



OUTER HOUSE, COURT OF SESSION

[2018] CSOH 101

CA134/16

OPINION OF LORD DOHERTY

In the cause

JAMES SHANLEY

Pursuer

against

LORIMER STEWART

Defender

Pursuer: Party

Defender: Ferguson QC; Clyde & Co LLP

24 October 2018

Introduction

[1] In this action the pursuer sought damages from the defender for professional negligence. The defender was the pursuer's accountant. The negligence complained of concerned his handling of the pursuer's tax affairs during 2008. The pursuer averred that as a result of that negligence HMRC obtained a decree for payment of tax liabilities and penalties against the pursuer and he was sequestrated at their instance in August 2008. At the relevant time the pursuer and his family had just moved to Australia. Following the sequestration they returned to Scotland where the pursuer sought and obtained recall of his sequestration.

[2] The action was commenced as an ordinary action in July 2013. At that time the pursuer and his wife were both pursuers. The pursuer sought damages of £800,000 and his wife sought damages of £315,000. The damages sought by the pursuer were made up of a claim for costs associated with his return to the UK from Australia, the costs of recalling the sequestration, a claim arising from adverse effects on the ability of he and his wife to exploit their assets because of reduced ability to obtain credit, and fees and interest charges arising from a bridging loan facility which the pursuer obtained after his sequestration. By the time of the closed record of 18 March 2015 (no 24 of process) it was averred that the pursuer's total losses were £5,254,000 (although his conclusion for damages continued to seek £800,000) and that his wife's total losses were said to be £3,566,000 (although her conclusion for damages continued to seek £315,000).

[3] On 3 July 2015 the defender obtained decree of absolvitor in respect of the pursuer's wife's claim following upon her non-insistence in the action. A procedural roll hearing was set down to take place on 23 September 2015. The day before that hearing it was discharged on the pursuer's motion and a minute of amendment (no 32 of process) tendered by him was allowed to be received. On 4 March 2016 the record was amended to give effect to the pursuer's minute and answers for the defender (as adjusted). The recast claim had four conclusions for damages. The first - for £161,712.31 - represented costs associated with the need to return from Australia. The second - for £9,341.10 - was for costs of having the sequestration recalled. The third - for £1,227,728 - represented loss of rental income which it was averred the pursuer and his wife would have obtained from residential property they owned at 28 Frogston Road West, Edinburgh for the period between 1 October 2009 and 28 February 2011, and loss of business profits which they would have generated from a nursery business to be operated at that property from September 2012. The fourth -

for £331,302 - was a damages claim representing increased taxation which the pursuer's wife was said to have incurred as a result of her return to the UK from Australia. The pursuer averred that his wife had assigned her claims for damages to him.

[4] The defender challenged the relevancy of the pursuer's amended pleadings and a procedure roll hearing was set down to take place on 13 July 2016. In response to the defender's challenge the pursuer tendered a Minute of Amendment (no 48 of process). That minute was received on 12 July 2016 at which time the procedure roll hearing was discharged. The minute sought to delete the pursuer's third and fourth conclusions and to delete the averments which supported those conclusions.

[5] On 9 November 2016 the action was remitted to the commercial roll. On 14 November 2016 the defender intimated a Minute of Tender (no 55 of process). The tender was in the following terms, *viz.*:

"BALFOUR for the defender states to the court that, under reservation of his whole rights and pleas, the defender hereby tenders to the first pursuer the sum of FIFTEEN THOUSAND POUNDS (£15,000) STERLING with the expenses of process to the date hereof in full of the conclusions of the summons."

At that stage the pursuer did not accept the tender.

[6] On 22 November 2016 the defender adjusted his defences to aver:

"... that for the purposes of the current action only, and under reservation of all rights and pleas in respect of causation, contributory negligence and quantum the defender admits liability to make reasonable reparation to the pursuer."

