SHERIFFDOM OF
LOTHIAN AND BORDERS

Case Number: A742/11

Judgment by

SHERIFF PRINCIPAL

MHAIRI M STEPHEN

in appeal

by

(1st) JAMES MOORE, residing at 51, Altmore Drive, Carfin, Motherwell,

ML1 4FM;

(2nd) The Firm of MOORE MACDONALD, Solicitors, Notaries Public having a place of business at 2 Scott Street, Motherwell, ML1 1PN

Defenders and Appellants

and

cross appeal

by

DIGBY BROWN LLP, Causewayside House, 160 Causewayside, Edinburgh, EH9 1PR

Pursuers and Appellants

in the cause

DIGBY BROWN LLP

Pursuers

Against

(1ST) JAMES MOORE and (2ND) THE FIRM OF MOORE MACDONALD, Solicitors

Defenders

Act: Tariq, Advocate instructed by the first named appellant, James Moore, solicitor

Alt: Richards, solicitor, Digby Brown, LLP

EDINBURGH, 3 May 2013

The Sheriff Principal having resumed consideration of the cause refuses the appeal by the defenders and now appellants; allows the cross appeal by the original pursuers; thereafter recalls that part of the sheriff's interlocutor dated 21 September 2012 which relates to the modification of the award of expenses only otherwise adheres to the sheriff's interlocutors of 10 May and 21 September 2012 subject to deletion of the words "and modified same to 50%" where they appear in the interlocutor of 21 September 2012; Finds the appellants and original defenders liable to the respondents and original pursuers in the expenses of the appeal and cross appeal; allows an account thereof to be given in and remits same, when lodged, to the Auditor of Court to tax and to report.

(signed) ***Mhairi M Stephen***

NOTE:

1. In this appeal the original defenders and now appellants appeal the sheriff's interlocutor of 21 September 2012 which is an interlocutor granting decree in favour of the pursuers in the sum of £13,035.39 together with interest and expenses. The original pursuers, Digby Brown LLP, also appeal the sheriff's decision to modify their entitlement to the expenses of the cause to 50% of those expenses. This I refer to as the cross appeal. Essentially, however, the appellants challenge the sheriff's decision and interlocutor of 10 May 2012 in which he repels the second plea in law for the pursuer and the first, third and fourth pleas in law for the defender; sustaining the first plea in law for the pursuer and finding them entitled to payment for the professional services they provided to the appellants. At the same time the sheriff remitted the pursuer's account for taxation by the Auditor of Court and continued consideration of the pursuer's fourth plea in law to await the Auditor's Report. The fourth plea in law essentially related to the quantum or the reasonableness of the sum sued for. Eventually these matters were dealt with by the sheriff on 21 September. Decree was granted for the taxed amount less £25,000 already paid by the third party, the Law Society of Scotland.

2. The action is a straightforward action for payment. A slightly unusual feature is that one firm of solicitors is in effect suing another firm of solicitors for payment of their professional fees incurred whilst acting for them in proceedings before the Inner House of the Court of Session in respect of a petition brought by the Law Society of Scotland to appoint a judicial factor to the defenders.

3. Indeed, the background to this matter about which there appear to be little dispute relates to proceedings taken by the Law Society of Scotland against the defenders, both Mr Moore as an individual and the firm of Moore Macdonald, solicitors. The Law Society petitioned the Court of Session to have a judicial factor appointed to the firm of Moore Macdonald. I was not told precisely why that was considered appropriate. In any event the Law Society had seized £28,000 which was either the firm's funds or the funds of Mr James Moore as an individual. Mr Moore then instructed Messrs Levy & McRae, solicitors in Glasgow to act on his behalf. Levy & McRae then instruct the pursuers and respondents Digby Brown LLP solicitors as their Edinburgh correspondents to deal with the Inner House business. It was necessary to instruct both senior and junior counsel for the proceedings in the Inner House. After sundry procedure there was a single bill hearing fixed for 20 and 21 October 2008. At that hearing the solicitors and counsel acting for the appellants were successful in persuading the court to recall the appointment of the interim judicial factor. It appears that the proceedings against the appellants were thereafter sisted. The petitioners (the Law Society of Scotland) were found liable to the appellants in the expenses of the single bill procedure and associated procedure. The scale of recovery of expenses was to be agent and client third party paying. An account of expenses was prepared on that basis and following negotiations between parties' representatives the appellants' account was agreed at the figure of £25,000. Although recovery of expenses was significant certain aspects of the work conducted was not recoverable from the opponents, the Law Society of Scotland. Counsel's fees accounted for a very substantial part of the account of expenses. Not all of the solicitor's fees and counsel's fees were recoverable against the third party opponent. The shortfall fell to be recovered from the client, namely, the appellants.

