SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2018] SC EDIN 10

EDI-SG1100-17

JUDGMENT OF SHERIFF NORMAN MCFADYEN

In the simple procedure case

ANDREW MARTIN

Claimant

Against

SOUTHERN ROCK INSURANCE COMPANY LTD

Respondent

Claimant: Shepherd; New Law Scotland
Respondent: Ford; Brodies LLP

Edinburgh, 20 February 2018

[1] Where expenses in a simple procedure claim are capped in terms of section 81 of the Courts Reform (Scotland) Act 2014 (the 2014 Act) and the Sheriff Court Simple Procedure (Limits on Award of Expenses) Order 2016 (SSI 2016/388) (the 2016 Order), is the capped sum inclusive of value added tax and outlays and, in particular, the court dues in respect of raising the claim?

Background

[2] In this simple procedure claim the claimant sought damages of £1665.88 in respect of loss arising from a car accident, largely relating to vehicle hire charges. The claim was defended on quantum only and, although ultimately the parties reached settlement terms in the sum of £1000, they were not able to agree whether the capped expenses of £150 in terms

of the 2016 Order were inclusive of value added tax (VAT) and the outlay of £100 in respect of the court fee for raising the claim, as maintained by the respondent, or whether VAT and the £100 outlay fell to be added to the capped expenses, as maintained by the claimant. Written submissions were lodged on behalf of both parties, but the claimant's solicitor requested an oral hearing and the matter ultimately proceeded to a hearing before me on 25 January 2018.

[3] At the outset of the hearing the claimant's solicitor sought to argue that the court should simply award assessed expenses in terms of section 81(5) of the 2014 Act, in respect that the respondent, having stated a defence, had not proceeded with it. Given that the claim had been settled between parties on the basis that the only issue was as to whether the capped sum of £150 was inclusive of VAT and the outlay of raising the claim and indeed written submissions had been lodged on that basis, I took the view that it was too late to open up the question of assessed expenses.

Submissions

[4] I heard submissions in elaboration of the written submissions of parties.

[5] The claimant's solicitor submitted that the starting point and default position were as set out in the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993 (SI 1993/3080) (as amended) (the 1993 Act of Sederunt). The General Regulations in schedule 1 set out the basis for award of expenses and outlays, but that was qualified by the 2016 Order, which provided that in any simple procedure case in which the value of the claim was greater than £200 but less than or equal to £1500 the expenses awarded by the sheriff may not exceed £150 (art 3(a)).

[6] Para 2(1) of the 1993 Act of Sederunt provided that schedule 1 (the General Regulations) "shall apply to work done and expenses or outlays incurred". The claimant's position was that outlays meant charges such as court dues and sheriff officer fees. If the intention had been to exclude VAT and outlays that should have been made clear in the Order and in section 81 of the 2014 Act, under which it was made. Both the Order and section 81 refer only to expenses. There was no need for assessment in cases affected by the cap, but the outlays would be added to the award of expenses. The process would be the same as in the case of party litigants, where the Litigants in Person (Costs and Expenses) Act 1975 allows taxation or determination of:

> "costs or expenses sums in respect of any work done, and outlays and losses incurred, by the litigant in or in connection with the proceedings" (section 1(2)).

The 2014 legislation and the subsequent subordinate legislation did not alter the position with regard to recovering VAT and outlays.

[7] The General Regulations provided, for present purposes, that in all cases solicitors' outlays reasonably incurred in the furtherance of the cause shall be allowed (para 11) and that where value added tax was chargeable by a solicitor on the basis of a supply of services, the amount of value added tax chargeable may be added to the fee (para 13).

[8] It would clearly be inequitable if, in admitted claims, the registration dues were not chargeable as an outlay, since in a claim settled for £1000 or less the instruction fee would be reduced by 50% and recoverable expenses would be minimal. I did not understand it to be disputed that the registration dues were chargeable as an outlay in such a case.