[7] On 24 November 2016 the commercial judge allowed the record to be amended in terms of the pursuer's minute of amendment (no 48 of process) and the defender's answers (no 50 of process). A consequence of that amendment was that the only heads of damages which the pursuer sought to recover were the costs associated with the return from Australia and the costs of recalling the sequestration. However, later, by purported

adjustment of his pleadings and by tendering a Minute of Amendment no 62 of process, he sought to change tack and to reintroduce heads of claim which had previously been departed from. On 9 February 2017 the commercial judge refused to allow the Minute of Amendment no 62 of process to be received and refused to allow adjustments made since the hearing on 24 November 2016. The following entry was made in the Minute of Proceedings:

“The Court recorded:

- that the pursuer was advised that his pleadings should be directed only to allegations of breach of contract and/or negligence of the defender, and the quantification of losses caused thereby;
 - that allegations about the conduct of the defender and his advisers in relation to their defence of the claim would not be permitted to enter the pleadings in these proceedings;
 - that it would not allow reinstatement of the claim for loss in respect of the property at 28 Frogston Road West which had been deleted by minute of amendment no 48 of process;
 - that in respect of liability, it would not allow any claim additional to that currently pled and with regard to which liability was admitted, unless such claim was supported by an expert report;
 - that in respect of quantum, it would not allow any head of loss unless supported by an independent report.
- ...”

[8] On 10 November 2017, almost a year after the tender was lodged, the pursuer accepted it. In the intervening period there had been a good deal of further procedure and significant further expense had been incurred.

[9] The pursuer moved for decree in terms of the Minute of Tender and Acceptance. On 10 November 2017 the commercial judge pronounced an interlocutor which included the following order:

“The Lord Ordinary, having heard the first pursuer personally and counsel for the defender at the continued procedural hearing:

1. on the unopposed motion of the pursuer, made at the bar, and in respect of the Minutes of Tender and Acceptance, nos 55 and 77 of Process, decerns against the

defender for payment to the pursuer of the sum of FIFTEEN THOUSAND POUNDS (£15,000) STERLING;
..”

The commercial judge also assigned a hearing on the question of expenses. Somewhat unusually, perhaps to in response to submissions thereanent made by the pursuer, the following note was made in the Minute of Proceedings:

“The Court recorded that the action was resolved in terms of the Minutes of Tender and Acceptance without the Court having made any finding with regard to either (a) whether there was fraud on the part of the defender, or (b) whether there was negligence on the part of the defender in carrying out work in respect of earlier years of assessment, neither matter having been the subject of pleadings by the pursuer on Record.”

[10] On 30 November 2017 the commercial judge found the defender liable to the pursuer in the expenses of process to the date of the tender insofar as not already dealt with; refused to find the defender liable to the pursuer on an agent and client, client paying basis; and allowed the pursuer an additional fee under head (e) of Rule of Court 42.14(3). He also found the pursuer liable to the defender in the expenses of process which post-dated the tender insofar as not already dealt with. On 21 December 2017 the commercial judge certified David Bell, *c/o* Ernst & Young, and Chris Hicks, *c/o* PKF Francis Clark as skilled witnesses for the pursuer in terms of rule of court 42.13A(3). On 19 April 2018 Andrew Flint was also certified as a skilled witness for the pursuer. The motion for certification of Mr Bell was not opposed. The motion for certification of Mr Hicks had been opposed by the defender on the basis that, with one exception, the matters which Mr Hicks appeared to deal with were irrelevant to the pursuer’s case on record, that the court should not be satisfied he was a skilled person, and that in the circumstances it had not been reasonable to instruct him. The motion for certification of Mr Flint had been opposed by the defender on the basis that it had not been reasonable to instruct him. His draft report of 11 April 2017 was

unnecessary and irrelevant to the damages which the pursuer sought ultimately to recover. The motion was granted on the basis that at the time Mr Flint was initially instructed it had been reasonable for the pursuer to have sought at least some skilled advice in relation to quantum. At the motion roll hearing the pursuer accepted that it would be for the Auditor to determine the extent to which any work which Mr Flint did related to matters not in issue in the litigation or was otherwise not reasonable for the proper conduct of the litigation.

[11] The pursuer and the defender each prepared accounts of expenses. The account prepared by the pursuer (no 83 of process) sought recovery of expenses and outlays totalling in excess of £253,610 before fee fund dues, and it proposed that the uplift for the additional fee should be 300 per cent. £84,240 of the account was a claim for fees the pursuer made for acting as a party litigant. The defender's account (no 86 of process) sought recovery of expenses and outlays totalling £40,833.40 before fee fund dues.

[12] At taxation the Auditor taxed off a total of £225,675.21 from the pursuer's account before fee fund dues were applied to it (including the whole of the claim for party litigant fees). He also taxed off £7,065.35 from the defender's account before fee fund dues were applied.

