



OUTER HOUSE, COURT OF SESSION

[2020] CSOH 93

CA100/17

OPINION OF LORD TYRE

in

NOTE OF OBJECTIONS

for the Defender

In the cause

CJC MEDIA (SCOTLAND) LIMITED

Pursuer

against

KENNETH SINCLAIR

Defender

**Pursuer: Davies; TC Young LLP
Defender: Party**

20 November 2020

[1] This was an action for count, reckoning and payment by the pursuer against the defender, a former director, in relation to alleged breaches of fiduciary duty. A proof before answer took place before Lord Doherty in 2018 on the issues of (i) whether the defender had breached his fiduciary duties; if so (ii) whether he had an obligation to account to the pursuer in respect of that breach; and, if so (iii) the period in respect of which the defender ought to account. In his opinion dated 25 January 2019, Lord Doherty held that the defender

had been in breach of fiduciary duty by appropriating a particular business opportunity for the benefit of a company that he had formed after his resignation as a director of the pursuer. Lord Doherty further held that the defender had an obligation to account to the pursuer for the profits of the appropriated business opportunity for a period of 12 months. By interlocutor dated 1 February 2019, he found the defender liable to the pursuer for the expenses of process to date with a modification of 20% in terms of Rule of 42.5(1), and remitted the account for taxation by the Auditor of Court.

[2] The action was then set down for proof before answer in relation to the accounting for profits. Settlement terms were agreed shortly before the proof date, and on 7 June 2019 Lord Doherty pronounced a further interlocutor *inter alia* finding the defender liable to the pursuer in the expenses of process insofar as not already dealt with.

[3] The pursuer lodged its account of expenses for taxation. After the diet of taxation, both parties lodged notes of objections to the Auditor's report. The Auditor produced minutes in response to both notes of objections. Only the defender's note of objections is now insisted upon. A hearing on the note of objections was fixed for 2 September 2020, and written notes of argument were lodged on behalf of both parties in advance of the hearing date. However on 1 September the defender's agents withdrew from acting and, having heard counsel for the pursuer and the defender in person, I discharged the hearing and pronounced an interlocutor ordaining the defender to intimate to the court whether he wished to insist in his note of objection. The defender confirmed that he did, and in subsequent email correspondence it was agreed between parties that I should decide the matter on the basis of the written submissions already lodged, without the need for an oral hearing.

General principles

[4] Before addressing the objections taken by the defender to the Auditor's report, it is necessary to state two important principles that must be applied when addressing such objections.

[5] The first concerns the division of responsibility between the court and the Auditor in relation to the awarding or allowing of expenses. The decision as to whether to award expenses to a party is one for the exercise of the discretion of the court. That discretion includes the scale upon which expenses are to be awarded, and in particular whether there should be a departure from the usual party and party scale, for example to award expenses on an agent and client, client paying scale in order to express disapproval of the manner in which a party has conducted his case. The question of modification of an award of expenses is also within the discretion of the court, in terms of Rule of Court 42.5(1). If, therefore, one party wishes an award of expenses to be modified to take account of conduct of the other party which he or she considers to have been improper, those are matters which must be canvassed before the judge when an application for expenses is made.

[6] The judge's decision establishes the basis upon which the Auditor must then conduct his taxation of the account of expenses. The Auditor has no power to reopen matters on which the court's discretion has been exercised (see eg *Stott v McWilliam* (1856) 18D 716). When considering the detail of the account, however, the Auditor must have regard to what was formerly Rule of Court 42.5(2) and is now Rule 2.2 of the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019 (SSI 2019 No 75), which states:

- “(1) The Auditor is to allow only such expenses as are reasonable for conducting the proceedings in a proper manner.
- (2) The Auditor may in particular refuse to allow —

- (a) expenses that the Auditor considers to have been incurred as a result of fault or error on the part of the entitled party or the entitled party's representative; and
- (b) expenses relating to a part of the proceedings in which the Auditor considers that the entitled party was unsuccessful."

