OUTER HOUSE, COURT OF SESSION

[2023] CSOH 32

P583/21

OPINION OF LORD BRAID

in Petition of

SCHOOL AND NURSERY MILK ALLIANCE LIMITED

Petitioner

for

Judicial review of the funding rates set in the Milk and Healthy Snack Scheme (Scotland) Regulations 2021 (as amended) and the guidance issued by the Scottish Ministers in relation to the Scottish Milk and Healthy Snack Scheme

Petitioner: MacGregor KC; Balfour + Manson LLP
Respondent: Crawford KC, McKinlay; Scottish Government Legal Department

19 May 2023

The issue

[1] This is a note of objections to the auditor's report in a petition for judicial review. The petitioner instructed English solicitors and counsel to undertake a considerable amount of work in relation to that petition. In taxing the petitioner's account, the auditor refused to allow the recovery of any fees for that work. The issue is whether he erred in so doing.

Background facts and circumstances

[2] The stated aim of the petitioner, which is based in England, is to ensure that all children receive the benefits to be derived from drinking milk in school or early years settings. A consultation exercise was commenced by Scottish Ministers (the respondents) in 2018 in relation to a proposed Scottish Milk and Healthy Snack Scheme. A similar scheme was proposed for England and Wales. The petitioner opposed the Scottish scheme, as it had done the English one, as it considered the proposed rates would render it unworkable. Although the English proposal was abandoned, the respondents proceeded to introduce the Scottish scheme with the introduction of new funding rates. The petitioner challenged those rates by judicial review, enjoying complete success (see 2022 SLT 262). It secured an award of expenses against the respondents, including an additional fee.

[3] The petitioner instructed an English firm of solicitors, Bates Wells, not only to challenge the proposed English scheme, but to oppose the Scottish one. Its reason for doing so was that it has for approximately 20 years been advised by a partner in that firm, Melanie Carter, who has extensive experience of the petitioner's sector, and knowledge of how it operates. Similarly, an English barrister, Mr Bates, who had been instructed in relation to a judicial review of the English scheme, was instructed to undertake certain work in relation to the Scottish one, including drafting the petition for judicial review and framing a note of arguments. A Scottish firm, Balfour + Manson, was instructed as Edinburgh agents and they instructed senior (but not junior) counsel. The account of expenses included charges for all of the work undertaken by Bates Wells (which included preparing affidavits of all the witnesses, including two witnesses who were based in England) and that undertaken by Mr Bates. The respondents objected to all of those charges.

The arguments presented to the auditor

[4] In his minute lodged in response to the petitioner's Note of Objections, the auditor summarises the parties' arguments in relation to the employment of English solicitors and counsel. The respondents argued that it would have been both feasible and reasonable to have instructed Scottish agents at an earlier stage. The use of English agents and counsel was unnecessary and an extravagance, superfluous and unreasonable. No documents had to be recovered in England nor were any witnesses to be precognosced outwith Scotland [the latter statement was conceded to be inaccurate, since two of the witnesses in question were based in England]. In response, the petitioner founded upon Bates Wells' in-depth knowledge of the sector in which it operated. It pointed out that the test was reasonableness, rather than feasibility. Significant work had been undertaken by Bates Wells, and by Mr Bates, in relation to the collation of documentation and preparation of the case including work on pleadings and documentation, which benefitted greatly from their expert knowledge of the sector and the issues at stake. The costs which Balfour + Manson would have incurred had they done all the work would have been significantly higher, if not more than the two firms put together, had Bates Wells and Mr Bates not carried out their services. In support of this argument, it provided the auditor with details of the hourly rates charged by various grades of fee earner at Bates Wells.

The auditor's decision

[5] At paragraph 5 of his minute, the auditor (correctly) narrates the test for recovery of work undertaken for a party by foreign agents: that he had to be satisfied that it was reasonable for that party to have instructed the foreign agents to undertake that work. He then summarises, at paragraph 6, his understanding of the reasons why the petitioner had

