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

[2025] SC EDIN 84

PIC-PN1316-24

JUDGMENT OF SHERIFF WALLS

in the cause

ANDREW HARKIN

Pursuer

against

ANNETTE MCNEIL

Defender

Pursuer: Mutapi, Digby Brown LLP
Defender: McNulty, DWF LLP

Edinburgh, 6 November 2025

The sheriff, having resumed consideration of the cause, refuses the pursuer's motion 7/8 of process.

NOTE

[1] This opposed motion called before me on 17 October 2025. The pursuer's motion was

> "For payment by the defender to the pursuer of £30,000 or other such sum as the court may award by way of interim payment to the Account of Expenses awarded against them, within a period of fourteen days failing which interest shall accrue at the Judicial rate."

[2] I was advised by parties' agents that the issues giving rise this motion were both important and recurring, and that users of the All Scotland Sheriff Personal Injury Court

would welcome clarity on the court's approach to such motions. I agreed to write a Note and having heard submissions for parties, made avizandum.

Background

[3] In March 2024 the pursuer raised an action against the defender seeking damages of £50,000 in respect of solatium arising from a road traffic accident. Following adjustment of pleadings, the record was closed, and a 4-day diet of proof was assigned for 15 July 2025. On 4 June 2025 the court was advised that the action had settled. On 23 June 2025 the court interponed authority to a Joint Minute which, *inter alia*, assoilzied the defender, found the defender liable to the pursuer for the expenses of the cause as taxed, and allowed an account of expenses to be lodged with the Auditor of Court for taxation.

[4] On 13 June 2025, a judicial account of expenses was intimated to the defender's agents in the sum of £35,428.35. Negotiations ensued between the defender's agents and the pursuer's law accountants. On 24 July 2025, the pursuer's law accountants indicated they would settle the account at £31,500. The defender responded on 28 July 2025 indicating that the best and final offer in relation to the account was £30,000. In response, the pursuer confirmed that a diet of taxation would be required and asked whether the defender might make an interim payment towards expenses to cut down on any interest which may ultimately be payable. No response was received and this motion was enrolled on 1 October 2025 along with written submissions in support. A taxation was due to take place on 31 October 2025.

[5] The pursuer's agent adopted her written submissions, and I was addressed first by the agent for the defender in opposition to the motion.

Defender

[6] There was agreement regarding the competency of the motion. Although there had been a delay in responding to the pursuer's proposals, this was due to the pursuer's agent having not redirected their correspondence on receipt of an out of office reply.

[7] In terms of the substance of opposition, I was referred to three Court of Session authorities. In *Martin & Co (UK) Ltd*, [2013] CSOH 134, Lord Drummond Young had previously awarded expenses against the respondent on agent and client, client paying basis and was subsequently asked to make an order for interim payment of expenses. He accepted that it was competent to make such an order. He was referred to, and approved of, the reasoning in the English case of *Mars UK Ltd* v *Teknowledge Ltd* [1999] 2 Costs LR 44 but stated that "…in Scotland…there is no normal practice of making such orders. In general, in Scotland it will be necessary to show special reason for making an interim award." He was persuaded that special reasons existed standing evidence regarding the respondent's reluctance to pay expenses and issues with liquidity.

[8] In *Tods Murray WS* v *Arakin Ltd* [2013] CSOH 134, Lord Woolman, citing *Martin*, found that although unusual, interim orders for payment of expenses could be made if special reasons exist. The pursuer had spent circa £1 million on legal costs and associated outlays. In view of the history of the case, the value of the account and questions about whether the defender would be able to meet any award of expenses, he was satisfied that there were special reasons to justify an order for interim payment of expenses.

[9] Finally, I was referred to *Robert Kidd* v *Paul & Williamson LLP and another* [2017] CSOH 124. In this case, Lord Tyre found that, taken together, the likely size of the award of expenses, the scale and complexity of the litigation and the fact that the litigation was ongoing justified an order for interim payment of expenses.

