



SHERIFF APPEAL COURT

**[2017] SAC (Civ) 17
PIC-PN186-15**

Sheriff Principal M M Stephen QC
Sheriff Principal C D Turnbull
Sheriff Principal R A Dunlop QC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M STEPHEN QC

in appeal by

SSE PLC, Inveralmond House, 200 Dunkeld Road, Perth

Defender and Appellant;

in the cause

JACK CUMMING, 3 Maxwell Drive, Inverness

Pursuer and Respondent:

against

SSE PLC, Inveralmond House, 200 Dunkeld Road, Perth

Defender and Appellant;

**Appellant: McGregor; CMS Cameron McKenna LLP
Respondent: Wilson; Digby Brown**

21 April 2017

[1] In this personal injuries action the pursuer seeks damages for pleural plaques he developed as a result of exposure to asbestos in the employment of the appellant. The pursuer was employed by the appellant as a craftsman electrician between June 1988 and December 2014. Throughout that period he delivered and installed domestic appliances,

storage heaters and electricity meters. The action was raised in Edinburgh Sheriff Court invoking its all Scotland jurisdiction. Both liability and quantum had been disputed. The defences were skeletal and made no admissions. They did however make calls on the pursuer *inter alia* in respect of his employment history; detailed nature of his work with the appellant including the identities of supervisors and colleagues with whom he worked together with the quantities of asbestos dust given off. The pursuer has two craves firstly for £50,000 being full and final damages in respect of solatium and any future risks caused by his exposure to asbestos. Secondly, he seeks provisional damages of £25,000 reserving the right to apply to the court for further damages in terms of section 12 of the Administration of Justice Act 1982 should he develop or be diagnosed with mesothelioma or some other asbestos related condition. Ultimately, the cause settled prior to proof when the pursuer accepted the sum of £9,175 tendered in full and final settlement. Counsel appeared for the pursuer to move a motion for decree in terms of the Minute of Tender and Acceptance seeking *inter alia* certification of the cause as suitable for the employment of junior counsel. A solicitor-advocate appeared for the appellant to oppose certification. Counsel had been instructed after defences had been lodged at the stage of adjustment of the pleadings. Counsel had consulted with the pursuer, drafted adjustments and a specification of documents. Subsequently, counsel advised the pursuer on the tender. This appeal lies against the sheriff's decision to grant the pursuer's motion to certify the cause as suitable for the employment of counsel for the pursuer.

The Statutory Test

[2] Section 108 of the Courts Reform (Scotland) Act 2014 provides:-

"Sanction for counsel in the sheriff court and Sheriff Appeal Court

- (1) This section applies in civil proceedings in the sheriff court or the Sheriff Appeal Court where the court is deciding, for the purposes of any relevant expenses rule, whether to sanction the employment of counsel by a party for the purposes of the proceedings.
- (2) The court must sanction the employment of counsel if the court considers, in all the circumstances of the case, that it is reasonable to do so.
- (3) In considering that matter, the court must have regard to –
 - (a) whether the proceedings are such as to merit the employment of counsel, having particular regard to –
 - (i) the difficulty or complexity, or likely difficulty or complexity, of the proceedings.
 - (ii) the importance or value of any claim in the proceedings, and
 - (b) the desirability of ensuring that no party gains an unfair advantage by virtue of the employment of counsel.
- (4) The court may have regard to such other matters as it considers appropriate.
- (5) References in this section to proceedings include references to any part or aspect of the proceedings.
- (6) In this section –
 - (a) an advocate
 - (b) a solicitor having a right of audience in the Court of Session under section 25A of the Solicitors (Scotland) Act 1980.

"court", in relation to proceedings in the sheriff court, means the sheriff,

"relevant expenses rule" means, in relation to any proceedings mentioned in subsection (1), any provision of an act of sederunt requiring, or having the effect of requiring, that the employment of counsel by a party for the purposes of the proceedings be sanctioned by the court before the fees of counsel are allowable as expenses that may be awarded to the party.

- (7) This section is subject to an act of sederunt under section 104(1) or 106(1)."

Appellant's submissions

[3] In presenting the appeal counsel for the appellant accepted that the sheriff had an element of discretion to determine whether in all the circumstances it was reasonable to sanction the employment of counsel. Counsel also conceded that normally appeals on the question of expenses although not incompetent are severely discouraged (*Caldwell v Dykes* (1906) 8.F.839). The jurisprudence on the function of an appellate court in appeals against discretionary decisions is well settled. Essentially the appellant's submission is that the sheriff came to a decision which was plainly wrong. The factors which the sheriff must have regard to in coming to a decision are highlighted in section 108(3). It was argued, in short, that there were no difficulties or complexities arising in these proceedings and there was nothing about the proceedings which render them of particular importance.

