

INSIGHT

Expenses in Scottish Court proceedings

It is an unavoidable consequence of raising (or defending) court proceedings that costs will be incurred by all parties engaged (including solicitor's fees, court dues, witness fees, incidental outlays, etc.)

Most legal systems have a mechanism for apportioning liability for at least part of those costs. In Scotland, these costs are known as "expenses".

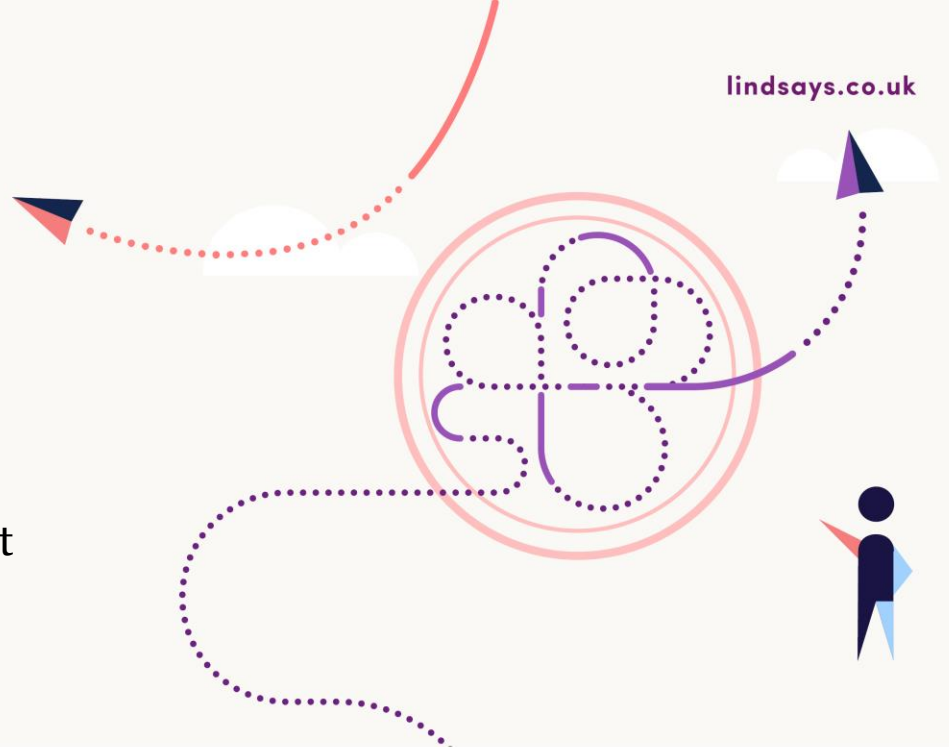
It is well established in all Scottish court proceedings that, as a general rule, "*expenses follow success*". In other words, the loser pays both their own and their competitor's expenses.

This general rule is qualified on the basis the court has an overriding discretion in making an award of expenses, subject to the terms of any settlement agreed by the parties (for example, parties often agree to formally waive expenses (often phrased "*no expenses due to or by either party*") where settlement has been reached prior to determination of the action by the court, notwithstanding that an expenses figure may have been agreed and factored into the agreed settlement sum.

The court may exercise its discretion in a number of ways, including:

- **Modification**

The court may direct that an award of expenses shall be subject to modification, either, in the form of **assessment** (i.e. modifying expenses to a fixed sum, without taxation (see Specific rules and procedure below)) or **restriction** (i.e. placing a limit on an expenses award for the purpose of, for example, expressing dissatisfaction with the manner in which the recipient of the expenses award has conducted the action).



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Modification can also be utilised where there is deemed to be divided success, for example, where a pursuer is awarded damages in a sum substantially lower than that sought or certain claims have been successful and others not. In such circumstances, expenses may be capped, awarded only in relation to specific aspects of the action (where possible) or neither party may be awarded expenses.

- **Refusing to award expenses to the successful party**

Expenses may be refused in part or in whole or subject to a restricted time period where, for example, the successful party has behaved improperly, carelessly or his/her actions are deemed to have been misleading during or prior to an action being raised, or if an action has been raised prematurely/unnecessarily or incorrect procedure has been adopted, etc.

- **Awarding expenses against the successful party**

As above, the court may determine that the conduct of the successful party merits a full reversal of the general rule and hold them liable for the expenses of any other party.