[10] As none of the factors present in these cases featured in the matter before me, it was submitted that the motion should be refused. There were no special reasons to justify the order.

[11] It was also submitted that although the account here was relatively modest, if delay in having accounts taxed was seen as a special reason to order interim payment of expenses, the floodgates would be opened to a potentially vast number of similar motions. The delay expected in this case was not unique or unusual and is a feature of every sheriff court account of expenses which proceeds to taxation.

Pursuer

[12] The court has an inherent discretion in relation to expenses under common law which it can exercise in every case unless it is expressly taken away by statute. (*MacPhail, Sheriff Court Practice*, 4th ed, paragraph 19.04). There was agreement that an award of interim expenses in the Sheriff Court was competent (*MacPhail*, ibid, paragraph 19.09).

[13] I was referred to the English case of *Mars UK Ltd* v *Teknowledge Ltd* [1999] 2 Costs L.R 44 as authority for the principle that there was no good reason why a successful party should have to wait to receive costs following judgment.

[14] I was also referred to the unreported decision of Lord Bannatyne in *Higherdelta* v *Covea Insurance* (Court of Session, 13 June 2017) where I was told the court had held that there was no need to show special reasons to obtain an interim order for payment of expenses as the issue for the court was fairness and substantive justice. In that case, Lord Bannatyne found that it was competent for the court to make an interim order for expenses of a fixed sum against the party who is ordered to pay expenses, pending preparation of a taxed account. No copy of this decision is available, but the case is cited in

Expenses: A Civil Practitioner's Handbook (Nicol and Flett, 1st ed., paragraph 19.20) as being a departure from Lord Drummond Young's approach in Martin.

[15] I was told there are significant delays in accounts being taxed by the Auditor of Court. I was referred to the following recent examples, which I was advised are typical:

- Account lodged, 5 September 2024, taxation 20 January 2025, taxed account issued 25 July 2025
- Account lodged, 12 September 2024, taxation 10 December 2024, taxed account issued 8 July 2025
- Account lodged, 5 September 2024, taxation 19 December 2025, taxed account issued 8 July 2025
- Account lodged, 19 September 2024, taxation 10 December 2024, taxed account issued 8 July 2025
- Account lodged, 25 September 2024, taxation 26 January 2025, taxed account issued 28 August
- Account lodged, 19 November 2024, taxation 7 February 2025, taxed account issued 2 September 2025
- Account lodged, 4 December 2024, taxation 3 March 2025, taxed account still to be issued
- Account lodged, 3 December 2024, taxation 20 January 2025, taxed account still to be issued

[16] Based on these indicative examples, agents are waiting around 10 months to receive a taxed account, after the account has been lodged with the Auditor.

[17] The outlays in the pursuer's account total £12,379.83 and these will require to be paid by the pursuer's agent while the taxed account is awaited. The outlays are not controversial

and have not been challenged. In all the circumstances, I was invited to exercise my discretion to make an award of interim expenses for £30,000 or such other sum as I considered appropriate, failing which an award to reflect outlays only. There was no prejudice to the defender in making an interim payment. No special reason was needed for an award of interim expenses.

[18] During submissions, the pursuer's agent confirmed that due to the terms of engagement between her firm and the pursuer, the pursuer was not responsible for meeting outlays or fees. The fee arrangement was speculative, as is normal in personal injury cases. In these circumstances it was accepted that there was no prejudice being experienced by the pursuer himself, and that the party who was out of pocket pending taxation was the pursuer's agent. However, the court ought to exercise its discretion in relation to expenses to reflect the typical funding model for pursuit of claims in the All Scotland Sheriff Personal Injury Court. Although interest on expenses under OCR 32.5 might be regarded as a remedy for late or delayed payments, motions for interest on taxed expenses were not always granted.

[19] During submissions it was also confirmed that the principal factor the pursuer was relying on in support of the motion was the delay in the account being taxed. If the defender's offer had been £15,000 rather £30,000, interim expenses would have been sought in that amount.