[4] In relation to the complexity and difficulty of proceedings the sheriff erred in concluding that the factors she relied on can be categorised as such. The evidential difficulties which the sheriff refers to at paragraphs [30] and [31] of her judgment are not matters which are truly difficult. They do not bear scrutiny. The question was posed why it might be difficult for the pursuer to give relevant details of his employment with the appellant; other employers and his handling of asbestos. The inclusion of a crave for provisional damages does not *per se* render the proceedings more complex or difficult. There is a statutory basis for claiming provisional damages (section 12 of the Administration of Justice Act 1982). The case law on provisional damages is clear (*W v Advocate General* [2015] CSOH 111; and *Rothwell v Chemical and Insulating Company Limited* [2006] ICR 1458).

[5] In this case the appellant's tender is framed in the alternative. There was nothing particularly complex or difficult in advising the pursuer whether to accept provisional damages leaving open a return to court should his medical condition deteriorate or whether to accept the tender in full and final settlement. Ultimately the pursuer accepted damages on a full and final basis in satisfaction of Crave 1. Counsel accepted that the return conditions on provisional damages can cause difficulties when considering a tender. However, that simply did not apply here. The authorities referred to on provisional damages were available to the pursuer and his agents. These together with *Harris v The Advocate General for Scotland* [2016] CSOH 49 provide clear guidance on quantification of provisional damages.

[6] The second consideration which the sheriff required to take account of is the importance of the proceedings. The pursuer suffered from pleural plaques. He had no physical symptoms and it is extremely unlikely that he will develop any more serious condition. The risk was assessed at one per cent. It was accepted that the pursuer had been exposed to asbestos in the employment of the appellant and would be compensated for the condition he suffered. Any anxiety which the pursuer felt in connection with his exposure to asbestos and the situation in which he finds himself forms part of that compensation.

Respondent's submissions

[7] Counsel for the respondent asked us to refuse the appeal as no error of law is disclosed in the grounds of appeal or in the oral argument made on behalf of the appellant. It is not disputed that the sheriff identified and applied the correct test, namely that set out in section 108 of the 2014 Act. That provision requires the court to grant sanction if in all the circumstances it is reasonable to do so. The sheriff patently had regard to the factors set out

in section 108(3)(a). No issue arises with regard to section 108(3)(b) – the so called "equality of arms" component.

[8] The sheriff's decision involves the exercise of discretion. The function of the appellate court in appeals against discretionary decisions is well settled (*Thomson v Corporation of Glasgow* 1962 SC (HL) 36) applied recently in *Moran v Freysinnet Limited* (*supra*). Accordingly, the appellant has a very high test to reach before this court can interfere. That test has not been passed and this court should not revisit the factors and circumstances of the case.

[9] Counsel reminded us that in his submission to the sheriff he identified eight factors which were relevant to the sheriff's consideration of the difficulty or complexity or likely difficulty or complexity of the proceedings. These are enumerated by the sheriff in paragraph [7] of her judgment. Rather than repeat these factors counsel argued that the nature of the litigation itself, being asbestos related disease, can be and is complex. The passage of time, particularly in this case, was of some significance. The pursuer had been employed by the appellant for a lengthy period of time. There was difficulty obtaining direct evidence of the nature of the asbestos exposure. Passage of time impacts on the identification of witnesses and the ability of witnesses to recollect their working conditions. Witnesses die or disappear. This is a specialist area of litigation which places significant emphasis on the pursuer's own evidence. The evidential difficulties are compounded by the failure of the appellant to make any admission at all. At the outset of proceedings the pursuer's employment with the appellant was denied. Quantification is not straightforward. See *Harris* (*supra*) which adopts the approach of the Court of Appeal in England and Wales to quantification (*Rothwell v Chemical & Insulating Company Limited* [2006] ICR 1458).

However when counsel was instructed to prepare the pursuer's valuation in this case the court's decision in *Harris* had not been issued.

[10] The second component of section 108(3)(a) is "*the importance... of any claim in the proceedings*". Although this is a wider concept than the importance to the pursuer or any other party to the proceedings the sheriff correctly accepted the pursuer's submissions as to the importance of the proceedings to the pursuer (para [36] of her judgment). The sheriff accepted that this was an important matter for the pursuer who was very anxious about his condition given that a number of his former work colleagues had also contracted an asbestos related disease and two had died as a result. Accordingly, his anxiety is no less real even if the prospects of him developing a serious asbestos related illness are remote.

