

Equalities, Human Rights and Civil Justice Committee

15th Meeting, 2023 (Session 6), Tuesday 20 June 2023

Subordinate legislation

Note by the Clerk

Purpose of the paper

1. This paper invites the Committee to consider the following negative instrument:
 - [The Act of Sederunt \(Fees of Solicitors in the Court of Session, Sheriff Appeal Court and Sheriff Court\) \(Taxation of Judicial Expenses Rules\) \(Amendment\) 2023 \(SSI 2023/165\)](#) – Policy Note and links to relevant impact assessments are at [Annexe A](#).

The Act of Sederunt (Fees of Solicitors in the Court of Session, Sheriff Appeal Court and Sheriff Court) (Taxation of Judicial Expenses Rules) (Amendment) 2023 (SSI 2023/165)

2. The objective of the Act of Sederunt is to provide court rules to implement an uplift in the fees chargeable for those carrying out relevant services in civil court proceedings.
3. The Act of Sederunt amends the fees that are prescribed in the tables (schedules) of solicitors' fees in the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993 ("the 1993 Act of Sederunt") – [Schedule 1](#), the Rules of the Court of Session 1994 – [Schedule 2](#) and the Act of Sederunt (Fees of Solicitors in the Sheriff Appeal Court) 2015 ("the 2015 Act of Sederunt") – [Schedule 3](#).
4. The Scottish Civil Justice Council Secretariat (the Council) approved a fee increase of 5% in June 2018 and carried out a review of solicitors' fees in 2018-19. The key policy output from the review was a new rules instrument, the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019/75 which reframed the tables of solicitors' fees to provide for unit-based charging. The current unit charge was £16.40.

5. This instrument provides for a 9.75% increase in the unit rate. This uplift results in an hourly rate of £180.00 with the unit charge increasing to a value of £18.00.
6. The increase of 9.75% on the existing fees only have effect in respect of work carried out on or after 30th June 2023.

Delegated Powers and Law Reform Committee Consideration

7. The Delegated Powers and Law Reform Committee (DPLR) considered the instrument at its meeting on [13 June 2023](#) and agreed that it did not need to draw the Parliament's attention to the instrument on any grounds within its remit.

Equalities, Human Rights and Civil Justice Committee Consideration

8. SSI 2023/165 was laid on 1 June 2023 and referred to the Equalities, Human Rights and Civil Justice Committee. The instrument is subject to the negative procedure and due to come into force on 30 June 2023.
9. **The Committee is invited to consider any issues which it wishes to raise on this instrument and is required to report to the Parliament by 11 September 2023.**

Procedure for negative instruments

10. Negative instruments are instruments that are "subject to annulment" by resolution of the Parliament for a period of 40 days after they are laid. This means they become law unless they are annulled by the Parliament. The annulment process would require a motion to be agreed in the Chamber.
11. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).
12. Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.
13. If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.
14. If the Parliament resolves to annul an SSI then what has been done under authority of the instrument remains valid but it can have no further legal effect.

Following a resolution to annul an SSI the Scottish Ministers (or other responsible authority) must revoke the SSI (make another SSI which removes the original SSI from the statute book). Ministers are not prevented from making another instrument in the same terms and seeking to persuade the Parliament that the second instrument should not be annulled.

15. Each negative instrument appears on the Equalities, Human Rights and Civil Justice Committee's agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. Members should however note that, for scheduling reasons, it is not *always* possible to continue an instrument to the following week. For this reason, if any Member has significant concerns about a negative instrument, they are encouraged to make this known to the clerks in advance of the meeting.
16. In many cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

Clerks to the Committee
June 2023

Annexe A

SSI 2023/165

The Act of Sederunt (Fees of Solicitors in the Court of Session, Sheriff Appeal Court and Sheriff Court) (Taxation of Judicial Expenses Rules) (Amendment) 2023

Scottish Government Policy Note

This Policy Note is published to accompany the Act of Sederunt (Fees of Solicitors in the Court of Session, Sheriff Appeal Court and Sheriff Court) (Taxation of Judicial Expenses Rules) (Amendment) 2023 made by the Court of Session on 30 May 2023. The Policy Note has been prepared by the Scottish Civil Justice Council Secretariat to set out the Council's policy behind the rules. It does not form part of the rules.

Policy Objectives

The objective of the Act of Sederunt is to provide court rules to implement an uplift in the fees chargeable for those carrying out relevant services in civil court proceedings.

Background

The Scottish Civil Justice Council's functions are set out in section 2 of the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013. These functions were amended in April 2015 to include the preparation and submission to the Court of Session of draft fees rules.