4. The appellants paid £15,000 to their solicitors in Glasgow Levy & McRae in October 2008 as a payment to account. Furthermore, £28,000 seized by the Law Society was rebated to Levy & McRae. I was informed that £25,336 was paid by Messrs Levy & McRae to Mr Moore, appellant. Whereas Mr Moore assumed that all sums due to both solicitors had been paid in fact Messrs Digby Brown the pursuers in this case had not been paid their fees in full nor had the outlays been paid in full. Messrs Digby Brown requested payment of the balance due to them in respect of fees and outlays to counsel etc. The total of the business account, including outlays, was £35,441.29. After allowance is made for the sum recoverable from the Law Society of Scotland a balance of £10,441.29 remained outstanding. This is the sum originally sued for. Following a request for payment of the outstanding fees and outlays which remained unanswered or unsatisfied for more than two years these proceedings were raised in this court in July 2011.

5. Following proof, the sheriff's interlocutor of 10 May 2012 sustained the first plea in law for the pursuers and found that they were entitled to payment for their professional services and remitted their account to the Auditor of Court. The balance of the taxed sum including the audit fee is £13,035.29 being the amount of the decree.

Defenders' Appeal

6. I propose to deal with the appeal by the defenders (No 13 of process) first of all and return to the cross-appeal on expenses later.

7. The appellant has two principal arguments. Firstly, the appellants argue that the pursuers' averments lack specification and are irrelevant in respect of aspects of the case namely - jurisdiction; the contract between the parties and the averments relating to the basis of charge in respect of professional fees. That being so the sheriff erred in failing to dismiss the action. Secondly, that the sheriff erred in repelling the appellants' third plea as to jurisdiction.

Appellants' Submissions

8. Mr Tariq, Advocate for the appellants helpfully prepared written submissions which he spoke to in the course of the appeal. He began with a preamble as to the context or background to the appeal. The written submissions are detailed and comprehensive and I do not intend to rehearse the contents.

9. The principal points relating to jurisdiction are:-

· The appellant not being domiciled in the jurisdiction of this court, this court does not have jurisdiction and the action ought to have been raised in Hamilton Sheriff Court, where the appellants are domiciled or alternatively Glasgow Sheriff Court being the domicile of his principal agents to whom payment should be made. The appellant referred to the Civil Jurisdiction and Judgments Act 1982 Schedule 8.

· The respondents appear to found jurisdiction in this court based on the provision of legal services in Edinburgh. This is misconceived as the important issue on jurisdiction, where the defenders are not domiciled in the jurisdiction of the court, is whether the obligation to pay rests within the jurisdiction of this court. There are no proper averments relating to this proposition.

· The respondents' averments on jurisdiction are quite inadequate (Ordinary Cause Rule 3.1(5)(a) and *Macphail - Sheriff Court Practice 9.28*). The Ordinary Cause Rule requires there to be averments stating the ground of jurisdiction and the facts supporting that. The purpose of the rule is to allow the court to decide whether it has jurisdiction over the parties and the cause and to give fair notice to the defenders.

10. In support of these propositions Mr Tariq referred to *Bank of Scotland* v *Investment Management Regulatory Organisation Limited* 1989 SLT 432; *McBryde - The Law of Contract in Scotland (3rd Ed.)*

paragraph 9.60 and *Maclaren on Expenses in the Supreme and Sheriff Courts of Scotland.*

Relevancy and Specification

11. It was argued that there was a complete absence of averments relating to how the pursuers' business account was made up and on what basis. The pursuers had failed to give a breakdown of the hourly rate for the work carried out. They failed to have regard to the Guidance Notes on the Solicitors (Scotland) (Client Communication) Practice Rules 2005 which requires the client to be provided with details of the work to be done and an estimate of the total fee or the basis upon which the fee is charged and an indication of the solicitor who will be carrying out the work. There was no hourly rate agreed with the respondent. In any event even if a rate had been agreed with the principal agent it would not apply across the board and would depend upon the seniority of the solicitor or individual undertaking the work. There was a complete failure to specify the basis of charge.

