

AMENDED GUIDANCE NOTE

AMENDED GUIDANCE FOR SCTS STAFF RE CHARGING COURT FEES IN GROUPS OF CASES

- 1 This Note provides guidance to SCTS staff regarding the charging of fees for proofs, debates or other substantive hearings in the Court of Session where more than one case is heard together, generally with the attention of the court focussed on one principal case.
- 2 The relevant Fees Order, the *Court of Session etc. Fees Order 2015*¹ (and from 25 April 2018, the *Court of Session etc. Fees Order 2018*²) is framed in unambiguous terms. There is provision in the enabling legislation to provide, in fees orders, for the remission of fees, and Parliament has chosen not to provide for remission in these circumstances. Nevertheless, there remains an obligation on the part of SCTS, in terms of administrative law, to exercise discretion – for example, where a strict application of the fees set out in the Fees Order would produce a manifestly unfair outcome. Given this need to exercise discretion, in these limited circumstances, this Note provides some guiding principles. Generally speaking, the exercise of discretion would involve restricting the fees which ought properly to be charged in terms of the relevant Table of Fees.
- 3 Fees for the lodging of any step in process will always be payable, for every case in a group of cases, as would motions fees, and fees for lodging any document. Discretion may require to be exercised however, in respect of the charges for court hearings (for example, in items B16 – B20 in the Court of Session Table of Fees).
- 4 The issue should not arise in groups of cases where there is a test case, or where cases are conjoined. If parties have identified a test case, and agreed to be bound by its outcome, then typically all other cases will be sisted. The test case will be charged fees in the usual way and the others will not incur any fees during the period they are sisted. Where cases are conjoined there is, notionally, only one case, and one set of interlocutors, and thus only fees in the single case will be charged.

¹ SSI 2015/261

² SSI 2018/83

- 5 Difficulties may arise where the court is asked to deal with a group of cases, all proceeding at the same time. There will typically be a principal case and a number of other cases. The principal case will address the main issues. There may well be variations in the facts and legal issues in those other cases such that each, singly or in sub-groups, needs individual attention from the court once the principal case has addressed the main issues. For these reasons, conjoining the cases or appointing a test case may not have been practicable. In these circumstances, if the hearing fees are likely to be very substantial relative to the actual amount of court resources employed, and there is a concern that charging full fees would bring about a manifestly unfair result, there is scope to exercise discretion in the charging of those fees.
- 6 How best this discretion should be exercised will depend on the particular circumstances. The principal case should almost always be charged full fees. Where other cases within the group have taken up some of the court's time, then it might be appropriate to remit the usual fee in each of those cases by a factor of, say, 80%. Thus, in a typical case, the principal case would attract a full fee, and all the other cases would be charged at 20% of full fees.
- 7 It is neither necessary nor practicable to try to calculate precisely what proportion of the court's time has been taken up by those cases other than the principal case, and to calculate percentage remissions accordingly. The remission offered is **not** based on a precise calculation of the court time involved. It is sufficient to take the 'broad axe' approach set out in paragraph 6 above.
- 8 It will be for parties' agents to nominate a principal case or cases, as soon as possible. The parties' agents will require to enrol a motion, in advance of the hearing or hearings in respect of which remission is sought, for a specific case to be identified (i) as the principal case for the purposes of handling that group of cases in court and (ii) for the purpose of remitting hearing fees, if so minded. It will be sufficient if the motion is enrolled in the prospective principal case, provided all other cases in the group are listed in the motion. A style of motion to nominate a principal case and for possible remission of fees is annexed.
- 9 Each party's agent is responsible for enrolling a motion for those cases in which he is instructed. Such a motion, if granted, will have no effect on any other party's liability for hearing fees. A joint motion may be appropriate in many cases. An agent's failure to enrol a motion at the appropriate time is

likely to preclude the exercise of discretion to remit the fees in the cases for which he is responsible.

- 10 The fact that a party's agent has nominated a principal case, and such a motion has been granted, in respect of the handling of the group of cases, does not guarantee that any element of the fees chargeable will be restricted. That will always depend on circumstances.
- 11 In many cases it will be possible for the judge hearing the motion to decide at the time whether to allow a remission of fees. If the judge wishes to hear the evidence or submissions in the case first, that part of the motion in respect of the question of remission of fees may be continued to a later date. In these circumstances it will be for the relevant party's counsel to move for the remission of fees at that time.
- 12 This guidance is not retrospective.

SCTS
29 March 2018