[13] The pursuer lodged notes of objection to each of the Auditor's reports (rule of court 42.4(1)). No 89 of process is the note of objections to the Auditor's report (no 87 of process) on the taxation of the pursuer's account of expenses. No 88 of process is the note of objections to the Auditor's report (no 86 of process) on the taxation of the defender's account of expenses. The Auditor prepared minutes in response to the notes of objection (nos 90 and 91 of process) (rule of court 42.4(2A)). The matter came before me on 4 October 2018 for a hearing on the notes in terms of rule of court 42.4(3) and (4).

The note of objections to the Auditor's report on the pursuer's account and the auditor's response

[14] The pursuer criticised the defender and his legal advisers for the way in which they conducted the litigation. In turn he criticised the Auditor for failing to investigate that conduct, and for failing to have regard to it and punish the defender for it when taxing the pursuer's account of expenses. He maintained that, given the importance of the cause to the pursuer and the defender's conduct of the litigation, the uplift of 20 per cent which the Auditor granted in respect of an additional fee was insufficient. Objection was also taken to the disallowance of particular expenses and to the abatement of others, *viz.*

- the fee for work taken in contemplation of litigation was said to have been "unfairly reduced";
- disallowance of a pre-litigation consultation fee with junior counsel, which the pursuer maintained was in anticipation of litigation and should be allowed;
- disallowance of fees incurred to English senior counsel, which the pursuer maintained should have been allowed because "he was the only identified suitable person";
- abatement of fees for a report by Mr Hicks and for consideration of that report by the pursuer's solicitors, which abatement the pursuer maintained was unjustified because the report was necessary to prepare for the litigation and to show that the defender had concealed dishonesty;
- abatement by half of junior counsel's fee for drafting the summons;
- disallowance of Mr Flint and Forth Forensics reports of 15 July 2014, which the pursuer maintained was unjustified because the reports were necessary to prepare for the litigation and to show that the defender had concealed dishonesty; a similar objection was taken to disallowance of a fee of 9 November 2015 for a consultation with Mr Flint, and to the abatement of the fees (22 January 2016) for a further report from Mr Flint and for an associated report by Forth Forensics;
- disallowance of PKF Clark's fee of 25 July 2014 for further examination of papers and advice on a potential claim, which disallowance the pursuer maintained was unjustified because the report was necessary to prepare for the litigation and to show that the defender had concealed dishonesty;
- disallowance of the fee of 14 July 2016 for "consultation with Expert".

[15] In response the Auditor noted that a large part of the objection comprised a complaint as to how the litigation was conducted by the defender and his agents, and a

complaint that the Auditor should have carried out some form of investigation into that conduct and should have allowed greater recovery of fees and outlays by the pursuer in order to sanction the defender and his agents for their conduct. In the Auditor's view that was not his role. Objections of that sort were not a competent use of the rule of court 42.4 procedure: *Urquhart v Ayrshire and Arran Health Board* 2000 SLT 829; *Gupta v Ross* 2005 SLT 548; *Campbell v Double Group Contracts Limited* [2007] CSOH 201; *Dr Prim Singh v Brian Napier QC* [2014] CSIH 54.

[16] So far as the additional fee was concerned, the Auditor had regard to previous decisions in similar cases; to the fact that it had been allowed under only one head; to the fact that the pleadings in their final form contained only two heads of claim, *viz* the costs associated with the return from Australia and the costs of recalling the sequestration; and to the fact that the settlement sum was £15,000.

[17] Turning to the other specific objections, the Auditor's view was that the majority of work done before the action was raised had no relevance to the case as finally pled. In his view the standard pre-litigation fee was appropriate. There was no reference in the pursuer's solicitors' files to a pre-litigation consultation with Scottish junior counsel, and, even if it had in fact taken place, the Auditor was not satisfied that it would have been reasonable to incur the charge. Nor was he satisfied that the fees incurred to English senior counsel were reasonably incurred. He abated the sums claimed (31 May 2013) for Mr Hick's report and for the agents' consideration of it because most of the report related to matters other than the cause in issue. He disallowed the fee to PKF Francis Clark (25 July 2014) as he was not satisfied that work done during the relevant period added anything to work previously done. He allowed a fee for a consultation with Mr Hicks (6 November 2015). The Auditor had disallowed the Flint and Forth Forensics reports (15 July 2014 in the

account) on the basis they dealt with different claims to those focussed in the action.