Discussion

[20] Although it was a matter of agreement, there appear to be no authorities which address whether an order for interim payment of expenses can competently be awarded in the Sheriff Court. It seems to me that there is no reason why the position now taken in the

Court of Session ought not to be followed in the Sheriff Court. The most detailed analysis of a Scottish court's power is that of Lord Tyre in *Kidd*. Following a detailed review of cases and references to Maclaren on *Expenses* (1912), he identifies a distinction between (i) interim awards of expenses for particular steps in process; and (ii) interim orders for payment of expenses prior to taxation. In relation to the latter, he agreed with Lord Drummond Young's approach which was followed by Lord Woolman in *Tods Murray*.

[21] The passages cited by the pursuer from MacPhail are supportive of a similar approach being taken in the Sheriff Court. Nicol and Flett state

> "Whilst the Scottish precedent on interim awards of expenses emanates solely from the Court of Session, there is little reason to doubt that such awards are competent in Sheriff Court litigation. The Court of Session precedent gives ample authority for the competency of interim expenses motions. The principles of fairness and the interests of justice extend to all courts and it would be iniquitous if such a remedy was only open to those litigating in the Court of Session." (Nicol and Flett, ibid., paragraph 19.29)

This opinion carries additional weight, in my opinion, given that one of the authors now sits as a Sheriff in the All Scotland Sheriff Personal Injury Court, and I respectfully agree with it. The source of the power, in my opinion, rests in a Sheriff's inherent discretion in relation to matters regarding expenses.

[22] The decision in *Higherdelta Ltd* v *Covea* is not only unreported - it is unavailable. I made inquiries with the Court of Session and there is no trace of it ever having been formally issued. The commentary on the case appears to be based entirely on an article written by senior counsel who represented the pursuer (Interim awards of expenses – a significant decision | Scottish Legal News[1]) A version of this article is referred to by Nicol and Flett who report that Lord Bannatyne found that in considering a motion for an order

[1] https://www.scottishlegalnews.com/articles/interim-awards-of-expenses-a-significant-decision (last accessed 05.11.25)

for interim payment of expenses, the issue for the court is "fairness and substantive justice. All of the circumstances should be looked at." (Ibid., paragraph 19.19)

[23] In exercising his discretion to make an order for interim payment of expenses, it appears Lord Bannatyne took into account (i) that the pursuers were required to pay their own legal costs of around £140K plus VAT; (ii) that there would be a delay of around 6 months before an enforceable decree, post taxation, was obtained; and (iii) that the pursuers would be required to pay interest on overdue fee notes. However, in the absence of the actual text of Lord Bannatyne's full decision, it is not possible to attach significant weight to it.

[24] In *Robert Kidd* v *Paul & Williamson* LLP, Lord Tyre queried whether special reasons were needed for a court to make such an order. He said

> "In Martin & Co (UK) Ltd, Lord Drummond Young identified a need to show 'special reasons' for making an interim award. I do not, for my part, read this observation as meaning that an order will only be made in exceptional circumstances. It does no more than acknowledge that the rules of court provide a mechanism whereby an award of expenses may be made, quantified by the Auditor of Court in case of dispute, extracted and in due course enforced. This is the 'ordinary way' to which reference was made in Byres' Trs v Gemmell and Jaffray v Jaffray: the procedure normally regarded by the rules of court as appropriate for recovery of expenses. But, as with other aspects of expenses, it is in my opinion within the discretion of the court to depart from the 'ordinary way', provided the court is satisfied that there is sufficient reason for so doing." (paragraph 13.)

[25] In my opinion, there is no material difference between the approaches taken by Lord Drummond Young, Lord Woolman and Lord Tyre – or indeed the approach attributed to Lord Bannatyne. The applicable rules of court (whether in the Court of Session or the Sheriff Court) provide a mechanism whereby an award of expenses may be made, quantified by the Auditor of Court, extracted and in due course enforced. This is the "ordinary way" in which, absent agreement, a party with an award of expenses in its favour gets paid. What all the cases identify, in one way or another, is that there must be a basis for

the court to exercise its discretion to depart from the ordinary way. It makes no difference, in my view, whether that is described as a "special reason" or as "sufficient reason."

