



OUTER HOUSE, COURT OF SESSION

[2023] CSOH 51

PD374-18

OPINION OF LORD BRAID

In the cause

SAMANTHA MAGUIRE

Pursuer

against

(FIRST) BLACK ISLE FIRE SYSTEMS LTD AND (SECOND) ROYAL & SUN ALLIANCE
INSURANCE PLC

Defenders

Pursuer: Springham, KC; DAC Beachcroft Scotland LLP
Defenders: M Hastings, Solicitor Advocate; BTO Solicitors LLP

11 August 2023

Introduction

[1] On 18 October 2015 the pursuer sustained life-changing and catastrophic injuries in a road traffic accident, when a van in which she was a front-seat passenger careered off the A835 Ullapool to Tore road and overturned. She raised a personal injury action for damages against (first) the driver's employers and (second) their insurers, Royal & Sun Alliance (RSA). The claim eventually settled and an interlocutor was pronounced on 30 March 2022 awarding the pursuer a substantial sum in damages, together with the expenses of process

as taxed. Ten persons were certified as “expert witnesses” (or, to use the term in the Table of Fees, skilled persons).

[2] The pursuer’s solicitors duly lodged their account of expenses for taxation by the Auditor of Court. Insofar as relevant for present purposes, following a diet of taxation at which the parties’ representatives made submissions, the Auditor disallowed (i) the fees for “revising” an Immediate Needs Assessment Report and monthly case management reports obtained throughout the course of the claim, albeit he allowed limited perusal charges in their stead; and (ii) a reading-in fee charged by junior counsel instructed some two and a half years into the litigation, after counsel originally instructed had become unavailable due to her having been appointed to Crown Office.

[3] The pursuer has lodged a Note of Objections to the Auditor’s report, taking issue with those abatements. In response, the Auditor has lodged a minute in terms of RCS 42.4(2A) stating the reasons for his decisions.

[4] Before considering the abatements, and the objections to them, it is necessary to say something of the background and of the basis on which the account of expenses was prepared.

The Immediate Needs Assessment Report

[5] The action was not raised until October 2018. In 2016, due to the nature of the pursuer’s injuries, an Immediate Needs Assessment Report (INA) was instructed jointly by the pursuer’s solicitors and RSA from Kirsten Galloway, of a company called Case Management Services Ltd. As paragraph 1.3 of that report narrates, it was prepared in accordance with the Code of Best practice on Rehabilitation, Early Intervention and Medical Treatment in Personal Injury Claims (the Rehabilitation Code). The purpose of the

Rehabilitation Code is, as the Introduction to the Code states, to help an injured claimant to make the best and quickest possible medical, social, vocational and psychological recovery, which means ensuring that (in this case) her need for rehabilitation is assessed and addressed as a priority and that the process is pursued collaboratively. The Code contains a section dealing with INA reports, which includes the statement that for the report to be of benefit to the parties, it should be prepared and used wholly outside the litigation process, unless both parties agree otherwise in writing. There was no such agreement in the present case. Ms Galloway was not certified as an “expert witness”; indeed, was not a witness at all.

[6] The purpose of the INA was, per paragraph 2.2, to assess whether the pursuer’s current medical situation or quality of life may be improved by immediate intervention.

Investigation was made with the pursuer, her mother and members of her medical treatment team and the report, as the title suggests, assessed the pursuer’s immediate needs and made recommendations as to how these might be met.

[7] Paragraph 1.3 of the report stated that:

“In accordance with the Rehabilitation Code...this report, any correspondence relating to it and any notes created are covered by legal privilege and may not, under any circumstances, be disclosed in any legal proceedings. Any notes or documents created in connection with the assessment process may not be disclosed in any litigation and any person involved in the preparation of the report or involved in the assessment process shall not be a compellable witness at Court. For this report to be of benefit to the parties it is prepared and used wholly outside of the litigation process.”

[8] Following the INA, monthly case management reports were provided by Case Management Services Ltd. These were funded by RSA. They provided monthly updates under a series of headings: A – the Case Manager Action Plan; B – the Longer-Term Aim/Goal of Rehabilitation; C – the Client Rehabilitation/Intervention Goals, including

progress in achieving these; D – what documentation has been completed; and, finally what progress had been made in the month under consideration.

Instruction of junior counsel

[9] The pursuer instructed junior counsel in the conduct of the court action. That counsel was involved in the case from 2018 until 2021, when she was appointed to Crown Office. That necessitated the instruction of new junior counsel, who charged a “reading-in” fee for reading all papers associated with the case.

