

**SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT**

[2019] SC EDIN 99

PN/2614/19

NOTE BY SHERIFF KENNETH J MCGOWAN

in the cause

MR LEWIS FINLAY

Pursuer

against

BORDERS HEALTH BOARD

Defender

Edinburgh, 29 October 2019

NOTE

Introduction

[1] This note is an attempt to give some guidance on motions for certification of skilled persons and sanction for the employment of counsel made under Chapter 5 of the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019 (“the 2019 Rules”).

[2] The matter came before me as an unopposed motion which was in the following terms:

- “i. remit the action to Chapter 36A with reference to Rule 36.1(2);
- ii. in terms of sections 4.3 and 5.1(c) of the Act of Sederunt (Taxation of Judicial Expenses) Rules 2019 to:
 - 1) grant sanction for the employment of junior counsel to assist with the conduct of the entire cause as a whole; and
 - 2) in respect that junior counsel has already drafted the initial writ necessary to allow these proceedings to be raised, to retrospectively sanction the employment of junior counsel for the work already undertaken;
- iii. in terms of sections 4.5 and 5.1(b) of the Act of Sederunt (Taxation of Judicial Expenses) Rules 2019 to:

- 1) certify the following persons as skilled persons for the entire conduct of these proceedings:
 - a) Mr Patrick Foster, Consultant Orthopaedic Surgeon....; and
 - b) Dr Naida Forbes, Consultant Psychiatrist....;
- 2) in respect that Mr Patrick Foster has already undertaken work necessary to allow these proceedings to be raised, to retrospectively certify this person as a skilled person in respect of work already done;
- iv. thereafter, to sist the cause..."

[3] The form G9 contains appropriate supporting submissions in relation to the orders sought.

Sanction

The Rules

[4] Chapter 4 regulates the position in relation to the allowance of outlays at taxation: rules 4.1 and 4.2.

[5] Taxation is regulated by Rule 4.3.

[6] No fees to counsel are to be allowed by the Auditor on taxation of an account unless the proceedings or particular work involved in the proceedings (in respect of which a fee to counsel is sought to be recovered as an outlay) have been sanctioned as suitable for the employment of counsel in accordance with Rule 5.4: Rule 4.3(2).

[7] Where particular work has been sanctioned as suitable for the employment of counsel, the Auditor is to allow the reasonable fees of counsel for doing that work, and consultations reasonably required in relation to that work, cause shown being required where fees are sought for more than two consultations in the course of proceedings: Rules 4.3(3) and (6).

[8] Where the proceedings have been sanctioned as suitable for the employment of counsel it is for the Auditor to determine the work in relation to which it was reasonable for counsel to be instructed and the fees to be allowed therefor: Rule 4.3 (4)(a) and (b).

[9] Rule 4.3(4)(c) provides:

“subject to paragraph (3), no fees are to be allowed for work carried out before the date on which sanction was granted unless the proceedings are—

- a. proceedings subject to Chapter 36 of the Ordinary Cause Rules 1993;
- b. a simple procedure case; or
- c. proceedings in the Sheriff Appeal Court.”

[10] Accordingly, as a matter of generality, Rule 4.3(4)(c) prohibits the Auditor from allowing as a recoverable outlay any fee to counsel pre-dating the sanctioning of the proceedings as suitable for the employment of counsel, unless the proceedings are one of the three types specified in the foregoing paragraph.

Applications for sanction

[11] These are regulated by Rule 5.4.

[12] Rule 5.4(2) provides:

“(2) On the application of a party the court may, subject to paragraphs (4) to (6), sanction—

- (a) the proceedings;
- (b) any part of the proceedings;
- (c) particular work involved in the conduct of the proceedings; or
- (d) any combination of (a), (b) and (c),

as suitable for the employment of counsel by that party.”

[13] I observe in passing that the terminology in this rule is different to that in Rule 4.3. Rule 4.3 contains two categories for which sanction may be sought, namely “the proceedings” and “particular work involved in the conduct of the proceedings”, whereas Rule 5.5(2) contains three, namely “the proceedings”; “any part of the proceedings”; and “particular work involved in the conduct of the proceedings”. It is not immediately clear to me what the difference is between “any part of the proceedings” and “particular work involved in the conduct of the proceedings”, but it may be that the distinction is made for the purposes of making the meaning and effect of rules 5.4(5) and 5.4(6) clearer – see below.

[14] Rule 5.4(4) provides that:

“Paragraphs (5) and (6) apply where the application is made in proceedings other than—

- (a) proceedings subject to Chapter 36 of the Ordinary Cause Rules 1993;
- (b) a simple procedure case; or
- (c) proceedings in the Sheriff Appeal Court.”