[9] I was invited to follow the approach taken by Summary Sheriff Hodge in *Ashleigh Potter* v *OSC Group UK Ltd*, 12 July 2017 (Aberdeen Sheriff Court, unreported). She had concluded that the 2016 Order left outstanding the issues of outlays and VAT in capped

expenses cases and noted the "all-embracing" terms of art 2 of the 1993 Act of Sederunt and para 11 of the General Regulations which refers to "all cases". She saw no reason to consider that the General Regulations, including paras 11 and 13, did not apply and the ambit of these provisions was wide enough to include cases brought under simple procedure:

> "Thus by virtue of Regulations 11 and 13, outlays incurred and VAT, where applicable, can be included in the accounts of expenses' (at [35])".

[10] The claimant's solicitor accepted that the decision of Summary Sheriff Martin-Brown in *Gowans* v *Miller* [2017] SC FOR 82, 2018 SLT (Sh Ct) 11 was to the contrary effect, but pointed out that it was decided wholly on written submissions and I was invited to prefer the approach in the case of *Potter*, which was earlier decided.

[11] It was inequitable that a successful claimant could be left out of pocket even if fully successful because of the requirement to pay court dues. Such an approach would not be consistent with the six principles by which such a system of civil justice should operate as set out in the Scottish Civil Courts Review (Report of the Scottish Civil Courts Review, 2009, chapter 1, para 5).

[12] The respondent's solicitor submitted that no regard should be had to the 1993 Act of Sederunt. Section 81 of the 2014 Act allowed for a cap to be imposed and that was where consideration of the matter started and ended. Para 1 of the General Regulations made it clear that the Table of Fees regulated the taxation of accounts between party and party. The relevant chapter for simple procedure (Chapter V) did not refer to capped expenses. In contrast, expenses awarded under the Litigants in Person (Costs and Expenses) Act 1975 were made specifically subject to rules of court (section 1(2)).

[13] The decision of the summary sheriff in *Potter* had proceeded on the basis of telephone submissions and the respondent's submissions, which were rejected in that case,

were extremely short in scope. The summary sheriff herself observed that her decision might provide limited assistance, in part at least because it was made in the context of a telephone discussion.

[14] It was submitted that the approach suggested for the claimant was at odds with practice under small claims procedure where similar provisions applied. I was referred to the *Small Claims Handbook*, WCH Ervine (3rd edition, 2012) where it was stated, under reference to the similarly capped expenses in small claims (at 6.10):

> "Even in the case where the successful party is a party litigant it will be fairly easy to reach the limit especially in lower value claims when one takes account of the fee on the summons which is currently £65 in claims for more than £50".

The eventual fee was £100 in claims for more than £200 (the Court Fees (Miscellaneous Amendments) (Scotland) Order 2016 (SSI 2016/332)).

[15] Any sum awarded under the capped expenses provision would reflect all the components that may make up an expenses claim, including VAT and outlays. That, it was submitted, would reflect the principle of certainty and was consistent with the approach of Summary Sheriff Martin-Brown in *Gowans* v *Miller*.

[16] In further submissions, the claimant's solicitor referred to *Graham* v *Farrell* [2017] SC EDIN 75 where the Sheriff (K McGowan) was quite clear that the process of considering expenses was subject to the 1993 Act of Sederunt and the General Regulations. Although the summary sheriff in *Ashleigh Potter* heard oral submissions by telephone, she did have the advantage of full written submissions. Speed and inexpensiveness should not be delivered at the cost of a successful party. Ervine did not refer to any authority, but did describe the process of calculation of expenses by the sheriff clerk and this would clearly not be onerous in a capped expenses case.

[17] In brief further submissions the respondent's solicitor reiterated that when the court was dealing with capped expenses it did not properly have recourse to the Table of Fees in the General Regulations.

Discussion and decision

[18] Simple procedure was introduced by the 2014 Act and, for most and certainly present purposes, replaces and supersedes both summary cause and small claim procedure.

[19] Section 81 provides, inter alia:

> "(1) The Scottish Ministers may by order provide that—
> (a) in such category of simple procedure cases as may be prescribed in the order, no award of expenses may be made,
> (b) in such other category of simple procedure cases as may be so prescribed, any expenses awarded may not exceed such sum as may be so prescribed.
> (2) The categories of simple procedure cases mentioned in subsection (1) may be prescribed by reference to—
> (a) the value of the claim in the cases,
> (b) the subject matter of the claim in the cases".

