insurance company): ***Smith v The***

Highland Council 2010 SLT 2.

The growth of speculative fees and the right to charge interest on any fee are elements of an evolving change in the role of an Advocate from the traditional model of an independent officer of the Court, indifferent to the outcome of the case provided only that it is arguable, to a commercial operator who may have a financial interest in the outcome. This in part reflects the more mature judgment that professional ethics transcend personal financial interest. After all, even the traditional rule that an advocate will be paid a fixed fee per day, irrespective of outcome, may be thought to provide a personal incentive to prolong cases. Of course, the new approach brings with it a hightened potential for conflict of interest between lawyer and client, particularly where the insurers make a low offer in settlement that carries with it the concession of judicial expenses to the legal team. Still, this seems to be the price worth paying for extended access to legal services. From time to time there is adverse comment on the modern claims culture but it can be strongly argued that this is not the product of lawyers "stirring up" spurious claims for their own financial benefit. Rather we live in a time where everyone is more safety conscious and legal systems are increasingly more receptive to claims. Speculative fees for advocate and solicitors, and percentage fees for claims consultants, play their part in ensuring that as wide a rage of individuals as possible can vindicate their rights.

Liability to the opponent

A speculative fee agreement by itself affects only the client's obligation to pay his own legal team. The client remains at risk of liability to the opponent in the event of failure. The agreement may go further, as it did in the ***Quantum Claims*** case, with the claims consultants indemnifying the client of any liability for costs in the event of falure; and doubtless in that situation the claims consultant can justify taking a percentage of the damages because he shares equally the risk of success and failure. It is not, however, a precondition of the lawfulness of such an agreement that the claims consultant does bear the liability of failure. Where the risk remains with the client it has to be carefully explained but cases do run with the claimant's legal team signed up to speculative fees agreements and the claimant retaining the risk of financial ruin at the hands of the opponent in the event of losing the action.

Litigation in the wider interest

That may be acceptable where the client is personally speculating for personal gain. It is less acceptable where the client has no financial interest in the outcome.

The norm in Scotland is to deal with expenses at the end of the case. The general rule is that expenses go with success but there are exceptions and the Court retains discretion. One recognised exception is where the point in dispute is of wider public interest. This tends to occur in relation to questions of statutory interpretation affecting public

authorities. Even where the public authority wins the day, the court can refuse to make the losing citizen meet the authorty's expenses if, for example, the case has clarified the law for the benefit of the wider public.

With litigation being so expensive it is unrealistic to expect citizens to peril themselves on what is effectively the unpredicatable mercy of the court at the end of the case. Accordingly, efforts have been made to rely on the English device of a Protective Costs Order famously associated with the case of ***R (Corner House Research) v Secretary of State for Trade & Industry*** [2005] 1 WLR 2600, which caps the claimant's potential liability in costs in advance. The ability of the Scottish Courts to make such an order was first recognised in ***McArthur v Lord Advocate*** 2006 SLT 170 but, in fact, no order was actully made in that case. Subsequently, Friends of the Earth sought a protective order in a case against the Scottish Executive challenging a decison to build an extension to a motorway through the south of Glasgow. However, that challenge was abandoned on a concession by the Scottish Executive that it would not seek to recover its costs from Friends of the Earth, so the law did not progress.

The first protective costs order was made by a Scottish Court as recently as 20th Janary 2010 in the case of ***McGinty Petitioner*** [2010] CSOH 5. This is an application for Judicial Review in which the petitioner (or applicant) seeks to challenge the allocation of a site in Hunterston in Ayrshire for the construction of a new power station. His interest in the site derives from the fact that he bird watches there and he is therefore seeking to protect a local amenity and not to advance any financial interest. He is unemployed and in receipt of benefits and quite incapable of meeting any award of expenses personally. Refused Legal Aid, he was funding the action by private donations and had raised £15,000, most of which ironically was likely to be spent on seeking the protective costs order.The case proceeded on a nmber of concessions essentially adopting English case law as establishing the relevant principles:

> "It was ... a matter of agreement between the parties that the principles which fell to be applied, are effectively those reflected in the case of *McArthur* and set out in the case of *Regina (Corner House Research)* v *Secretary of State for Trade & Industry* 2005 1 WLR 2600 at paragraph 74. Those criteria are:
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> (i) The issues raised are of general public importance;
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> (ii) the public interest requires that those issues should be resolved;
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> (iii) the applicant has no private interest in the outcome of the case;
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> (iv) having regard to the financial resources of the applicant and the respondent and to the amount of costs that are likely to be involved, it is fair and just to make the order;
>
> (v) if the order is not made, the applicant will probably discontinue the proceedings and will be acting reasonably in doing so."

There is doubt in England whether the third of these criteria (the absence of finacial interest) is a necessary pre-condition but, in any event, Mr. McGinty met it. The Court made an order because the criteria were met. The order made had two parts:

1. Mr. McGinty's right to recover his own expenses in the event of success was capped at the cost of engaging one solicitor and one advocate (a Q,C.) to ensure that he advanced his own case with due economy.

2. His liability in the event of failure was limited to £30,000.

Unfortunately, there is no explanation how the Judge, Lady Dorrian, arrived at the figure of £30,000 and today it is not yet clear whether the case will proceed even with the protective costs order in place because the cap is disproportionate to Mr. McGnty's minimal means.

The **McGinty** case has all the drawbacks that Lord Justice Jackson discusses in chapter 30 of his report. Admittedly the argument about costs was novel for a Scottish court but it is somewhat paradoxical that resolving the argument about costs more or less exhausted the available funds. What is more, the order secured has not clearly achieved its aim because the liability is set so high that the action may not be able to proceed even with it in place.

It is worth reflecting on the fact that protective costs orders are a product of a fundamental shift in the attitude to judicial intervention in the conduct of public affairs. The procedure of Judicial Review has facilitated wide ranging challenges to executive action and now the Courts are increasingly required by international Conventions (such as the European Convention on Human Rights and the Aarhus Convention on the Environment) to subject executive action to close scrutiny. Protective costs orders very much reflect the attitude that responsible litigation is, to some extent, to be enouraged because it is consisent with those who yield executive power being held to the rule of law.

Doubtless we can debate whether the public interest would be better served by applicants with arguable cases of Judicial Review being presumed to have no liability in legal expenses in the event of failure. That is controversial because Judicial Reviews can have adverse effects, notably delaying development projects and hence increasig the costs of necessary public works. I do not propose to take up that question because, however it is resolved, there remains the point that I began with. It is evident that if that case is to proceed Mr. McGnty's Advocate may well have to proceed on a speculative basis, but with no prospect of a success fee uplift, simply because Mr. McGinty does not have the means to pay.

The point that I want to highlight is that a protective costs order is only one half of what is required. It provides only the shield - protecting the citizen from exorbitant liability in expenses to the public authority. Victory requires the citizen to be armed with a sword and that sword may have to be wielded by a mercenary, a lawyer willing to take on the case on a speculative basis. That is not how Advocates in Scotland have viewed themselves but that is very much the trend and we have to acknowldege that the expanding project of promoting access to justice will undoubedly require Advocates to act on a more commercial basis.

Conclusion

Bars across the world, and indeed the wider legal profesion, pride themselves on their independence. The Advocate as a speculator in the outome of his or her endeavours is not easy to reconcile with the traditional perception of the independent officer of the court, indifferent to the outcome of the case, but the pressures posed by the level of legal fees inevitably mean that the Advocate as commercial operator is likely to be the model for the future.