[15] This mirrors the distinction drawn between different types of proceedings in Rule 4.3(4)(c). Pausing there, and reading Rule 5.4(2) and 5.4(4) together, means that sanction of “the proceedings”, “any part of the proceedings”, “particular work involved in the conduct of the proceedings” or any combination thereof may be sought at any time in proceedings subject to Chapter 36 of the Ordinary Cause Rules 1993; simple procedure cases; or proceedings in the Sheriff Appeal Court (“SAC”); and if and when granted in these categories of cases, may have prospective and/or retrospective effect, as appropriate.

[16] In attempt to express that in concrete terms, I give the following hypothetical examples. A motion in a case is brought under Chapter 36 to sanction the proceedings as suitable for the employment of counsel may be made at any time and will have effect for work done both before and after the date is granted (i.e. for the whole proceedings); a motion to sanction a simple procedure proof as suitable for the employment of counsel may be made before or after the proof and if granted will have effect for that part of the proceedings; and a motion to sanction the drafting of grounds of appeal as suitable for the employment of counsel in appeal proceedings before the SAC may be made before or after the grounds are drafted and has effect for that particular work.

[17] Turning then to Rule 5.4(5), it provides:

“An interlocutor sanctioning proceedings, or a part of proceedings, as suitable for the employment of counsel has no effect as regards work carried out by counsel before the date of the interlocutor.” (Emphasis added).

[18] Rule 5.4(6) provides:

“The court may only sanction particular work already carried out as suitable for the employment of counsel when satisfied that the party applying has shown cause for not having applied for sanction before the work was carried out.”

[19] There are several points to be made about these rules.

[20] First, they apply to all types of proceedings in the sheriff court except proceedings under Chapter 36 OCR; simple procedure cases; or proceedings in the Sheriff Appeal Court.

[21] Second, given the use of the phrases “proceedings, or a part of the proceedings” in Rule 5.4(5) on the one hand and “particular work” in Rule 5.4(6) on the other, these rules read together must mean that applications for sanction with retrospective effect cannot ever competently be made for proceedings or a part of them. Instead, sanction with retrospective effect can only be sought and obtained in relation to “particular work involved in the conduct of the proceedings” which already been carried out.

[22] Third, it is implicit in the foregoing that the particular work must be specified.

[23] Fourth, where an application to retrospectively sanction particular work involved in the conduct of the proceedings already carried out is made as suitable for the employment of counsel, cause must be shown for that not being done before the work was carried out.

The present motion for sanction

[24] Returning to the present case, the relevant part of the motion seeks

“...in terms of sections 4.3 and 5.1(c) of the Act of Sederunt (Taxation of Judicial Expenses) Rules 2019 to grant sanction for the employment of junior counsel to assist with the conduct of the entire cause as a whole; and in respect that junior counsel has already drafted the initial writ necessary to allow these proceedings to be raised, to retrospectively sanction the employment of junior counsel for the work already undertaken;...

Observations on the terms of the motion

[25] As a matter of generality, where an application (of any kind) is made to the court under legislation or rules, it is best if the language used mirrors as closely as practicable the wording of the law or rule under which the application is made. This helps to eliminate ambiguity.

[26] The Act of Sederunt is the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019, not the Act of Sederunt (Taxation of Judicial Expenses) Rules 2019; and it contains rules, not sections.

[27] Applications for sanction are properly made not under Rules 4.3 and 5.1(c) (presumably 5.1(1)(c)) but under Rule 5.4(2) – and, where necessary, Rule 5.4(6).

[28] Phrases like “...to grant sanction for the employment of junior counsel to assist with the conduct of the entire cause as a whole...” are both otiose and inaccurate.

[29] What may be sanctioned as suitable for the employment of counsel is (i) the proceedings; and/or (ii) part of the proceedings; and/or (iii) particular work involved in the conduct of the proceedings. The court does not “grant sanction for the employment of counsel.”

[30] The “conduct of the entire case as whole” presumably means, and could be substituted with, “the proceedings”.

Sanction of the proceedings

[31] I proceed on the basis that I am correctly interpreting Part ii 1) of the motion as an application to sanction “the proceedings” as suitable for the employment of counsel.

[32] The grounds on which that is sought are that it is a complex clinical negligence case apt to proceed under Chapter 36A and of importance to the pursuer. The motion is

unopposed. In these circumstances, and having considered also the terms of the writ, I am satisfied that this part of the motion should be granted.

Retrospective sanction

[33] Retrospective sanction is also sought for work already undertaken, namely the drafting of an initial writ. (I observe that Rule 5.4(6) refers to “particular work already done”).

[34] In my view, this part of the motion is unnecessary. This case is (presently) subject to Chapter 36. Part of the motion before me seeks a remit to Chapter 36A. But until that motion is granted and takes effect – which does not happen until the interlocutor is signed by me – the case remains subject to Chapter 36. That being so, it is one of the three categories of case where sanction of the proceedings has both retrospective and prospective effect.