- **Incidental Procedure**

During the course of any court action, the question of expenses can arise in relation to incidental procedure such as a motion roll hearing or amendment of the written case. The court has a discretion to make expenses awards in relation to such incidental procedure or, otherwise, order that the question of expenses be reserved (i.e. postponed, usually pending the outcome of the action) or that expenses are "*in the cause*" (i.e. to be awarded to the party who is ultimately successful).

- **Additional fee**

In many types of court actions, after an award of expenses has been made, the court may award an additional fee (essentially, an uplift in the expenses based on a percentage increase).

The additional fee is largely awarded in recognition of the work done by the legal advisors of the party in receipt of the award of expenses as opposed to the conduct of the other party – see "*agent and client*" expenses, discussed at Modes of taxation of expenses below.

In determining whether to exercise its discretion, the court may take account of various factors (often known as "heads"), including: the complexity, difficulty and novelty of the action; the extent to which specialised knowledge was required; the importance of the subject-matter to the client; etc.

It is now accepted that that an award of an additional fee is still competent even if expenses had previously been awarded on an agent and client basis (*Trunature Ltd v Scotnet (1974) Ltd* [2008] CSIH 33).

The above is caveated on the basis that the purpose of an award of expenses is to indemnify the party in whose favour it has been made in respect of that party's liability for their legal adviser's fees and outlays. Thus the expenses recovered cannot exceed the amount to be paid to the legal adviser.

In practice, it is not uncommon for an uplift of around 25% to be awarded for each head deemed applicable to the particular circumstances of the action. If not fixed by the court, the percentage uplift is at the discretion of the Auditor of Court and will be set at a Diet of Taxation (see Specific rules and procedure below).

Specific Rules and Procedure

Different rules in relation to expenses apply across the various forms of court procedure, including, those in the [Sheriff Courts](#) and the [Court of Session](#).



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In terms of procedure generally, after an award of expenses has been made by the court (whether during the course of or upon conclusion of an action) the party in receipt of the award will prepare an account of expenses – in practice, the account is often prepared by law accountants instructed by the relevant party's solicitor.

In relation to party and party awards (see Modes of taxation of expenses below) the basis for determining the value of expenses is fixed by the relevant Table of Fees. This is the most common mode for preparing an account of expenses. In particular circumstances the court may make an award of expenses on an agent and client basis (see Modes of taxation of expenses below), in which case the account would largely reflect the actual fees charged by the relevant party's solicitor.

The account would then be intimated to the other party's solicitor. Often the account will be agreed between the parties/ their respective solicitors. However, if no agreement is reached, the account will be lodged for a Diet of Taxation with the Auditor of Court.

At the Diet of Taxation, the parties or, more usually, their solicitors would ordinarily attend and make representations as required in order to assist the Auditor in taxing the relevant account – this normally takes the form of simply answering questions posed by the Auditor regarding the specific entries in the relevant account.

- **Sheriff Court**

Simple Procedure

The [Simple Procedure](#) introduced in November 2016 applies to relatively low value payment actions (i.e. £5,000 or less). Specific rules govern expenses in Simple Procedure actions with the effect of placing strict limits on what can be awarded depending on the value of the claim.

The rules distinguish between defended and undefended actions.

- **Undefended** – the sums which may be awarded in undefended actions are fixed, subject to the value of the action (generally, in the region of £100 to £300 at present). Higher caps apply to actions with multiple defenders.
- **Defended** – In defended actions, specific caps apply subject to the value of the action. These range from expenses being restricted to nil (claims up to £200) to 10% of the value of the action (claims up to £3,000). Above £3,000 there is no cap on expenses.

The court also has the discretion to deviate from the above limits in certain circumstances, such as, where it considers one party has acted in bad faith.

Special rules apply to expenses in low value claims. Specifically, the prescribed block fee expenses may be reduced by fixed percentage (25% or 50% at present depending on the value of the action), subject to the discretion of the court.

Summary Cause and Ordinary Cause

Summary Cause procedure (utilised to a lesser extent in light of the new Simple Procedure), applies to actions involving heritable property (e.g. actions for recovery of possession of heritable property and payment of arrears, etc.).

Ordinary Cause procedure applies to all payment actions above £5,000 and a range of other specific types of actions.