12. Mr Tariq referred to *Maclaren, Expenses in the Supreme and Sheriff Courts of Scotland (supra)*; *Macphail, Sheriff Court Practice* (3rd Ed.); *Semple Fraser WS* v *Quayle* 2002 SLT (Sh Ct) 33; *Steelmek Marine and General Engineers' Trustees* v *Shetland Sea Farms Limited* 1999 SLT (Sh Ct) 30 to support this ground of appeal. Accordingly, the respondents' averments were sufficiently lacking in specification so as to be irrelevant. The averments failed to give the requisite notice to the appellants causing prejudice. The sheriff therefore erred in failing to dismiss the action.

the respondents' submissions

13. Mr Richards for the respondents, Digby Brown LLP, also provided written submissions on the appellants' note of appeal and also on the cross-appeal by Digby Brown. The written submissions for the respondent follow the sequence of the note of appeal and answer the points raised on appeal.

14. On relevancy and specification Mr Richards relies on the leading authority of Jamieson v Jamieson 1952 SC(HL) 44 and the test of relevancy set out by Lord Normand. I was also referred to *Macphail The Sheriff Court Practice (3rd Ed) para 9.29* on specification.

15. Mr Richards pointed out that the pleadings required to be read as a whole when construing the averments on jurisdiction. The proposition put forward on behalf of the pursuer and respondent is entirely straight forward particularly to a defender/appellant who is also a solicitor. The professional services provided to the appellant by the respondent related entirely to the professional activities of the appellants.

16. The respondent gives ample specification of the basis of charge. The business account is incorporated into the pleadings. The judicial account of expenses incurred by the appellants to the respondents in the petition of the Law Society of Scotland forms the backdrop and context to the respondent's business account.

17. Regarding the contract between the parties and the averments relating to that contract Mr Richards re-stated his argument made before the sheriff namely that the appellant was bound by his agents Levy & McRae who instructed the respondent to provide legal services for which payment is now due. The sheriff was correct to observe that the relationship between local agent and Edinburgh agent is a matter governed by common law. The sheriff deals with this in his judgment at paragraphs 38 and 39. Likewise the sheriff was correct to distinguish the case of *Semple Fraser WS* v *Quayle* having regard to the attack on the averments relative to the pursuers' business account. (Sheriff's judgment paragraph 40 to 42).

Jurisdiction

18. Mr Richards submitted that the appellants' ground of appeal on jurisdiction was misconceived. The respondents had not confused the place of performance with the place of payment. As it happens the facts

and circumstances indicate perfectly clearly that both coincide. The obligation to pay the respondents in Edinburgh brings this case fully within the jurisdiction of this court.

19. The appellants' argument on jurisdiction ignores the fundamental difficulty for the appellants that the defences do not disclose any proper defence to the action and the pursuers and respondents are entitled to summary decree. The only matter then to be resolved is the reasonableness of the pursuers' business account by taxation. For these reasons there was no merit in the appeal and the appeal ought to be refused with expenses in favour of the respondents.

DECISION

20. This is a straightforward action for payment. The respondents who are a firm of solicitors in Edinburgh sue for payment of fees incurred having provided professional services to the appellants. The appellants are also solicitors, the first named being the individual partner or principal and the second named being the firm of Moore MacDonald both based in Motherwell.

21. The contract between the parties is based on agency, the respondents and original pursuers having been instructed to act as Edinburgh solicitors by the appellants' agents Messrs Levy & McRae, Solicitors in Glasgow. The professional services involved answering or resisting a petition by the Law Society of Scotland to have a judicial factor appointed to the appellants. The petition had been raised in the Court of Session in Edinburgh. The respondents set out in Article 4 of Condescendence a synopsis of the work done with an emphasis on the requirement to use and consult with counsel.