The pursuer’s account of expenses

[10] The pursuer’s account was prepared on a block fee basis in accordance with Part VA of the table of fees¹, which applies to defended personal injuries actions. Paragraphs 1, 2 and 12 are relevant. They provide:

1. Precognitions/Expert Reports/Factual Reports	£²
Taking and drawing precognitions, per sheet	78.00

Note:

Where a skilled person prepares his or her own precognition or report, the solicitor shall be allowed, for perusing it (whether or not in the course of doing so he or she revises or adjusts it), half of the taking and drawing fee per sheet.

2. Pre-litigation fee

All work which the Auditor is satisfied has reasonably been undertaken in contemplation of, or preparatory to the commencement of proceedings particularly to include communications between parties in relation to areas of medical/quantum/discussion re settlement (or such other sum as in the opinion of the Auditor is justified) 702.00

...

¹ As substituted by SSI 2014/15, and amended by SSI 2018/186.

² These fees increased during the currency of the case, by virtue of SSI 2018/16 but nothing turns on that.

12. Specification of documents (if further specification considered necessary)

...

(g) Fee for perusal of documents recovered under a specification of documents (or by informal means) where not otherwise provided for in the Table of Fees, per quarter hour	39.00
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The pursuer's account included charges under paragraph 1 for "revisal" (in fact, perusal) of Ms Galloway's report and the case management reports, calculated on a sheetage basis.

Against the date 29 August 2016, it charged a fee of £1,326 for "revising" the former (34 sheets). Against various dates from 25 June 2016 to 25 October 2021 it charged fees totalling £7,099 for "revising" the monthly reports, of which there were more than 60. It also included an outlay of £2,250 plus VAT for the reading-in fee.

The Auditor's approach

[11] The Auditor disallowed all of the foregoing charges, save for six of the case management charges, for each of which he allowed a ½ hour perusal fee. In his minute, he reports that his reason for doing so was that the expenses which he did allow were those reasonable for conducting the cause in a proper manner, that being the test set out in Rule of Court 42.10(1). (By necessary inference, the disallowed expenses were not, in his view, reasonably incurred in so conducting the cause.) His more detailed reasoning is contained in paragraph 6 of the note appended to the minute. He was of the opinion that the INA and the case management reports were instructed for the purpose of identification and management of the pursuer's care requirements. The fee allowed at paragraph 1 of Part VA of the Table of Fees is in respect of reports, factual or otherwise, instructed for the purpose of the proceedings. The established practice of the Auditor in respect of reports that were not instructed for the purpose of the proceedings, but where their perusal was reasonable for conducting the cause in a proper matter, is to allow their perusal to be recovered as part of

the pre-litigation fee at paragraph 2 of the Table of Fees, or, where perused after the commencement of proceedings, at paragraph 12(g). He was satisfied that the perusal of the reports was reasonable for conducting the cause in a proper manner. “Accordingly” (*sic*), he abated the fees claimed under paragraph 1 of the Table of Fees and increased the pre-litigation fee by 50% (in the sum of £369) to reflect the increased level of pre-litigation work brought about by the perusal of Ms Galloway’s report and the case management reports up to that date. For perusal of the case management reports obtained after the commencement of the proceedings he allowed, under paragraph 12(g), of the Table of Fees, six perusal charges of £82 each (totalling £492) on 31 March 2019, 25 September 2019, 25 March 2020, 25 September 2020, 25 March 2021 and 25 November 2021, on the basis of his opinion that it was reasonable for conducting the case in a proper manner to have obtained and perused the reports half-yearly.

[12] Insofar as Ms Waugh’s reading in fee was concerned, the Auditor stated (in paragraph 16 of his note) that in his opinion the pursuer, through her agents, was ultimately responsible for instructing a junior counsel who would be available for the duration of the proceedings; and that the circumstances which resulted in a requirement to instruct a new junior counsel and in doing so incur a fee in respect that new junior counsel for reading in, were circumstances for which the pursuer had to be take responsibility. He did not consider it reasonable that the paying party should be responsible for the duplication of work caused by the change in counsel.