Generally, expenses in both Summary Cause and Ordinary Cause procedure are not capped (in defended actions). Expenses in this context are



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generally not fixed by the court, rather, they are subject to the outcome of the Diet of Taxation, albeit, in relation to party and party awards (see 3. below) the basis for determining the value of expenses is fixed by the relevant Table of Fees. Outlays such as Sheriff Officer's fees may also be recovered.

Generally speaking, in a routine action where an unmodified award of expenses has been made, a party can expect to recover the majority of, albeit not all, the actual cost (including solicitors' fees) of the court action.

In line with the Court of Session, the Auditor of Court in the Sheriff Courts now has the power to vary the block fees prescribed in the relevant Table of Fees in Ordinary Cause actions only.

- **Court of Session**

The same general principles as apply to actions in the Sheriff Court also apply in both Ordinary and Commercial actions in the Court of Session. The main difference in practice is that due to the value/complexity of actions in the Court of Session, the cost of running such actions are ordinarily higher than actions in the Sheriff Court. Accordingly, expenses awarded tend to be proportionately higher.

For example, every hearing at the Court of Session necessarily entails costs being incurred, including: Solicitors' fees, Advocates' fees (the Scottish equivalent of a Barrister) and court fees. Notably, court fees can accrue at a rate of several hundred pounds per 30 minutes for every hearing. It is therefore not uncommon for hearings to result in costs being incurred by the parties (which may be recoverable in expenses) of several thousand pounds.

In the Court of Session, the Auditor of Court has a longstanding power to vary the level of recoverable fees in a judicial account of expenses prepared on a block fee basis in "appropriate circumstances".

Is it also possible for the court to order an interim payment to account to be made to a party in receipt of an award of expenses in the Court of Session. In practice, this has generally been underutilised but recent cases demonstrate how it can be used to significant effect, in particular, in the context of higher value commercial litigation (see our article - [Significant litigation success for our client defending a commercial claim](#)).

Modes of taxation of expenses

After an award of expenses has been made, subject to the determination made by the court, an account of expenses will be prepared in accordance with one of three modes:

- Party and party;
- Agent and client, client paying; and
- Agent and client, third party paying.

Party and party awards are the most common and apply in most circumstances where there is no special reason to deviate from the norm.

Agent and client awards tend to be made where the court is dissatisfied with the conduct of one of the parties, for example, where a party has acted unreasonably in conducting the action resulting in costs which could have otherwise been avoided. Where an agent and client award has been made, an account of expenses will be prepared with direct reference to the actual costs incurred by the party in receipt of the award, including, solicitors' fees and outlays.



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Agent and client awards are split into two categories, specifically, *agent and client, client paying* and *agent and client, third party paying*. The former is the more prevalent of the two and accounts prepared on that basis will encompass most of the fees and outlays charged to the relevant legal advisor's client. The latter are applicable where a third party, such as, the Scottish Legal Aid Board is meeting the relevant legal advisor's fees.

Following the Taylor Review, the impact of the notable disparity identified between Scotland and England and Wales can be seen in the implementation of the new Simple Procedure which encompasses expenses caps offering a degree of predictability and therefore accessibility to litigants with lower value claims.

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Costs in England v Expenses in Scotland

Whilst the rules regarding costs in England are beyond the scope of this article, it is worth noting that there are notable differences between expenses in Scotland and the equivalent costs in England and Wales.

Generally, there is a perception that litigation south of the border is more costly, however, as touched on in the Taylor Review into Expenses and Funding of Civil Litigation in Scotland (published on 28 October 2013), one of the key differences between the jurisdictions is the predictability and recoverability of judicial costs/ expenses.

In England and Wales, it is generally considered that successful claimants tend to recover a significantly greater proportion of their legal costs from the unsuccessful litigant. Fixed costs awards are also more common. By way of example, in the English fast track procedure, recoverable costs relative to a fast track trial are fixed regardless of whether the trial is conducted by a solicitor or a barrister. The court can vary the award only in specified circumstances, for example, where there is unreasonable or improper conduct. The court also has the discretion to apportion the amount awarded in a divided success scenario.

Generally, the fixed costs awards are determined by the value of the claim which allows parties' a large degree of certainty as to their recoverable costs prior to embarking on costly litigated court action.