22. The appellants were successful in obtaining an award of expenses against the Law Society on a solicitor and client third party paying basis. The account of expenses was duly prepared and totalled £35,441.29. The account of expenses is, in essence, the fees and outlays incurred by the appellants to the respondents in the petition procedure in the Court of Session. That account of expenses was adjusted with the agents for the paying party at £25,000 which figure is said not to cover counsel's fees. Accordingly, £10,441.29 remained outstanding. This is the sum originally craved prior to taxation of the respondents' accounts.

23. In Article 5 of Condescendence the respondents state that payment has been requested but the refusal or delay in paying has made the action necessary. In answer the appellants deny this but explain that at one stage settlement was proposed on the basis that the respondents would accept the sum of £8,500. The respondents' business account (5/1 of process) has been adopted *brevitatis causa* this being the business account drawn up by Alex Quinn & Partners Limited, dated 3 May 2010.

24. I have provided this summary of the respondents' written case in order that the appellants' argument as to jurisdiction can be considered.

25. The Civil Jurisdiction and Judgments Act 1982 Schedule 8 governs matters of jurisdiction. That Act (Schedule 8 Rule 1) provides that the principal ground of jurisdiction is the domicile of the defender. The respondents, Digby Brown & Company, rely on the exception or alternative basis to domicile provided in Schedule 8 Rule 2 *"(b) in matters relating to a contract, in the courts for the place of performance of the obligation in question."* With reference to the designation of respondents and the legal services provided, the place of performance of the obligation in question is in the jurisdiction of this court.

26. The sheriff deals with the matter at paragraph 38 of his judgment.

"38. Where a solicitor outwith Edinburgh is authorised by his client to employ an Edinburgh solicitor, the Edinburgh solicitor is the agent of the client and not the sub-agent of the local solicitor (Maxwell, Court of Session Practice page 30). Prima facie any obligation to make payment of fees would be at the business premises of the creditor, that being the obligation in question. Although Mr Richards appeared initially to approach matters on the basis that the obligation in question related to the services provided, I understood him to ultimately to include the matter of payment in his contentions as to the obligation in question. In my

view the plea to jurisdiction falls to be repelled, in respect that the place of performance of the obligation to pay fell within Edinburgh."

27. When one approaches the question of jurisdiction from the point of view of specification I have to consider whether the pleadings include averments on (a) the ground of jurisdiction and (b) the facts upon which the ground of jurisdiction is based. The appellants criticise the sheriff for repelling the plea to jurisdiction. Counsel for the appellants argues that the respondents fail to aver the obligation to make payment and makes specific averments in support thereof. In my view, that argument is misconceived. The obligation on the pleader is to plead the ground of jurisdiction and facts to support that. The averments on jurisdiction should not be a formulaic repetition of the ground of jurisdiction but rather the averments should give proper notice to the opponent as to the basis upon which Edinburgh Sheriff Court is the appropriate court with jurisdiction having regard to the contractual obligations. In a contract where professional services are provided the relative obligations are to provide these services and the corresponding obligation to pay for the services. Looking at the pleadings as a whole but particularly the averments for the pursuers and now respondents it is plain that the work was carried out in Edinburgh where the respondents are based. That is why they are called Edinburgh agents and the reason they are instructed relates to the petition in the Court of Session. Taking these averments in the round they require no further specification or amplification. The case on record against the appellants is perfectly clear. It would be an affront to common sense to suggest that the respondents require to say any more than they have in order to establish jurisdiction in this court. The nature of the contract between the parties ought to be well known to the appellants as they are solicitors. It is obvious from the averments that the obligations on both parties under this contract are fairly and squarely centred on Edinburgh.

28. I now turn to the substantive argument on jurisdiction.

29. It is well established that it is *pars judicis* for the sheriff to decide whether the cause comes within the jurisdiction of the court. It is not necessary for any party to raise the issue of jurisdiction. This is confirmed in *Macphail Sheriff Court Practice (3rd Ed) paragraph 2.11*.