The Court of Session will consider draft instruments submitted to it by the Council to be made under the powers conferred on the Court by sections 105 and 106 of the Courts Reform (Scotland) Act 2014. Inter alia, these powers allow the Court of Session to make provision for or about the fees of solicitors in relation to proceedings in the Court of Session and civil proceedings in the Sheriff Appeal Court and sheriff court.

The Council approved a fee increase of 5% in June 2018³ and carried out a review of solicitors' fees in 2018-19. The key policy output from the review was a new rules instrument, the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019/75 that took account of recommendations in Sheriff Principal Taylor's *Review of Expenses and Funding of Civil Litigation in Scotland* and reframed the tables of solicitors' fees to provide for unit-based charging. The current unit charge was £16.40.

Rules provision

The instrument provides for a 9.75% increase in the unit rate provided for in rule 3.2 of the 2019 rules. This uplift results in an hourly rate of £180.00 with the unit charge increasing to a value of £18.00.

The uplift applies to all items contained in the tables of fees set out in Schedules 1 to 5 of the 2019 rules. These tables regulate the charges that an entitled party can recover in respect of the work carried out by their solicitor in the conduct of civil proceedings in the Court of Session, Sheriff Appeal Court and sheriff court (where the proceedings are commenced on or after 29th April 2019).

The taxation of accounts in proceedings commenced before SSI 2019/75 came into force on 29th April 2019, and in summary causes commenced on or after that date, continue to be subject to the rules and tables of fees in place prior to the 2019 rule.

As noted, the last increase approved by Council to these 'non-unitised' fee tables was made by SSI 2018/186. That instrument provided for a 5% uplift to the various tables of solicitors' fees prescribed in:

- Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993;
- Rules of the Court of Session 1994;
- Act of Sederunt (Fees of Solicitors in the Sheriff Appeal Court) 2015.

These tables regulate the fees that can be recovered under an award of expenses in respect of work carried out by a party's solicitor in civil proceedings on or after 24th September 2018.

There are a number of such cases still in dependence, so in the interests of consistency and fairness, the Council agreed that the tables of fees, for proceedings raised before 29 April 2019 (i.e. non-unitised), should also be subject to a 9.75% increase to come into force on the same date as the change in the unitised rate. The instrument therefore makes amendments to the rules that apply to ongoing civil proceedings which were commenced before 29 April 2019. The changes made by the instrument will also impact on the charges that may be allowed in respect of work undertaken by a party litigant.

In preparing the fees tables, the Council policy on the matter of 'rounding' of figures is that sums are rounded up or down to the nearest 50p/£1. Whilst the new solicitor fee tables have a unit based charging system, there may be occasions (such as the present instrument) which will involve uplifts to previous tables. This rounding approach is intended to provide consistency throughout the fee tables and to reduce the administrative burden and margin for error when compiling tables, which usually run into several hundred individual entries.

The Council agreed that due to current inflationary pressures and economic trends, under our system, the cost burden of litigation means that those entitled to awards of judicial expenses are likely to be worse off than they were 2-3 years ago.

In terms of context, the Council noted that it is important to consider how law firms charge their clients. For most cases, firms have terms of business with clients and apply rates to the work done on an agent and client basis. The Council does not control the fee rates for Solicitors and whilst the current judicial rate is £164 hourly, firms might charge significantly more per hour for some solicitors. Not all work will therefore be recoverable under a party/party account and the shortfall is ordinarily met by the client and does not affect solicitors' earnings. In personal injury cases, many pursuers' firms generally charge their clients on a 'no win/no fee' basis and will recover any judicial expenses awarded.

The Council acknowledged that cost recovery factors do feed into access to justice questions such as whether or not people choose to litigate and whether cases are raised in this jurisdiction or in others with better costs recovery.

The Council therefore approved a 9.75% inflationary increase to all aspects of the tables of fees based on a blend of the Consumer Price Index (CPI) and the Consumer Price Index with Housing (CPIH) over the last 3 years.

This approach was considered appropriate as it takes account of the inflation figures over the 3-year period and reflects a number of years' inflation in the costs of solicitors performing their role. Indexation of the figures indicates that 9.75% is a reasonable and justifiable uplift to bring fees up to a fully inflation adjusted position since the last approved fee increase in 2019.

In arriving at the increase to the charge rate, the Council anticipates that there will be considerable volatility in consumer-based indices over the next few years and that CPI/CPIH are likely to be unreliable measurements after September 2021.