[20] There are exceptions, where the defender has not stated a defence, or had stated a defence but not proceeded with it or not acted in good faith as to its merits or where there had been unreasonable conduct in relation to the proceedings or the claim (by either party) (section 81(5)) or where a difficult question of law, or a question of fact of exceptional complexity, is involved (section 81(6)) or where the sheriff on the application of any party to the case, directs that an order under section 81(1) is not to apply in relation to the case (section 81(7)), but the exceptions are not relevant to the generality of defended claims and in particular this case.

[21] The 2016 Order provides that no award of expenses may be made where the value of the claim is less than or equal to £200 (art 2) and:

> "In any simple procedure case in which the value of the claim is—

> (a) greater than £200 but less than or equal to £1,500, the expenses awarded by the sheriff may not exceed £150;
> (b) greater than £1,500 but less than or equal to £3,000, the expenses awarded by the sheriff may not exceed 10% of the value of the claim" (art 3).

In the present case it is accepted that the capped expenses would be £150.

[22] The Sheriff Courts (Scotland) Act 1971 (the 1971 Act) provided for a single summary cause procedure for low value claims, initially for cases generally with a value of up to £250, but latterly £5000. Expenses in summary causes were fixed by the sheriff clerk in accordance with the relevant statutory table of fees (Act of Sederunt (Summary Cause Rules, Sheriff Court) 1976 (SI 1976/476), schedule 1, rule 88) and the process of fixing fees came to be described as assessment (see Act of Sederunt (Amendment of Ordinary Cause, Summary Cause and Small Claim Rules) 1992 (SI 1992/249), rule 3(17)).

[23] The Law Reform (Miscellaneous Provisions) (Scotland) Act 1985, section 18(1) amended the 1971 Act to create, in section 35(2), a new form of summary cause, to be known as a small claim for the purposes of such descriptions of summary cause proceedings as were to be prescribed by order by the Lord Advocate. Latterly, small claim procedure was, for present purposes, reserved for cases up to £3000 in value.

[24] The 2014 Act for present purposes abolishes both summary cause and small claim procedure and reintroduces a single procedure for claims under £5000 in value.

[25] During the life of the former small claim procedure expenses in defended claims were generally governed by section 36B(1) and (2) of the 1971 Act, which enabled the Lord Advocate (ultimately Scottish Ministers) to make an order prescribing a value of claim below which no award of expenses could be made and prescribing a maximum sum in respect of which expenses could be awarded. Latterly the Small Claims (Scotland) Order 1988 (SI 1988/1999) art 4 (amended by the Small Claims (Scotland) Amendment Order

2007(SSI 2007/496) art 2(4)) specified that no award could be made in any case in which the value of the claim did not exceed £200 and otherwise:

> "the sheriff may award expenses–
> (a) not exceeding £150, where the value of the claim is £1500 or less; or
> (b) not exceeding 10% of the value of the claim, where the value of the claim is greater than £1500".

[26] There were exceptions where the defender had stated a defence but not proceeded with it or not acted in good faith as to its merits or where there had been unreasonable conduct in relation to the proceedings or the claim (by either party), in which case expenses were assessed in accordance with the relevant statutory table of fees (Small Claim Rules, rule 21(6)(2)) – ie the summary cause scale in the 1993 Act of Sederunt. Unlike section 81 of the 2014 Act, the 1971 Act did not contain an exception for complexity, but achieved a similar result by way of section 37(2B), which enabled the sheriff to direct that a small claim be treated as a summary cause if a difficult question of law or a question of fact of exceptional complexity was involved. Although section 37(2B) gave the sheriff a similar power of direction on joint motion of the parties, it did not go so far as section 81(7) of the 2014 Act, which, as I have noted, allows the sheriff to direct that an order made under section 81 shall not apply on the motion of either party.

[27] The 1993 General Regulations did not make specific provision for small claims, which were, of course, a species of summary cause, although many of the differences between the provisions as to expenses in simple procedure and in small claims procedure were no doubt attributable to the more or less free standing nature of small claims procedure, with, for example, its own rules of court.