30. The appellants' argument on jurisdiction appears to ignore the basis upon which the action against the appellants is brought namely based on the law of agency. Instead the appellants put forward an argument which suggests that the appellants, ignorant of the basis for the respondents founding jurisdiction in this court, would, had they known that place of payment was the basis of jurisdiction here, have made averments sufficient to seek a proof before answer or a preliminary proof on the matter of jurisdiction. They say that the domicile of the appellants should be the first ground of jurisdiction. Secondly, in the absence of a written contract between the parties and given that the principal agents for the appellants are Levy & McRae of Glasgow, the solicitors who instruct the respondents as their Edinburgh agents, then the place of payment should be Glasgow being the domicile of the principal agents. The appellants would have offered to prove that custom and usage suggests that the Edinburgh solicitor would render its fee to the principal solicitor who would then recover from the client to settle the fee. Therefore the client makes payment of the fee to the principal agent at the principal agent's place of business. The principal agent then in turn makes payment of the Edinburgh solicitors' account. I cannot suggest that this practice would be unfamiliar to many Edinburgh agents as a method of ingathering fees. However, that is nothing to the point in an issue or question of jurisdiction.

31. In my view, this argument is without merit. The respondents sue on their contract with the appellants. Digby Brown had provided professional services to the appellants, that being the petition procedure in the Inner House. The respondents are entitled to be paid for their professional services and they look to the client to pay them at their place of business in Edinburgh. The argument that payment ought to be made to the principal solicitors in Glasgow is something of a red herring. It matters not that the appellants paid the money to their Glasgow agents, if Levy & McRae did not pay the Edinburgh solicitors the sums due to them in terms of their business account. The appellants would still remain liable to the respondents to pay the fees due.

32. The sheriff's decision on this matter is found again at paragraph 38 where in my view the sheriff states the proper legal basis of the relationship between the Edinburgh solicitors and the local or principal solicitors. I can detect no error on the part of the sheriff in his approach to this. The position of Edinburgh agents is well known it is regulated by the common law as the sheriff observes.

33. The appellant also criticises the sheriff for failing to dismiss the action due to lack of specification of the averments relative to the sum owed in terms of the business account and how that is made up. There is no detailed breakdown of the work carried out; the hourly rate charged and by whom the work was carried out.

34. The case of *Semple Fraser WS v Quayle (supra)* was cited by the appellants' counsel in support of his argument. It was submitted that the sheriff erred in distinguishing that case. In *Semple Fraser* the fee was charged at a global figure. It was said to be a "reasonable fee in all the circumstances of the case and for a commercial firm to charge". The pursuers in that case accepted that further specification had not been given but would be provided at or just before any diet of taxation. The sheriff considered that the defenders were entitled to a breakdown of how the sum was arrived at; what the solicitor had done and how the account was made up. That is, however, far removed from the situation here for two main reasons - firstly, the respondents do give a breakdown, which is incorporated in the pleadings and secondly, and importantly, this account is the balance of the judicial account prepared in connection with the petition proceedings and which details all the work carried out by the respondents as the solicitors for the appellants in connection with that business. That account was made up of fees and outlays with the predominant part of the account being the counsel's fees. Counsel's fees are outlays for which the respondents are responsible to pay on behalf of the client and which fees are incurred solely for the purpose of resisting the petition. Therefore, specification is given to the appellant. Against that background the detail provided is proportionate and properly narrated in the business account. The sheriff, in my view, was correct to distinguish *Semple Fraser*. Further, the relevancy test in *Jamieson v Jamieson* is not met. It would be wrong to suggest that the pursuer would not succeed to any extent if he proves what he sets out in his averments especially with regard to the business account drawn up and dated 3 May 2010.

35. The remaining point on appeal relates to the averments as to the contract between the parties. The appellants' argument proceeds on the basis that there is or there is purported to be a contract between the appellants and Digby Brown. This ignores the basis upon which this action proceeds namely, that the appellants' agents Levy & McRae have authority to instruct the respondents as Edinburgh agents and thus bind the appellants. There is therefore a contract between the parties which does not require to be committed to writing and which binds the appellants to the obligation to pay the reasonable fees of the Edinburgh agents. There is nothing in the defences to suggest that the appellants were discontent with that arrangement and were not prepared to proceed with Digby Brown as Edinburgh agents. There was no withdrawal of that mandate. On the contrary, the appellants' participated actively with Digby Brown in the petition proceedings before the Inner House including preparation for Inner House hearings; consultations with counsel all of which organised by the respondents.