[11] In considering whether to grant sanction the sheriff required to consider all the circumstances of the case but particularly the enumerated factors. She did so and exercised her discretion to grant sanction. There is no basis upon which this court should interfere and the appeal should be refused with expenses in favour of the respondent.

Decision

[12] Section 108 of the Courts Reform (Scotland) Act 2014 ("the 2014 Act") imposes a positive duty on the court to sanction the employment of counsel if it considers that in all the circumstances it is reasonable to do so. In making that judgement the court must have particular regard to the difficulty or complexity, or the likely difficulty or complexity, of the proceedings; the importance or value of any claim in the proceedings; and the desirability of ensuring that no party gains an unfair advantage by virtue of the employment of counsel. The court may also have regard to such other matters as it considers appropriate.

[13] Section 108 has already been considered by a sheriff exercising his All Scotland jurisdiction in a personal injury action (*J's Parent and Guardian v M & D (Leisure) limited* 2016 SLT (Sh Ct) 185). We agree that the statutory provision broadly follows the common law position set out in *Macphail* 12.25 except that "appropriateness" gives way to the test of whether it is "reasonable" to sanction counsel's involvement in all the circumstances of the case. We approve the approach taken by the sheriff in *J's Parent and Guardian* that "the test is one of objective reasonableness considered at the time of the motion" in all the circumstances of the case. The introduction of the requirement to sanction by virtue of the expression "must" adds little to the test. It is difficult to envisage circumstances where the court having reached the conclusion that it is reasonable to sanction the employment of counsel did not then proceed to do so. We refer to this requirement as a "positive duty". It is a matter to which we will return.

[14] Whether or not to sanction the employment of counsel remains quintessentially within the judgement or discretion of the sheriff who is likely to be better placed than an appellate court to come to a judgement as to the nature of the cause; any difficulty or complexity arising; and its importance. The function of the appellate court where an appeal is taken against a decision involving the exercise of judicial discretion is well known and is conveniently set out in *Macphail* at 18.110 onwards. Absent misdirection it is not open to the appellate court to interfere and reach its own decision as to sanction. The appeal court may interfere with the conclusion reached by the sheriff if it is one which in the circumstances is plainly wrong. In *Henderson v Foxworth Investments Limited* 2014 SC UKSC 203, Lord Reed explained what the expression "plainly wrong" means. It is whether the decision under appeal is one that no reasonable judge could have reached. The test for review of a decision on a discretionary matter is set out in *Thomson v Corporation of Glasgow*

(*supra*). That test has more recently been applied and approved in *Moran v Freysinnet Limited* (*supra*).

[15] It is well recognised that appeals solely on a question or aspect of expenses are severely discouraged (*Caldwell v Dykes supra*; *Miller v Chivas Brothers Limited* 2015 SC 85), however, we accept that this appeal raises a point of general importance on sanction for counsel in the sheriff court with its new and extended privative limit. This involves the application of section 108 of the 2014 Act.

[16] We agree that the sheriff addressed herself to the correct test in her analysis of section 108. The sheriff clearly recognised that the factors mentioned in section 108(3)(a) were not only relevant but factors which she required to give particular consideration to. There is no issue between the parties as to the sheriff's approach to the statutory test but rather whether she was correct in her application of that test by concluding that it was reasonable to grant sanction. The appellant argues that the sheriff was "plainly wrong" in her application of the test to the circumstances of this case and that no reasonable sheriff would have reached the conclusion she did. No argument was advanced on appeal in respect of section 108(3)(b), what we call the "equality of arms" argument. We were not addressed by the pursuer on section 108(3)(b) nor did the respondent wish to make any submission to the effect that this was a relevant consideration.

[17] In reaching her conclusion as to the reasonableness of sanctioning the employment of counsel the sheriff required to consider whether the proceedings merited the employment of counsel (section 108 (3)(a)). The sheriff had particular regard to the difficulty or complexity of the proceedings (and indeed the likely difficulty or complexity). The sheriff's reasoning on these factors may be found in paragraphs [29] to [34] of her judgment. The sheriff gave careful consideration to the eight points advanced before her by the pursuer and preferred

these submissions to those advanced on behalf of the defender (para [29]). The difficulty or complexity related not only to the nature of the proceedings but to specific aspects such as the pursuer's employment not being of the traditional sort such as in the shipbuilding industry. The sheriff had regard to the pleadings in particular the skeletal nature of the defences and the number of calls made on the pursuer. At paragraph [31] the sheriff states:

"I agreed with Mr Wilson's submission to the effect that one of the potential evidential complications in the present case had been the fact that different types of exposure to asbestos had been involved, and that these had not been of the types more commonly involved. I also had no hesitation in agreeing with his submission that it would have been unsafe for the pursuer's agents to have assumed that the case would settle. The fact was that liability was in dispute, with detailed calls having been made on the pursuer."