[26] The reason advanced by the pursuer in this case is the length of time it will take for the account to be taxed and a decree obtained. It was accepted that this reason is not a unique feature of this case, but of cases generally. It was also accepted that the pursuer himself is not prejudiced by a delayed taxation, standing the nature of his fee arrangement with his solicitors. In all the cases cited, a common feature is that the party seeking the interim order was materially and directly impacted by the factors justifying such an order.

[27] In *Higherdelta*, the case principally relied on by the pursuer, two material considerations of Lord Bannatyne appear to have been that the pursuers were due to pay legal fees of £140K plus VAT and that they were also required to pay interest due to late payment. Delay in taxation was a closely linked third reason, but that impacted the pursuers, not their solicitors.

[28] In *Martin*, Lord Drummond Young was satisfied that there was a material risk that the respondent might dispose of assets prior to any account being taxed. There was no mechanism to inhibit on the dependence of the action and there was a risk that the petitioner's recovery of costs would be prejudiced.

[29] In *Tods Murray*, there were findings of procedural impropriety on the part of the defender, the pursuers themselves had paid over £1 million in legal fees, there was a history of delay and nonpayment in relation to previously taxed expenses in the same action and there were questions regarding the defender's ability to fund any award.

[30] In *Kidd*, the pursuer was likely to be found entitled to a very significant sum after taxation (the account was submitted at over £2 million) but was still having to fund ongoing

litigation against the defender. (The award of expenses had related to the expenses of an amendment procedure and a discharged diet of proof).

[31] The position in this case is different. The party who is disadvantaged is not the pursuer, but his solicitors. There are no concerns regarding the defender's ability to make payment. The pursuer's solicitor was unable to point to any reason for the court to award interim expenses that was linked to the circumstances of the pursuer himself. It was submitted, however, that recognition should be given to the fact that this was a personal injury action where speculative funding arrangements between pursuers and solicitors is normal. There was no good reason why these firms should have to wait so long to be paid. It was submitted that the court should recognise that the funding of personal injury litigation is different from commercial litigation and reflect that in an order for interim payment of expenses.

[32] There is a pragmatic attraction to this argument. However, the applicable provisions of the Ordinary Cause Rules in relation to taxation of expenses are common to both personal injury actions and ordinary actions. The same can be said of the principles which can be drawn from the authorities I was referred to. I am not persuaded that a different approach to motions for interim payment of expenses in personal injury actions can be justified.

[33] The length of time being taken to tax accounts is a source of concern to firms who act for pursuers in personal injury cases. It may also be a concern to parties with awards of expenses that need taxed in other types of action. However, this court has no control over the length of time that the Auditor of Court takes to tax accounts. The schedule of taxation timescales produced by the pursuer speaks for itself but confirms that the delay in having an account taxed is not unique to this case.

[34] In the cases I have referred to, concerns about liquidity, the burden of funding ongoing litigation, and outstanding legal fees accruing interest are examples matters found to justify an award of interim expenses. None of these are factors are present in this case. Depending on the facts of any given case, other facts may justify an award of interim expenses. However, a common feature of all the cases is that the order for interim payment of expenses was justified in view of the position of the pursuer. As accepted by the pursuer’s agent, in this case the pursuer has no remaining financial interest in this case. There is no concern regarding the defender’s ability to make payment of any taxed account of expenses, as any liability will be met by his insurers. Further, OCR 32.5 provides a mechanism whereby a party decerned against can be required to pay interest on taxed expenses. In the absence of submissions, and recent opposed motions in relation to OCR 32.5, I will refrain from offering a view on how this mechanism is intended to operate.

[35] Each motion of this sort will require to be considered on its own merits. However, in the circumstances of this case, I am not persuaded that there is a basis to depart from the ordinary way in which a successful party obtains payment of its expenses. Accordingly, I will refuse the pursuer’s motion.