Ultimately (the entries for 22 January 2016) Mr Flint and Forth Forensics had produced reports which were more focussed on the claims actually being made. The auditor abated the fees claimed for those reports to levels which he considered appropriate for the relevant work. He considered that the consultations with Mr Flint/Forth Forensics (9 November 2015 and 14 January 2016 in the account) had not been reasonably required and he disallowed those expenses.

The note of objection to the Auditor's report on the defender's account and the Auditor's response

[18] The note of objections to the Auditor's report on the defender's account advanced a general objection to the Auditor's report. The thrust of the objection was that the Auditor failed to have due regard to the way that the defender had conducted the litigation, and that if proper regard had been had to that factor the defender's account should have been further abated. Otherwise, no specific objection was made to the way that the Auditor had dealt with any of the particular entries in the account. In response the Auditor maintained that the pursuer had misunderstood the Auditor's jurisdiction, and that the objection was not a competent use of the rule 42.4 procedure.

The pursuer's submissions

[19] The pursuer submitted that, having regard to the conduct of the litigation by the defender and his agents, the Auditor ought to have penalised the defender in expenses. The defender and his agents had had a duty of candour. Reference was made to *Gibson v Menzies Aviation UK Ltd* 2016 SLT (Sh Ct) 179. The uplift for the additional fee was far too

low and did not reflect the importance of the cause to the pursuer. The fees and outlays claimed had been reasonably incurred. In particular, it had been reasonable to incur the fees to English senior counsel and PKF Francis Clark. English senior counsel had had relevant litigation experience in the area of establishing that HMRC owed a duty of care to the taxpayer. PKF Francis Clark were tax specialists whose personnel had former experience as senior managers with HMRC.

Counsel for the defender's submissions

[20] Senior counsel for the defender submitted that both notes of objection should be repelled. There was no proper basis for the court to interfere with the Auditor's decision on any of the points on which objection was advanced. It had not been incumbent upon the Auditor to carry out the investigations into the conduct of the defender and his agents which the pursuer had proposed. In so far as the objections taken were complaints about the procedure followed by the Auditor rather than items to which specific objection was taken, they were not in reality objections to the report. Reference was made to *Urquhart v Ayrshire and Arran Health Board, supra*, per Lord Reed at paragraphs 8-10. It was not for the Auditor to investigate or adjudicate upon alleged misconduct by the defender or his agents. The pursuer had canvassed that alleged misconduct before the commercial judge as part of the suggested justification of making the award of expenses against the defender on the agent and client scale, but the judge had not accepted that such an award was appropriate. The Auditor exercised a wide discretion, and the normal restrictive principles applicable in respect of the review of discretionary decisions applied: *Wood v Millar* 1960 SC 86, per Lord Justice Clerk Thomson at page 98. He had been entitled to conclude as he did on each of the issues raised in the notes of objections. His decisions had been open to him on the

material before him. None of the decisions challenged had been unreasonable. Nor had any of them proceeded upon a mistaken or erroneous understanding of the material facts.

Decision and reasons

[21] At the conclusion of the hearing on 4 October 2018 I repelled all of the pursuer's objections. I gave brief oral reasons at the time. I now set out my reasons out more fully.

[22] Each party's award of expenses was on the party and party scale. The pursuer's motion for the expenses awarded to him to be on the agent and client scale was refused. That is noteworthy because the pursuer sought to persuade the court at that time that it should make such an award to mark its disapproval of suggested misconduct by defender and his agents.

[23] Before I turn to the objections I observe that, on any view, the account which the pursuer submitted was remarkable. It sought recovery of the cost of no fewer than seven consultations with Scottish counsel (some of which were with senior and junior, some with senior alone, and some with junior alone); three conferences with English senior counsel; three consultations with expert witnesses; preparation of several expert reports where (in relation to Mr Hicks and Mr Flint) in very large part matters discussed were not relevant to the issues between the parties in this litigation; and a variety of written advice from English and Scottish counsel. The total expense claimed by the pursuer was very high indeed. It dwarfed the £15,000 achieved by way of settlement.