We accept that there are evidential difficulties for pursuers in asbestos related actions. The pursuer requires not only to be a reliable and accurate historian but must establish the levels of asbestos dust to which he was probably exposed over a long period of employment. In this case the relevant employment extends to more than 26 years. The adequacy or lack of protective equipment and precautions are matters for the pursuer to address. In this case no admission is made by the appellant. The pursuer requires to be prepared to prove all material factual averments including his very employment with the appellant. One need look no further than the Lord Ordinary's opinion in *Prescott v The University of St Andrews* [2016] CSOH 3 to find the evidential difficulties in cases involving negligent exposure to asbestos. We see no basis upon which the sheriff can be criticised for concluding that the difficulty and complexity were such as to merit the employment of counsel.

[18] The tender lodged by the appellant is in the alternative in the sense that it addresses both craves, firstly for provisional damages and secondly in full and final settlement. The sheriff was satisfied that the need to advise the pursuer on both provisional and final damages was a complication. We agree with that observation. We are also content to agree

that quantification of damages on both bases is elucidated in recent authorities such as *W v Advocate General* 2015 SLT 537 and *Harris v Advocate General* [2016] CSOH 49. The application of section 12 of the Administration of Justice Act 1982 by the court was considered in *Fraser v Kitsons Insulation Contractors Limited* [2015] CSOH 135 in the context of a tender and acceptance of tender. Suffice to say there is divided opinion as to the operative or return conditions in a tender relating to provisional damages. In this case, of course, the pursuer accepted the sum tendered in full and final settlement. Nonetheless, not only must each case be considered on its own specific averments and circumstances, regard must be given to the medical evidence. A pursuer requires to be advised on the tender as a whole taking account of the alternative craves for damages. Accordingly, we do not accept the submission that the sheriff erred in reaching the conclusion that the separate craves constituted an additional factor which adds to complexity. She was entitled to take the view that advising the pursuer in this case was not entirely straightforward. The pursuer had to decide which course to follow and was entitled to expect to be advised fully on the tender insofar as it was intended to satisfy each of the pecuniary craves. The sheriff considered this to be another factor which merited the employment of counsel. We see no error in that approach. We were informed that the court's decision in *Harris (supra)* had not been issued at the time of the pursuer's valuation and consideration of the tender.

[19] As regards the importance (or value) the appellant argued that the sheriff had failed to adequately articulate why this consideration merited the employment of counsel. The sheriff's conclusions are to be found at paragraphs [36] and [37] of her judgment. Again the sheriff accepted the submissions made by counsel for the pursuer as to the pursuer's anxiety about his condition. Of course, the pursuer at present suffers from pleural plaques which are asymptomatic. The likelihood of the pursuer going on to develop a serious medical

condition such as mesothelioma is said to be very low, in the region of one per cent. Nevertheless, there are averments of the pursuer's distress and anxiety relating to his diagnosis and the associated risk of his condition progressing. He states that former colleagues suffer from asbestos related conditions and that two named individuals have died as a result of asbestos related disease. The sheriff accepted that these were relevant factors in assessing the importance of the proceedings particularly to the pursuer. Section 108(3)(a)(ii) refers to the importance of any claim in the proceedings. This is a wider concept than importance of the proceedings to the pursuer or indeed for any other party to the proceedings. Nevertheless, the importance of the claim to the pursuer is a relevant matter for the sheriff to take account of. We do not consider that the criticism of the sheriff is well founded. The sheriff was entitled to have regard to this factor as meriting the involvement of counsel.

[20] Section 108 requires the court to consider whether it is reasonable to sanction the employment of counsel in all the circumstances of the case. If the court considers it reasonable it must grant sanction. Accordingly, the court has discretion to consider each case on its own merits. When the test is broadly formulated, which, in our view, it must be to allow the court to exercise its discretion properly, then it is not for an appellate court to set down principles upon which either this court or the sheriff court should approach motions for sanction. However, we do recognise that the statutory compulsitor requiring the court to grant sanction, if it is reasonable, (section 108(2)) is curiously otiose for the reasons we give at paragraph [13]. It may simply be emphasis signifying the intention that counsel would play a real and meaningful role in the work of the sheriff court in its new and expanded jurisdiction.

[21] For the above reasons this appeal falls to be refused. The court's interlocutor will give effect to the parties' agreed position on expenses and we sanction the employment of counsel in this appeal.