36. Therefore, in my view, the submissions made on behalf of the appellants on this point are misconceived and fail to appreciate the concept of agency on which this action is based. Section 30 of the Solicitors (Scotland) Act 1980 is of no assistance to the appellant. The effect of that section would be to allow the Edinburgh agent to seek payment of his professional fees from the client or from the Glasgow agent. It was evident from the correspondence lodged in the pursuers' inventory 5/3 of process that the respondents had expressly reserved their right to recover the sums due from Levy & McRae as the firm's instructing agent and indeed as agent for the principal. However that does not derogate from their entitlement to seek payment from the client or principal direct. Accordingly, for these reasons the appeal falls to be refused.

Cross Appeal by Digby Brown

37. The pursuers and respondents have lodged a cross appeal. This is No 14 of process. It appeals the sheriff's interlocutor of 21 September 2012 in so far as the sheriff modified the award of expenses in favour of the

pursuer to 50%.

38. The note of cross appeal sets out the ground of appeal and the pursuer's argument in support of the cross appeal.

39. Mr Richards for the pursuer accepted that the sheriff's decision on expenses was the exercise of judicial discretion. He discussed the principle of expenses following success with reference to *Howitt v Alexander & Sons* 1948 SC 154 and *Shepherd v Elliott* (1896) 23R at 695.

40. Modification of expenses is addressed in *Macphail - Sheriff Court Practice (3rd Ed) paragraph 19.10*.

41. Mr Richards spoke to the procedure in this case and the steps taken by the pursuers to request payment of the fees due and outstanding. I was informed that the process of seeking payment was lengthy beginning with an e-mail from the pursuers to Mr Macreath of Levy & McRae on 22 May 2009. This followed payment by the Law Society of Scotland of the agreed expenses as awarded by the Inner House on 24 October 2008. Full credit was given for the agreed expenses of £25,000. The pursuer sought payment of the balance of the account of expenses which as at May 2009 amounted to £8,714.65. A breakdown was provided with reference to the original account of expenses incurred by the respondents (now appellants) to the pursuer in the petition of the Law Society of Scotland against them. During the protracted correspondence between the pursuers and Levy & McRae there was no challenge to the amount of the fee or request for a more detailed account. However, there was a request for further advice from counsel who had acted as junior counsel for the appellants in respect of the petition by the Law Society.

42. I was informed that the Law Society guidelines in the form of accounts and taxation states:-

"The form in which a solicitor presents an account is a matter for the solicitor's personal preference but if the person liable to pay requires details, the solicitor must give a narrative or summary sufficient to indicate the nature and extent of the work done. If a breakdown is requested the solicitor should give such information as can readily be derived from the records, such as the total recorded time spent, the number and length of meetings, the number of letters and telephone calls. No charge may be made for preparing the note of fee or for the provision of such information. However, if having been given such information the party paying insists on a fully itemised account, the cost of preparing that may be charged to them."

43. It was submitted that the sheriff modified the award of expenses on the basis that a fully itemised account was not given to the appellant prior to litigation being commenced in September 2011. As previously stated Mr Richards maintained that there had been no such request; the account had not been challenged there was merely delay in payment. The appellants placed reliance on an e-mail dated 15 June 2010 from Mr Macreath of Levy & McRae which *inter alia* states:- "*Can you let me have the breakdown on this one*". Mr Richards disputed that this was a request for an itemised account. There had been correspondence for more than a year about the sums outstanding. In any event a detailed narrative was provided in May 2010 and this is the account which has been incorporated into the pleadings. This brings out a balance to the pursuer of £10,441.29 after allowance is made for the payment received from the paying party, the Law Society of Scotland. Throughout the period when demands for payment were being made the amount of the fee was not challenged by the appellants.

44. Mr Richards pointed out that the appellants' defence was not a defence of quantum - to the effect that he would pay a reasonable fee and that the pursuers account should be remitted for taxation. Indeed the appellant had taken a contradictory approach to the issue of taxation. He successfully opposed the motion for summary decree on the basis that he had a right to insist on taxation yet when the pursuers enrolled for taxation the appellant opposed that motion. Decree was pronounced by the sheriff on the basis of the taxed account. The sheriff repelled the defences and sustained the third plea-in-law for the pursuers on the basis that no defence was disclosed. In these circumstances it is difficult to know what else the pursuers could have done and how long they had to wait before taking steps to seek payment of the fee.