[28] The statutory scheme for simple procedure preserves the distinction between cases up to £3000 in value, but of course that is now within a single scheme of procedure and in

considering just what the rules on expenses are and mean it is necessary to look to a number of provisions.

[29] As has already been noted, the capping provision is now found in section 81(1) of the 2014 Act, which empowers Scottish Ministers to make an order such as was originally conferred on the Lord Advocate in respect of small claims. The relevant order – the 2016 Order – largely replicates the previous order in respect of small claims.

[30] The 1993 Act of Sederunt (as amended) now deals explicitly with simple procedure expenses, in schedule 1, para 3A of the General Regulations which provides, so far as relevant, that only expenses under Chapter V of the Table of Fees shall be allowed (para 3A(a), inserted by SSI 2016/316 reg 3(2)(a)), although para 11 continues to provide:

> "Subject to paragraph 14 of these General Regulations, in all cases, the solicitor's outlays reasonably incurred in the furtherance of the cause shall be allowed".

[31] The General Regulations also provide:

> "Where work done by a solicitor constitutes a supply of services in respect of which value added tax is chargeable by him, there may be added to the amount of fees an amount equal to the amount of value added tax chargeable" (para 13).

[32] Para 14 is concerned only with Chapter IV (summary causes) and therefore has no direct bearing on the current issue.

[33] More generally, art 2(1) of the 1993 Act of Sederunt appears to differentiate between expenses and outlays, in providing that:

> "(1) Subject to sub-paragraph (2), Schedule 1 to this Act of Sederunt shall apply to work done and expenses or outlays incurred on or after the date on which this Act of Sederunt comes into force".

[34] For the sake of completeness, it is probably appropriate to record that the glossary in the Simple Procedure Rules (Act of Sederunt (Simple Procedure) 2016 (SS1 2016/200)) which:

> "contains a guide for litigants, lay representatives and courtroom supporters to the meaning of certain legal words and expressions used in these rules" (rule 21.1(1))

provides what might be regarded as a definition of "expenses"(although it does not use the word "definition" or any of its forms):

> "*Expenses* The contribution the court can order one party to make towards how much it costs another party to conduct a case".

[35] Although on one reading that might infer that expenses are used in a broad sense to include outlays, I do not attach too much significance to the glossary since the rules themselves have little to say about expenses other than when an order may be made and are, in any event, generally pitched in highly simplistic language.

[36] While the way in which the rules with regard to expenses in simple procedure are set out appears to be unnecessarily complex and excessively dispersed across primary and secondary legislation, it seems clear to me that the provisions as to capped expenses in section 81 of the 2014 Act and the 2016 order are not exhaustive as to what a successful party may recover in ordinary circumstances given the very clear terms of art 2(1) of the 1993 Act of Sederunt and paras 11 and 13 of the General Regulations, which show respectively that outlays are not treated as synonymous with expenses, that solicitor's outlays are allowed "in all cases" and that value added tax may be added to the amount of fees.

[37] The phrase "in all cases", with regard to outlays, is one which obviously includes simple procedure cases.

[38] VAT is a tax which is chargeable by operation of law on taxable supplies and it is not therefore surprising that para 13 provides that VAT may be added. If VAT is chargeable it should properly be added: *Cham* v *Stone and others* [2017] SC EDIN 76.

[39] Given the very restricted expenses which are provided for under the 2016 Order I am not convinced that too much can be made of the argument of harshness arising from having to meet court dues or the charge to VAT from the capped expenses, although that clearly

would adversely affect a successful party. I do not think the principles stated in the Civil Courts Review (which can be summarised as fairness, securing justice in the outcomes of disputes, accessibility and sensitivity to needs, encouragement of early resolution and economy and effective use and application of the resources of the system and others) have any bearing on the appropriate decision in this case, which is concerned with what on any view will be modest provision for expenses and or outlays.

[40] I am satisfied that, whatever may have been the position under small claims procedure (and my understanding is that practice there varied, although the matter was never authoritatively determined), under the new regime of simple procedure capped expenses will be subject to the additional outlay, where applicable of court dues for registration of a claim and VAT.

[41] Accordingly, I shall grant an order for payment in the agreed sum of £1000 and for expenses in the capped sum of £150, plus the outlay of £100 in respect of court dues and value added tax.