[7] The second general principle concerns the role of the court when dealing with objections to the Auditor's report. It is well settled that that role is a very restricted one. The authorities were summarised by the court in *Shanley v Stewart* 2019 SLT 1090 at paragraph 25 as follows:

"In carrying out his task, the auditor is afforded a wide discretion. He sees a very large number of accounts over a considerable range of cases (*Jarvie v Greater Glasgow Primary Care NHS Trust* [2006] CSOH 42, Lord Carloway at paragraph 39). The court has no equivalent experience (*Glasgow Caledonian University v Liu* [2016] CSIH 91, Lord Brodie, delivering the opinion of the court, at paragraph 7). Accordingly, '[i]t is not the function of a Judge reviewing an exercise of a discretion to substitute his own view of the material under consideration. The decision of the Auditor stands in a not dissimilar position to the verdict of a jury. If the Auditor had no material to go on, his exercise will fall, but if he had material, then, so long as the decision he reached on it was not unreasonable, it cannot readily be upset' (*Wood v Miller* 1960 SC 86, LJC (Thomson) at page 98). The available grounds of objection are analogous with those available in a judicial review (*Tods Murray WS v Arakin Ltd (No 2)* 2002 SCLR 759, Lord Mackay at page 764). The court can only interfere if, for example, the auditor has; 'misdirected himself in law or has taken irrelevant circumstances into account or has failed to take into account relevant considerations or has misunderstood the factual material put before him. Where, as will very often be the case, his decision depends on the exercise of discretion, it will only be susceptible to being overturned where it is such that no reasonable decision-maker could come to that conclusion' (*Glasgow Caledonian University v Liu, supra*, paragraph 6)."

[8] The court further noted, at paragraph 26, under reference to *Gupta v Ross* 2005 SLT 548 (Lord Osborne, delivering the opinion of the court, at paragraph 6), approving *Urquhart v Ayrshire and Arran Health Board* 2000 SLT 829 (Lord Reed at paragraph 9), that once the Auditor has taxed the account, the objection procedure is limited to permitting objections to specific items in the Auditor's report, and is not for dealing with objections of a different nature.

Grounds of objection to the Auditor's Report

[9] Following the lodging of the Auditor's minute responding to the note of objections, the defender withdrew a number of his objections. The following objections were, however, insisted upon.

General objection

[10] The defender has a general objection to the Auditor's report which arises from the fact that in its pleadings the pursuer had sought count, reckoning and payment for alleged breaches of fiduciary duty by the defender in relation to eight separate business opportunities. That was the pursuer's case which went to proof before answer. At the close of the proof, however, the pursuer made submissions in respect of only one of the eight, abandoning the others. Moreover, in respect of the one that was not abandoned, the pursuer sought an accounting for profits for four years but Lord Doherty held that it was entitled to an accounting for one year only.

[11] In these circumstances, the defender submitted that he had had substantial success. The matters which were abandoned had caused the majority of the parties' expenses. Additionally, since the diet of taxation, documents lodged by the pursuer in separate legal proceedings in Glasgow Sheriff Court indicated that certain averments made by the pursuer in the present action had been false, and that some of the business opportunities that the pursuer had accused the defender of diverting to himself had in fact been diverted by the pursuer's other director to a company controlled by him, all of which indicated that the pursuer's case had been presented dishonestly and in bad faith.

[12] It was contended that although the Auditor had correctly determined that expenses in respect of matters where the pursuer had been unsuccessful ought to be disallowed in full, the Auditor had misdirected himself in relation to items in which a “minimum charge” had been made for items of work which were referable to both the successful and the unsuccessful claims. The Auditor had allowed such charges in full, whereas he ought to have abated them by 7/8^{ths} to reflect the degree to which the pursuer had been unsuccessful.