45. Accordingly, Mr Richards submitted that the sheriff fell into error in modifying the appellants liability in expenses by 50% on the basis that some procedure in the case could have been avoided had the business account been submitted by the pursuers for taxation at an earlier stage. The lack of an itemised account or taxed account did not cause or contribute to the litigation or to unnecessary procedure in the litigation. There had been no unnecessary delay or conduct on the part of the pursuer which would justify modification of expenses. The cross appeal should be allowed and the award of expenses should remain unmodified.

Appellants' reply

46. Mr Tariq for the appellants emphasised the discretionary nature of the sheriff's function in awarding expenses. He stressed that appeals on issues of expenses are severely discouraged and referred to Maclaren on Expenses in the Supreme and Sheriff Courts of Scotland at page 4 which states:-

"The House of Lords however does not entertain appeals upon the question of expenses alone. The Inner House is under a different rule, and appeals or reclaiming notes from inferior courts upon questions of expenses alone are quite competent. They are, however, severely discouraged both in the Sheriff Court and the Court of Session and 'should never be given effect to unless there has been an obvious miscarriage of justice in the interlocutor reclaimed or appealed against or in some of those cases where the expenses have become a great deal more valuable than the merits'. To these exceptions must be added cases where there is a principle involved, or where the expenses are the merits."

47. There had been no obvious miscarriage of justice and therefore the award of expenses as modified should not be disturbed on appeal. The sheriff was correct as a matter of fact and law. The only detailed breakdown was given following litigation being commenced and furthermore although there had been correspondence in respect of payment of the "fees", I was referred to a production (5/14 of process) being an e-mail from William Macreath of the firm of Levy & McRae to Simon Richards of the pursuers on 15 June 2010 requesting a breakdown of the outstanding amount. The reply by Mr Richards the following day attaches a business account which fails to give an adequate breakdown of the sum and simply gives a narrative in support of the fee. There was no mention of an hourly rate or time recording. The sheriff was correct to modify the expenses. It lay within his discretion and no error has been disclosed.

DECISION

48. The question of expenses is pre-eminently one for the exercise of the sheriff's discretion. The appellate court would only be entitled to interfere with the sheriff's decision if what he did was plainly wrong. The sheriff in this case applied the normal principle that expenses should follow success but then modified expenses to 50%. The sheriff explains his decision in his further note, (no 16 of process). The sheriff prepared the further note in response to the cross appeal being lodged by the pursuers and respondents. The sheriff's reasoning on his decision can be found in the second paragraph of the second page. He states:

"I reflected on parties' submissions. Although the respondents had been successful in having the defences repelled I was mindful that the appellant at an earlier stage had succeeded in resisting a motion for summary decree in the cause. I took the view that at least some procedure in the case could have been avoided had the business account been remitted for taxation at an earlier stage. In the whole circumstances I took the view that the respondents should be awarded the expenses of process (insofar as not already dealt with) but modified to 50% to reflect my view of matters."

49. Accordingly the sheriff takes into account the overall success which the pursuers achieved but noted that the appellants had succeeded in resisting the motion for summary decree. It is clear that the motion for summary decree was resisted as the defenders sought to exercise their right to taxation. The sheriff proceeds to modify the expenses to 50% as he took the view that at least some procedure could have been avoided had the account been taxed at an earlier stage.

50. It appears to me that the sheriff may have confused the paying parties' right to taxation with a duty or obligation on the part of the pursuers' solicitors to have the account taxed. There is a significant distinction to be drawn between the two. The Sheriff refers to the curious feature of the case that the appellant resisted the motion for summary decree *inter alia* contending that the matter of the pursuers' account had not yet gone for taxation yet opposed the pursuers' motion for remit to taxation prior to debate. Thus the defenders had avoided summary decree by insisting on the exercise of a right they had no intention of exercising. The sheriff, of course, observes that the issue of jurisdiction was still a live matter at the stage of the motion for summary decree.

51. Standing the discretionary nature of questions of expenses the issue for me is whether the sheriff made an error in modifying the award of expenses to reflect the pursuers' conduct. In particular that they had failed to take steps to have their business account taxed prior to litigation.