instructed Bates Wells: (a) their in-depth knowledge of the sector, which Balfour + Manson did not have; (b) much of the relevant public law was English; and (c) that the time incurred in dealing with various aspects of the litigation was less. He deals with (a) and (b) in paragraph 7, stating that in his opinion, the required degree of knowledge of the legal framework and the role of agents and dairies was available from the petitioner such as to allow the litigation to be competently raised and conducted by Scottish agents. They would have been able to have familiarised themselves with the relevant aspects of the matter and then conduct the litigation without such difficulty that would have required assistance from English agents. He states that he was "unable to identify any aspect of the litigation that required the input of English agents". As far as (c) is concerned the auditor deals with that at paragraphs 8 to 10. After quoting from Lord Menzies in *Kirkwood* v *Thelem Assurances* [2022] CSOH 53, where he made reference to recovery being effectively on an agent and client basis, were English solicitors' charges to be recovered, the auditor stated that in his experience where he has determined that expenses claimed in respect of work undertaken by foreign agents have been reasonably incurred for conducting the proceedings in a proper manner, that invariably results in the paying party having to pay expenses at a greater level than they would have, had the work been undertaken by Scottish agents. This is said to be on the basis that although the allowance of work undertaken by foreign agents requires to be determined on the same party and party basis as Scottish agents, there is often additional work in respect of liaising with Scottish agents, and the allowance of all recoverable work on a time basis is often more favourable than the Scottish method of allowing some work on a time basis and some work on a sheetage or page basis. In addition, according to the auditor, the hourly rate to be applied to the recoverable work is often greater than the hourly rate allowed in Scotland. He concluded this chapter of his reasoning at paragraph 11 by stating

that in his opinion, based on his knowledge and experience of litigation in similar matters and having considered the work required in this litigation, the instruction of the English agents had resulted in the claim being at a higher level than it would have, had the work been undertaken by Scottish agents. Overall, the auditor determined (paragraph 12 of his minute) that the expenses claimed in respect of the English agents were not expenses reasonable for conducting the proceedings in a proper manner. He then applied similar reasoning in relation to Mr Bates, concluding that he was unable to identify any aspect of the litigation that required the instruction of an English barrister and on that basis he was not persuaded that the knowledge and experience of Mr Bates was sufficient reason to justify his instruction. He also concluded that the instruction of Mr Bates had resulted in the claim for expenses against the paying party being at a higher level than it would have been, had the work been undertaken by Scottish counsel on the instruction of Scottish agents.

The law

[6] Rule 2.2(1) of the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019 (SSI 2019/75) provides that the auditor is to allow only such expenses as are reasonable for conducting the proceedings in a proper manner. Rule 4.2 provides that outlays reasonably incurred in order to conduct the proceedings in a proper manner are to be allowed.

[7] In deciding whether or not expenses are reasonable, or reasonably incurred, for conducting the proceedings in a proper manner, the auditor is exercising a wide discretion; the court's role in challenges to the exercise of that discretion is a limited one, the available grounds of objection being analogous to those in a judicial review: *Shanley* v *Stewart* 2019 SLT 1090, Lord President (Carloway) at [25]. The court can interfere only if the auditor has erred in law in some way, for example, by misdirecting himself in law, or taking into

account irrelevant considerations, ignoring relevant ones or misunderstanding the factual material placed before him.

[8] As regards the fees of solicitors or counsel outwith the jurisdiction, there is no prohibition on these being recovered, provided that they satisfy the reasonableness test: *Kirkwood* v *Thelem Assurances,* above, Lord Menzies at [24]. If they do satisfy that test, the amount recoverable will be assessed in accordance with the rules of that jurisdiction. So, in *Ebbw Vale Steel, Iron and Coal Company Ltd* v *Murray* (1898) 25R 925, while the auditor had allowed, as a good charge, the expense of instructing an English solicitor to precognosce witnesses who were resident in England, he had taxed that expense on the Scottish scale, resulting in a significant reduction to the account. The Inner House sustained an objection by the party entitled to payment, holding that the outlay must be taxed according to English rules. The Lord President observed (at 927) that the losing party could "only" be charged with the cost of having witnesses away from the seat of the Court precognosced by a local solicitor, this being less expensive than an Edinburgh agent doing the work: in other words, cost was a relevant consideration, albeit in *Ebbw Vale* it was cheaper to instruct an English agent than to have the Scottish solicitor do the work.

[9] The seven judge case of *Wimpey Construction (UK) Ltd* v *Martin Black & Co (Wire Ropes) Ltd* 1988 SLT 637 gave consideration to the correct approach where an account of expenses incurred by English solicitors was sought to be recovered in a Scottish litigation. The principles derived from that case were summarised by Lord Drummond Young in *Scottish Lion Insurance Co Ltd, Petr* 2006 SLT 606 at [8] as follows:

> 1. an English solicitor properly employed in a Scottish litigation is entitled to be remunerated for their work according to an English scale of remuneration [as had been decided in *Ebbw Vale*];

2. such remuneration is treated as part of the outlays in the account of expenses;

3. in considering the English account, the auditor must first determine which items would be admissible in a Scottish party and party account (applying Scottish principles);

4. thereafter, having made such inquiries as may be appropriate to ascertain what charges may be appropriate, the auditor must apply the relevant English scale of charges.