[35] I acknowledge that there might be a concern as to whether the sanction granted by me flies off once the case is remitted to Chapter 36A. But it is clear that Rules 5.4(5) and (6) only have effect when an application is made in proceedings other than Chapter 36 and SAC proceedings and simple procedure cases: Rule 5.4(4). So, where an application to sanction “the proceedings” as suitable for employment of counsel is made and granted, there will be no need for another application to be made at a later stage i.e. once the remit to Chapter 36A has been effected. (The situation may be different where sanction of only a “part of the proceedings” is granted prior to a remit of a case to Chapter 36A).

Certification

The rules

[36] No charges to a skilled persons are to be allowed by the Auditor on taxation of an account unless the person has been certified as skilled in accordance with Rule 5.3; and (except where Rule 4.5(4) applies) the charge relates to work done or expenses incurred after the date of certification: Rule 4.5(1) (a) and (b).

[37] Rule 4.5(4) applies where:

“(a) the account relates to —

- i. proceedings subject to Chapter 36 of the Ordinary Cause Rules 1993;
- ii. a simple procedure case; or
- iii. proceedings in the Sheriff Appeal Court; or

(b) the sheriff has determined in accordance with rule 5.3(5) that the certification has effect for the purposes of work done, or expenses incurred, before the date of certification.”

[38] Accordingly, as in relation to sanction for counsel, Rule 4.5 contains a general prohibition on the Auditor allowing as a recoverable outlay charges to skilled witnesses pre-dating certification. In other words, certification of a skilled witness does not ordinarily have retrospective effect.

[39] That prohibition does not apply to certification in two situations. The first is if certification is granted in one of the three types specified, namely proceedings under Chapter 43 in the Court of Session, Chapter 36 in the Sheriff Court; or simple procedure cases: Rule 4.5(4)(a). The second is if the sheriff has determined in accordance with Rule 5.3(5) that the certification has effect for the purposes of work done, or expenses incurred, before the date of certification: Rule 4.5(4)(b).

Applications for certification

[40] These are regulated by Rule 5.3.

[41] Before a person can be certified as skilled for the purpose of Rule 4.5, the court must be satisfied that he or she is a skilled person and that it is, or was, reasonable and proportionate that he or she should be employed: Rule 5.3(1) and (2).

[42] Where a motion for certification is made in cases other than those specified in paragraph [39] above, Rule 5.3(5) applies: Rule 5.3(4).

[43] Rule 5.3(5) provides that:

“...the court may only determine that the certification has effect for the purposes of work already done by the person where the court is satisfied that the party applying has shown cause for not having applied for certification before the work was done.”

[44] Thus, the general rule is that an application for certification with retrospective effect has to be justified.

The present motion for certification

[45] The relevant parts of the present motion are as follows:

“iii. in terms of sections 4.5 and 5.1(b) of the Act of Sederunt (Taxation of Judicial Expenses) Rules 2019 to:

- i. certify the follow persons as skilled persons for the entire conduct of these proceedings:
 1. Mr Patrick Foster, Consultant Orthopaedic Surgeon...; and
 2. Dr Naida Forbes, Consultant Psychiatrist...;
- ii. in respect that Mr Patrick Foster has already undertaken work necessary to allow these proceedings to be raised, to retrospectively certify this person as a skilled person in respect of work already done;...”

[46] I have already noted that where an application is made to the court under legislation or rules, the language used should follow closely the wording of the law or rule under which the application is made.

[47] Applications for sanction are properly made not under rules 4.5 and 5.1(b) (*sic*) but under Rule 5.3(1) and (2) – and, where necessary, Rule 5.3(5).

[48] Phrases like "...for the entire conduct of these proceedings..." are unnecessary and inaccurate. The order made by the court is that a person is certified as skilled (with or without retrospective effect – see above). It is then a matter for the Auditor to decide to what extent charges for work done or expenses incurred by the skilled person are recoverable: Rule 4.5(2).

Retrospective certification

[49] Retrospective certification sanction is also sought for work already done by Mr Foster.

[50] In my view, this part of the motion is unnecessary for the same reasons as set out at paragraph [34] in relation to sanction. In short, this case is presently proceeding under Chapter 36. Thus, if I grant the motion for certification in respect of Mr Foster, that has retrospective effect.

Conclusion

[51] I shall sanction the proceedings as suitable for the employment of junior counsel; certify Mr Patrick Foster, Consultant Orthopaedic Surgeon and Dr Naida Forbes, Consultant Psychiatrist as skilled persons; refuse as unnecessary the motion for retrospective sanction (under Rule 5.4(6)) for particular work already carried out and retrospective certification under Rule 5.3(5) for work already done; remit the action to Chapter 36A; and sist the cause.