[24] The Auditor's jurisdiction here was to allow the expenses which were reasonable for conducting the litigation in a proper manner (Macfadyen, *Court of Session Practice*, Division L, Chapter 6, Accounts and Taxation, (Lord Carloway), paras [705] - [710], [714]; rule of court 42.10(1)). In addition, he had power to disallow items caused by a party's own

fault or incurred in respect of an unsuccessful part of the procedure (Macfadyen, *ibid*, Division L, para [705] - [710]; rule of court 42.5(2)). Those principles applied equally to the assessment of remuneration to be paid to persons whom the court had certified as skilled witnesses. Where the court grants a motion for certification of a skilled witness in terms of rule of court 42.13A it has been satisfied that the person was a skilled person and that it was reasonable to employ him (rule of court 42.13A(2)). However, whether all of the expenses incurred in respect of that person were reasonable for conducting the litigation in a proper manner (eg whether all aspects of the work were reasonable, and what reasonable remuneration for them was) were matters for the Auditor to determine.

[25] The Auditor exercises a wide discretion. The normal restrictive principles applicable in respect of the review of discretionary decisions are in play: *Wood v Millar, supra*, per Lord Justice Clerk Thomson at page 98; Macfadyen, *Court of Session Practice*, Division L, paras [705] - [710].

[26] The objection that the Auditor ought to have investigated the pursuer's allegations of misconduct on the part of the defender and his agents is incompetent in my view. The Auditor had no jurisdiction to carry out any such investigation, nor did he have jurisdiction to impose the sort of sanctions on the defender or his agents which the pursuer suggested were appropriate. Besides, the procedure in rule of court 42.4 is designed to deal with objections to specific items in the Auditor's report. It is not a procedure which can competently be used to make the other sorts of objections which the pursuer seeks to make: *Urquhart v Ayrshire and Arran Health Board, supra*, per Lord Reed at paragraphs 7-10; *Gupta v Ross, supra*, per the Opinion of the Court delivered by Lord Osborne at paragraphs 3-7; *Campbell v Double Group Contracts Limited, supra*, per Lady Dorrian at paragraph 13; *Dr Prim Singh v Brian Napier QC, supra*, per the Opinion of the Court delivered by

Lady Smith at paragraph 12. Even if it had been competent, it seems to me that it would have been very difficult for the Auditor to have found that there was misconduct and to have imposed an expenses sanction on the defender to mark his disapproval, given that the commercial judge was not persuaded that it was appropriate in the whole circumstances to award expenses on the agent and client scale.

[27] That brings me to the pursuer's objections to specific items. I am not satisfied that the Auditor has erred in the exercise of his discretion. On the contrary, it seems to me that in each case the objection is no more than a disagreement with the Auditor's assessment.

[28] The additional fee uplift of 20 per cent appears to me to be within the range of reasonable outcomes which it was open to the Auditor to reach on the material before him. I am not persuaded that in arriving at that figure he took into account irrelevant factors, or left out of account relevant factors, or acted unreasonably.

[29] The Auditor was unconvinced that the instruction of English senior counsel was an expense which was reasonable for conducting the litigation in a proper manner. That was a decision he was entitled to reach. That is sufficient to dispose of the objection. For my part, I think the Auditor's decision was plainly right - the expense claimed was clearly not an expense which was reasonable for conducting the litigation in a proper manner.

[30] The Auditor allowed certain of the fees for Mr Hicks, Mr Flint, PKF Clark and Forth Forensics, but he disallowed large parts of them. In making those assessments he appears to me to have directed himself to the correct test, and to have applied his knowledge and experience to the material placed before him. It was apparent to him that a good deal of the work involved concerned other matters, or that the remuneration charged was excessive, or that the expense involved was otherwise not reasonable for the proper conduct of the litigation. I am not satisfied that his decisions on any of these matters ought to be disturbed.

[31] I am not persuaded that there is any substance in any of the other objections. In fixing the pre-litigation fee the Auditor had regard to the fact that most of the work done at that stage had no relevance to the case as finally pled. He disallowed the pre-litigation consultation with junior counsel both because he was not satisfied on the material produced to him that it had taken place, and because he did not consider that such a consultation ought to have been necessary. In my opinion, that was a course which he was entitled to take on the material before him. Likewise, I am not satisfied that there is any proper basis for interfering with his decision to abate the fee for junior counsel drafting the summons. The determination of reasonable remuneration for that work on a party and party basis was a matter which fell squarely within his experience and expertise.

[32] Finally, I am not satisfied that there is any proper basis for interfering with the Auditor's taxation of the defender's account. No relevant specific objections were advanced. The general objections made by the pursuer suffer the same fate as the general objections taken to the Auditor's taxation of the pursuer's account.

[33] For the foregoing reasons I repelled the objections to each of the Auditor's reports.