[10] In relation to the instruction of English counsel, the Lord President said, in *Shanley*, at [29], that it would be "most unusual" for the auditor to allow, as an expense reasonably incurred for the proper conduct of an action in Scotland, the fees of English counsel. He went on to say:

> "Such counsel have no rights of audience in the Court of Session and it is difficult to see why it would be reasonable to instruct English counsel, given the instruction of, and advice by, Scottish counsel and solicitors on liability and quantum. Any advice from English counsel was superfluous. In any event, the auditor considered, reasonably, that the case as finally pled did not require this advice. If there had been a matter of English law to be considered, the matter may have been different. In that event, as the auditor noted, certification as a skilled person would be needed."

Submissions

Petitioner

[11] Senior counsel for the petitioner submitted that the auditor had erred in the following respects. First, he had applied a test of necessity, rather than one of reasonableness, as his use of the word "required" showed. Second, he had wrongly taken into account the cost of doing the work in assessing whether or not it was reasonable to instruct English solicitors and counsel, thereby conflating what ought to have been a two stage approach required by *Wimpey Construction*. Third, he had taken into account

irrelevant factors, and failed to take into account relevant ones: he had failed to appreciate that the rates charged by Bates Wells were, in the main, lower than the hourly rate which Balfour + Manson was entitled to charge following allowance of the additional fee, which was £287; and had wrongly proceeded on the basis that all of the witnesses were situated in Scotland. Finally, his decision to impose a blanket prohibition on the recovery of any charges for work done in England was irrational. The charges for precognoscing, and then preparing affidavits for, the two witnesses who were based in England, should have been allowed. As regards the instruction of counsel, the auditor had erred in concluding that *Shanley* was directly in point: the case merited the instruction of senior and junior counsel and the question ought to have been whether recovery of fees for junior counsel was reasonable: if so, the work of Mr Bates was not superfluous and ought to have been allowed. The refusal to allow any charges in respect of that work was irrational.

Respondent

[12] Senior counsel for the respondent submitted that reading his minute as a whole, the auditor had identified, and then applied, the correct test of whether the instruction of English solicitors and counsel had been reasonable. He was entitled to come to the view he had reached, that the instruction was not reasonable. The auditor had dealt with the arguments which had been presented to him, and his minute must be read in that context. The Note of Objections amounted to no more than a disagreement with the reasons given by the auditor as to why he had found the instruction of English advice to be unreasonable. It could not be said that the auditor's decision was irrational. *Ebbw Vale* must be read in the context that Zoom, and other such platforms, did not exist in the late 19th century, and it did not lay down a rule of general application that it was always reasonable to instruct foreign

agents to precognosce witnesses outwith the jurisdiction. The court should not interfere with the auditor's decision.

Decision

[13] Since the respondents concede that if the auditor applied a test of necessity rather than reasonableness that would be an error of law which would vitiate his decision, I will address that question first. The auditor correctly notes, at paragraph 3 of his minute, the tests set out in rules 2.2(1) and 4.(2), which are tests of reasonableness. He had before him, and narrates in his minute, not only the respondent's argument that it would have been "feasible" to instruct Scottish agents sooner, but the petitioner's riposte that feasibility was not the test. At paragraph 5, under reference to *Wimpey Construction* and *Scottish Lion*, he notes, correctly, that to allow a party to recover English charges, he would have to be satisfied that it was reasonable for the party to instruct foreign agents to undertake that work. Having then given his reasons for reaching his opinion, the auditor then concludes that the expenses claimed were not expenses reasonable for conducting the proceedings in a proper manner. Reading his minute as a whole, it is clear that the auditor had the correct test in mind. It is true that in considering reasonableness, he stated (among other factors) that he was unable to identify any aspect of the litigation which required the role of English agents; then again, the same language appears to have been used by the auditor in *Shanley* without attracting any adverse comment from the Lord President (see paragraph [10] above). In any event, I see no reason why, in considering whether it was reasonable to obtain English advice, the need for such advice should not be a relevant factor. More to the point, the auditor makes clear that he took into account the arguments before him about the particular knowledge of the English agents and the aspects of English public law involved,

but was not persuaded that they were sufficient reasons to justify the instruction of English agents (see paragraph [5] above): nothing about the expression of that conclusion is redolent of the application of a test of necessity.