The pursuer's note of objections*The case management reports*

[13] The principal objection to the abatement of the charges for considering the case management reports was that these reports were obtained jointly pursuant to an agreement between the pursuer and RSA and wholly funded by RSA. It was, said the pursuer, illogical for RSA to pay for the reports and at the same time object to the pursuer's solicitors' fee for reading them. In developing this objection, senior counsel for the pursuer submitted that it had not been open to the Auditor to, in effect, rewrite the parties' agreement as to the frequency at which reports should be obtained. The Auditor had erred in drawing a distinction between reports instructed for the purpose of proceedings and reports not so instructed: no such distinction was to be found in the table of fees. If there was an established practice to draw such a distinction, the practice was illogical. Having reached the view that perusal of the reports was reasonable, he ought to have allowed a fee for perusing each and every report. The INA and the monthly reports were all important to conducting the case in a proper manner. The pursuer's care expert had access to all the reports in preparing her expert report. The Auditor ought to have asked for sight of the case management reports before deciding the extent to which perusal of them was reasonable. The implications of the Auditor's approach could be far-reaching and might affect the handling of this type of case in future. Rather than using the collaborative approach exhorted by the Code, agents for injured parties may decide to ingather information using other routes. This went to the reasonableness of the Auditor's decision and illustrated that his decision was one which no reasonable auditor could have reached.

The reading-in fee

[14] Senior counsel argued that the Auditor had imposed a test which it was impossible for any instructing solicitor to meet. It could never be known, when counsel was instructed to conduct a case, whether that counsel would be available throughout the duration of the case, for a whole variety of reasons, including the possibility of illness, paternity/maternity leave or judicial appointment. It was simply a vagary of litigation that a replacement junior counsel had to be instructed, for which the paying party should bear the cost.

The defenders' response

[15] The solicitor-advocate for the defenders submitted that the Auditor had not erred. Unreasonableness in a *Wednesbury* sense was required, and the Auditor's decision, in relation both to the reports and the reading in fee did not meet that level of unreasonableness. Nor had the Auditor erred in his application of the Table of Fees, or in not asking for sight of the case management reports. The onus had been on the pursuer's agents to have brought them to the Auditor's attention if they considered them material. The Auditor had not re-written the parties' agreement but his function had not been to decide whether or not that agreement was reasonable; rather, to decide what expenses the defenders should reasonably bear, and this he had done.

The law

[16] Parties are in agreement that the available grounds of objection to a decision of the Auditor are limited, being analogous with those available in a judicial review. The leading modern authority is *Shanley v Stewart* [1019] CSIH 15, Lord President (Carloway) delivering the opinion of the court, at [25]. The court can interfere only if the Auditor has misdirected

himself in law, taken irrelevant circumstances into account, failed to take into account relevant circumstances or misunderstood the factual material before him. Where his decision depended on the exercise of discretion, it will be susceptible to being overturned only where it is such that no reasonable auditor could have reached it. In *Kirkwood v Thelem Assurances* [2023] CSIH 30, the Inner House eschewed the notion that there was any need for the Auditor to investigate matters within his field of expertise.

Decision

The INA and case management reports

[17] There is, at first blush, a contradiction or at least a logical disconnect in the Auditor's reasoning, inasmuch as he states that perusal of the reports was reasonable for conducting the cause in a proper manner, and "accordingly" abated the cost of perusing the majority of the case management reports obtained after the litigation commenced, allowing only a restricted fee for perusing the INA and the other pre-litigation reports. Nonetheless, it is tolerably clear, reading the minute as a whole, what the Auditor meant: that, in principle, it was reasonable to charge for perusal of the reports but that the number charged for was unreasonable and excessive. As he makes clear at paragraph 2 of his minute, he applied the correct test, namely that set out in Rule of Court 42.10(1), and allowed only such expenses as were reasonable for conducting the cause in a proper manner. His decision that it was reasonable to peruse the case management reports only once every 6 months was a discretionary one and standing the stated purpose of the reports, and their repetitive nature, that cannot be categorised as so unreasonable a decision as to entitle the court to interfere with it; particularly since the Auditor also allowed an enhanced pre-litigation fee which took into account perusal of the INA and the case management reports obtained pre-litigation.

As has repeatedly been made clear in the authorities, the court must defer to the Auditor's experience in deciding what is and is not reasonable in conducting a litigation.

[18] Dealing with the various arguments advanced by the pursuer, it was first argued that the Auditor misdirected himself by drawing a distinction between reports instructed for the purpose of the proceedings and reports not so instructed. While it is true that such a distinction does not expressly appear in the Table of Fees, the Auditor did not err in making that distinction, which is implicit within paragraph 1: it is difficult to envisage a precognition, expert report or factual report ever giving rise to a proper charge if it were not for the purpose of the proceedings. Standing the stated purpose of the INA and that Ms Galloway was not a witness, far less a skilled person, the Auditor was not only entitled, but correct, to conclude that it was not the sort of report which fell within paragraph 1. It could not be more plain from the terms of Ms Galloway's report that it was provided outwith the court process, and it is difficult for the pursuer, having obtained the report on that basis, now to argue that it was after all a report obtained for the purpose of the proceedings or one falling within paragraph 1 of the table. The Auditor was entitled to reach the same conclusion with regard to the monthly case management reports, the author of those not being a witness, skilled or otherwise, either. He was entitled to conclude, as he did, that the reports were all provided for the purpose of identification and management of the pursuer's care requirements and that they did not fall within paragraph 1. Even if I had considered that the Auditor had erred in his approach, and I had been considering the matter *de novo*, I would have concluded that paragraph 1 had no application, as neither Ms Galloway, nor the author of the case management reports, was a skilled person, and paragraph 1 simply has no application with or without the distinction drawn by the Auditor.