[13] In his minute in response to the note of objections, the Auditor explained his approach as follows:

“The general approach taken by the Auditor pursuant to the determination recorded in the Note issued by him on 22 August 2019 was to endeavour to tax the account as though it only covered work which was reasonably undertaken in relation to the part of the action in which the pursuers were successful. Thus:

- (a) He abated in full any entries relating exclusively to the 7 (of 8) breach of duty claims abandoned by the pursuers at the end of the proof;
- (b) He also abated in full any entries relating exclusively to the claim that the defender breached his duties by preparing a powerpoint presentation; and
- (c) Rejecting the submission made on behalf of the defender that all entries relating to what was described as ‘general expenditure’ should simply be abated by 7/8^{ths}, he sought to identify accurately how much of each individual item of work was referable to the part of the action in which the Pursuers were successful and to apportion each entry accordingly (other than where a minimum charge was made for an item of work which was referable both to the successful claim and the unsuccessful claims, in which case the minimum charge was allowed in full).”

[14] As the observations assembled in the dictum above from *Shanley v Stewart* make clear, the role of the court in reviewing decisions made by the Auditor in taxing an account is limited to assessing whether the Auditor has misdirected himself in law, taken irrelevant considerations into account, failed to have regard to material considerations, or misunderstood the factual material before him. Beyond that, the court acknowledges and respects the expertise and experience of the Auditor in reaching a view as to whether

particular expenses are to be allowed. In my opinion the approach taken by the Auditor, as described above, to the abatement of entries in the pursuer's account fell clearly within the scope of his discretion. He rejected the proposition that all entries should be abated by 7/8^{ths} and instead sought to identify entries relating exclusively to the claims abandoned by the pursuer, which were disallowed in full. In relation to items for which a minimum charge was made, he took the view that that charge should be allowed in full, presumably on the basis that *ex hypothesi* that amount would have been charged regardless of whether it related to one or to eight heads of claim, and that there was accordingly no basis for applying a further discount. I can detect no error of law or misunderstanding of fact in the Auditor's approach, and accordingly there is no basis upon which the court ought to interfere with it.

[15] As regards the allegation now made that the pursuer conducted its case in bad faith, even if the matters now complained of (if true) had come to light before the diet of taxation, they would not in my view have fallen within the scope of the Auditor's discretion. They would have been relevant, if at all, to allowance or modification of an award of expenses, which would have been matters for the court and not, for the reasons explained above, matters for the Auditor to take into account when deciding which items in the pursuer's account to allow or abate.

Specific objections

[16] The defender insisted upon the following four specific objections to the Auditor's report.

1. Service of summons

[17] The defender objected to allowance of certain expenses connected with unsuccessful service of the summons. In his minute, the Auditor explained that he had allowed expenses

up until the time when the pursuer's solicitors were advised of the identity of the defender's solicitors and arranged for them to accept service. In response, the defender states that the pursuer itself had been aware of the identity of the defender's solicitors. It is not for this court to enter into matters of disputed fact as to who knew what and when in relation to a matter such as this. The Auditor had access to the whole case papers and I see no reason to disturb his allowance of these expenses.

2. *Copying of documents*

[18] The defender objected to allowance of the expense of copying documents produced by the pursuer in response to an application for commission and diligence, on the ground that it was the responsibility of the pursuer itself, not the agents. The Auditor allowed the expense because the copying would have had to be carried out by someone. In my view this is a matter for the Auditor's discretion and there is no basis in law for the court to interfere.

3. *Expenses of responding to specification of documents.*

[19] Objection was taken on the ground that the expenses were incurred by the pursuer as a haver and not as a party. The Auditor considered that the work was reasonably carried out by the agents. Again there is no basis in law for the court to disturb the Auditor's judgment.

4. *Pre-trial meeting*

[20] Objection was taken to the allowance of expenses relating to the pre-trial meeting on the ground that the pursuer had refused to engage in it responsibly and in good faith, and refused to agree a minute of the meeting. The Auditor was satisfied that all of the work, to

the extent allowed, was reasonably required for the proper conduct of the part of the proceedings in which the pursuer was successful, and did not consider that the failure to agree the terms of a joint minute of the meeting was attributable to anyone's fault. Once again these are matters falling entirely within the Auditor's discretion.

Disposal

[21] For these reasons, I shall, in terms of Rule of Court 42.4(4), repel all of the objections in the note of objections that were insisted upon. I shall defer pronouncing an interlocutor to allow any motion to be made in relation to the expenses of the procedure on the note.