[14] The next ground of challenge is that the auditor wrongly applied what was said to be a two-stage test, by having regard to the costs of doing the work (which arose only at stage two) when considering the reasonableness of instructing the work. However, as the auditor points out at paragraph 5 of his minute, at least on Lord Drummond Young's summary of the principles in *Scottish Lion*, there is an anterior test, which is whether or not English agents were properly instructed in the first place. Only if they were, does the auditor then go on to consider which items would then be allowed in a Scottish party party account; and those items which would be so allowed are then taxed at English rates. Even proceeding on the basis that "properly instructed" is synonymous with "reasonably instructed", it must be relevant, in considering that question, to have regard to the costs of instructing English agents. By way of example, suppose work could be done with equal efficiency and proficiency by solicitors based in London and Edinburgh, say the precognition of a witness in Berwick: it must be a relevant consideration in weighing up reasonableness, if the cost of the English solicitor doing so were twice as high that of the Scottish solicitor. Indeed, in *Ebbw Vale*, the rationale for allowing the charges of English solicitors for precognoscing a witness, was that it was less expensive than sending an Edinburgh solicitor to do the work. Similarly, in assessing the reasonableness of instructing English counsel, the respective costs of English and Scottish junior counsel must, at the very least, be a factor to be weighed in the balance. Accordingly I do not consider that the auditor erred, in principle, in having regard to cost considerations in assessing reasonableness.

[15] The next question is whether the auditor erred in his treatment of certain factual matters, principally, in apparently accepting (or at least not correcting) the respondents' erroneous suggestion that none of the witnesses was outwith Scotland; and in proceeding on the basis that the hourly rate charged by Bates Wells was higher than the Scottish hourly rate. In relation to the first of these, it appears that the petitioner itself did not correct this in its submissions to the auditor; it is hard therefore to criticise the auditor for any error in this regard. Further, it emerged, in response to a query raised by me at the hearing, that the witnesses were in any event precognosced by Zoom. Thus, it is correct to say that no witnesses outwith the jurisdiction had to be visited by agents. The location of the witnesses is ultimately a neutral factor.

[16] I have more difficulty with the auditor's approach to hourly rates. He states (at paragraph 9) that in his experience, the instruction of foreign agents "invariably" results in the paying party having to pay expenses at a greater level than they would have had the work been undertaken by Scottish agents; that the hourly rate "is often greater" than the hourly rate allowed under Scottish statute; and (at paragraph 10) that "based on his knowledge and experience of expenses in similar matters and having considered the work required in this litigation", the instruction of English agents had resulted in the claim for expenses being at a higher level than it would have been had the work been undertaken by Scottish agents. In other words, the auditor had regard to what was either "invariably" or, in his second formulation, "usually" the case. What is lacking in that analysis is any consideration of what the respective costs of the English and Scottish agents were in *this* case. I consider that this was a misunderstanding, or at least a failure to appreciate, or investigate, the factual matrix which does go to the heart of the auditor's decision. Had he concluded that that the costs were broadly similar, then, taking into account the embedded

knowledge of Ms Carter, he might have come to a different decision on the reasonableness of instructing Bates Wells, if not that of instructing Mr Bates. For this reason, the auditor did err in law, in failing to take into account a material factual matter (or misunderstanding or failing to investigate the respective rates in this case), which renders his decision susceptible to challenge. In relation to Bates Wells's fees (but not those of counsel, where it is not suggested that the auditor misunderstood the respective costs of English and Scottish junior counsel), the matter must be remitted for reconsideration.

[17] The final argument was irrationality. The petitioner's argument on this issue is, in effect, that certain work (for example, preparing affidavits; drafting a petition; preparing a note of arguments) had to be undertaken; had it been undertaken by Scottish solicitors and counsel, the charges would have been recoverable; and it is irrational not to allow any recovery for such work where it happened to be undertaken by English solicitors and counsel. The flaw in that argument is that it flies in the face of the established principles, whereby one first enquires whether it was reasonable to instruct English solicitors and counsel to do the work, and only if it was are the costs of that work to be recoverable. If work had to be done, but was (unreasonably) done by a foreign solicitor, then one can see the logic in taxing that work at Scottish rates. However, that approach is ruled out by the authorities; and the auditor's decision to disallow the English charges in their entirety cannot be categorised as irrational. Indeed, having reached the view that he did on reasonableness, he had no option other than to disallow the charges in their entirety.

[18] In summary, the auditor did not apply a test of necessity; his decision was not irrational; however insofar as his approach to assessing reasonableness was concerned, he failed to have regard to the actual charges of Bates Wells on the one hand, and Balfour +

Manson (after allowance of the additional fee) on the other. To that extent only, he fell into error. He did not fall into error in disallowing the fees of Mr Bates.

Disposal

[19] I will sustain the objection to the abatement of the fees of Bates Wells, and repel that to the abatement of English counsel's fees. I will remit to the auditor to give further consideration to Bates Wells' fees. I will reserve the question of expenses.