52. The sheriff was entitled to modify or restrict the pursuers' expenses to mark the court's dissatisfaction on some aspect of the behaviour of the successful party.

53. This is dealt with in *Macphail at paragraph 9.10*.

"*Modification, in the sense of restriction of expenses, may be directed in order to mark the court's dissatisfaction with some aspect of the behaviour of the successful party, either as regards the conduct of the litigation or in the matter which gave rise to it. Such modification may be appropriate where his behaviour towards the other party before the litigation merits disapproval; or where his conduct of the action has been inefficient, as where he has only belatedly taken a valid objection to competency, or irresponsible, as where he has made uncandid or unfounded averments, or has failed to adjust a minute of admissions which would have obviated a long proof; or needlessly pursued an action which was partially misconceived thereby prolonging a proof unnecessarily. In such cases the sheriff usually finds the successful party entitled to only a proportion of the taxed amount of his expenses, and the modification is applied after taxation and the approval of the auditor's report. Modification or restriction of expenses may also be directed where there has been divided success."*

54. It appears to me that the sheriff has confused the client's right to taxation with the solicitors' obligations in respect of his business account. There is no duty on the solicitor to have his business account taxed unless requested to do so. In my opinion, there is no requirement that in every action by a solicitor against his client for payment of his business account, (including in an undefended action), that the solicitor must have his business account taxed. Nor is there any requirement for the court to remit the account to taxation before granting decree. The court has a discretion to determine whether or not the account of a solicitor to his client should be remitted for taxation. It is for the exercise of the sheriff's discretion in any given case. There is no requirement. In my view, the sheriff has confused the client's right to taxation of a solicitor's account with the solicitor's position. The solicitor is entitled to sue for his account and does not come under any obligation to have the account taxed. If the client wishes to assert his right to taxation the sheriff would require to decide on that matter and there would have to be very good reasons to refuse such a remit. There may well however be good reason for refusing such as the previous acceptance of the business account or express waiver. Taxation, of course, is a method by which accounts of expenses between agents and client are checked and assessed by an independent auditor. It is an important provision in order that clients have confidence that the fees are properly charged. The process of taxation is not without its complications. It can cause delay and does cause expense. The audit fee or fee fund dues in the Court of Session can be considerable and are based on a percentage of the account. This adds expense for the paying party and is a factor which solicitors must take into account before proceeding swiftly to taxation without ascertaining whether the reasonableness of their fee is challenged.

55. The pursuers' solicitor referred to the productions and the audit trail of e-mails between the pursuers and their Glasgow agents with regard to the fees. The correspondence discloses no concern with regard to the amount of the fee. Rather it appears that the clients are questioning whether any fee is due at all given the

sums which have passed between the appellants and the Glasgow agent. There is nothing to suggest that the reason for non-payment is the reasonableness or otherwise of the charge. Instead the correspondence points to prolonged delay leading to a proposed instalment arrangement for payment. It is reasonable to infer that the basis and amount of the fee is not the issue. Ultimately no payment is made and litigation is commenced. As there is no duty on the solicitor to have the account of expenses taxed it is indeed difficult to decern what Digby Brown should have done in order to bring this matter to a proper resolution without litigating. They did litigate and in respect of the litigation they have been successful. The authorities indicate that the cost of litigation should fall on the party who has caused it. The litigation was commenced because of the appellants' failure to make payment despite repeated requests for payment over a period of more than two years. The lack of a detailed account does not appear to have caused or contributed in any way to the litigation. Had the pursuers incurred the cost of taxation without testing the water with litigation they could likewise have been criticised for acting prematurely and escalating the sum due by the client. The conduct of the litigation by Digby Brown discloses no concern whatsoever. On the contrary they took steps to resolve the litigation by enrolling for summary decree to avoid delay and expense.

56. Accordingly, I reach the view that the sheriff did make an error in suggesting that the pursuers came under a duty to have the account taxed and which would avoid unnecessary procedure once the action was raised. On the other hand, the pursuers could rightly have been criticised had they incurred the cost of taxation prior to ascertaining what, if any, defence there was to the action. Accordingly, I propose to allow the cross appeal on modification of expenses.

(signed) ***Mhairi M Stephen***