[19] The pursuer next complained that the Auditor was not entitled to apply charges under paragraph 12, since the reports were not documents which had been recovered under specification. That is technically correct, but on the other hand the complexity of a document, and the time taken to peruse it, do not depend upon whether or not it has been recovered pursuant to a specification. The Auditor's decision to apply paragraph 12 cannot be characterised as unreasonable, and if it was an error, it was an error in the pursuer's favour. Had he not allowed a charge under that paragraph, the pursuer would have recovered nothing in respect of the perusal of the reports.

[20] The pursuer also argued that the Auditor should have allowed the perusal of all the reports, since the parties had agreed that monthly reports be obtained for which RSA would pay. However, it is for the Auditor, not the parties, to decide what costs are reasonable in the conduct of the case and, as a matter of principle, the Auditor's discretion cannot be fettered by an agreement reached by the parties. The parties' agreement may be a factor in deciding what is reasonable but it cannot be the only factor. I do not agree with the pursuer's submission that the Auditor has in effect re-written the parties' agreement for them; rather, he has, in effect, determined that the expense of perusing the reports was, in large part, an agent-client expense rather than a party-party one. The Auditor states that he had regard to both parties' submissions and so he was aware of the agreement reached between the parties, and must be presumed to have taken it into account in reaching his decision, attaching to it such weight as he deemed appropriate.

[21] Counsel for the pursuer also criticised the Auditor's decision on the basis that he had not perused any of the case management reports, so could not have properly formed a view as to what was reasonable. Apparently the former practice whereby the Auditor saw the entire process has been discontinued since the Covid pandemic. However, both parties in

their submissions to the Auditor at the diet of taxation referred to the purpose of the case management reports, and the Auditor can be taken to be familiar with the nature of such reports without having to make specific inquiry. While I concede that it might have been better if the Auditor, in reaching a decision about the reasonableness of perusing documents, had actually seen the documents in question, or at least a sample of them, ultimately his decision was based not on the content of the documents but on the frequency with which they were obtained. The Auditor was aware, from the submissions made to him, of the sort of information that the monthly reports contained, and he did see the INA. I have therefore concluded that he was entitled to reach the view, based upon his experience of taxing accounts in personal injury actions, and without seeing the case management reports, that to conduct the case in a proper manner, it was reasonable to obtain and peruse the case management reports only on a half-yearly basis.

[22] As for the impact the Auditor's decision might have on the future conduct of litigation, I do not consider that is a relevant factor in assessing the reasonableness of the decision. The consequences are uncertain and do not provide a sound basis for interfering with the decision, particularly since the Auditor's decision was based not on the nature or content of the reports but the frequency with which they are obtained.

[23] In summary, viewed in the round, the Auditor's decision was that charges totalling £871 were reasonable for perusing the reports, and the Court may not substitute its own view, even if different. There is no illogicality in the Auditor stating that perusal of the reports was reasonable, and abating the fee for so doing because the fee charged was excessive. The Auditor did not err in law in any of the ways which can give rise to a successful challenge. There is no basis for interfering with his decision with regard to the reports.

The reading-in fee

[24] Turning to the reading-in fee, the Auditor does appear to hold a party's solicitors to an impossibly high standard when instructing counsel, particularly when regard is had to the length of most litigations, and the impossibility of knowing what fate might have in store for any chosen counsel. However, the nub of the Auditor's decision is to be found in a subsequent sentence in his minute, where he states that he did not consider it reasonable that the paying party should be responsible for the duplication of work caused by the change in counsel. While it may well be that different auditors would reach a different conclusion, I cannot conclude that a decision that the paying party should not pay for a duplication of work is one which no reasonable auditor would have reached. To call it a vagary of litigation – as it is – takes one nowhere, since that begs the question as to whether it is a vagary for which the paying party should pay, or is an irrecoverable agent-client expense. Again, this was a decision that the Auditor was entitled to reach and there is no basis for the court to interfere with it.

Disposal

[25] For the foregoing reasons, I have repelled the Note of Objections and sustained the Auditor's Report.