

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

[2026] SC EDI 96

PIC-PN1395-23

JUDGMENT OF SHERIFF KOMOROWSKI

in the cause

ANDREW PHILIP JAMES

Pursuer

against

ARR CRAIB TRANSPORT LTD and QBE UK LTD

Defenders

**Pursuer: Poole; Thorntons Law LLP
Defenders: Agnew; Keoghs Scotland LLP**

EDINBURGH, 7 July 2026

The sheriff, having resumed consideration of the cause, repels the pursuer's objections to the auditor's report.

NOTE:

Introduction

[1] A diet of proof in a personal injuries action proceeding under the Ordinary Cause Rules, Chapter 36, anticipated to last up to 3 days, was discharged on the first day because the action had settled. Though counsel for the pursuer had been instructed, only the pursuer's solicitor appeared at the diet to move for its discharge.

[2] In due course, on the pursuer's unopposed motion, the court found the defender liable to the pursuer in the expenses of the cause as taxed, certified Professor Grey Giddins, surgeon, as a skilled person, and:

“found the proceedings suitable for the employment of junior counsel; for the following pieces of work [*inter alia*]; ... (g) preparing for proof and consulting with pursuer regarding Tender.”

No other reference was made in the motion to the proof. The interlocutor reflected the precise terms of the pursuer's motion.

[3] The pursuer's solicitor objects to the auditor's abatement of fees of counsel and the skilled witness arising from the discharged proof.

[4] I have considered the taxed account, counsel's fee note, the pursuer's solicitor's note of objections, the auditor's minute in response, the pursuer's solicitor's written submissions and both parties' oral submissions.

[5] The pursuer's solicitor's oral submissions did not innovate upon what was said in writing, and reference to that written material largely suffices to explain his position. As I have decided this matter in favour of the defender, I need not say much as to the defender's solicitor's submissions.

Counsel's commitment fee

[6] Counsel submitted a fee note with an item dated for the first day of the proof, with the following description:

“Instructions for 3-day proof. Settled on day 1. Fee to include 1 day[']s preparation, consultation with client on the morning of proof, plus 2 days['] commitment to diet.”

Counsel charged £6,750 plus value added tax.

The abatement

[7] The auditor taxed off almost two thirds, deducting £4,125, leaving only a fee of £2,625. The auditor did this because the court had sanctioned only particular work, which did not include “attendance at or commitment to the diet of Proof” (auditor’s minute, paragraph 7).

The objection

[8] The pursuer’s solicitor submits that the sanction for “Preparing for Proof and Consulting with Pursuer regarding Tender” was sufficient to allow the auditor to pay a commitment fee (written submission, paragraph 8). The pursuer’s solicitor objects that the auditor’s approach puts him in an impossible position, as sanction could not competently be sought for an attendance at the proof that never took place (note of objections, paragraph 4). He submits that such a motion would “at very least ... misrepresent the factual position” (written submissions, paragraph 9). What had been sought was the “very limit of what could competently have been sought” as the proof had never begun (*ibid*). The pursuer’s solicitor objects that the auditor’s approach was improperly “narrow” (note of objections, paragraph 4). He submits it was “too narrow” and “too simplistic” (written submissions, paragraphs 7, 10, 13, 14).

Decision

“Work” includes fees for being committed to a proof that does not proceed

[9] As the pursuer’s solicitor noted (written submissions, paragraph 11), under the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019, where sanction is granted for “particular work”, “fees of counsel for carrying out work include, where appropriate in the

case of Proofs that do not proceed, fees reflecting counsel's inability to accept alternative commitments." (rules 4.3(3), (7)).

The receiving party could have, but had not, sought explicit sanction for the commitment fee

[10] The problem for the pursuer's solicitor is that no such sanction was granted in explicit terms. No such sanction was ever sought.

[11] Sanction could have been sought. The pursuer's solicitor could have moved for sanction for the attendance of counsel at the proof on a notional basis. I reject the contention that this would entail any misrepresentation. The reference to work of attending the proof would be used in the same technical, extended sense meant in the 2019 Rules. No-one would be misled by a motion in these terms. All knew the proof did not run for 3 days. Alternatively, a solicitor could simply enrol a motion to sanction, in explicit terms, incurring counsel's commitment fee.

The court's role in reviewing the auditor's decision

[12] The question then is whether the sanction that was granted, for "Preparing for Proof and Consulting with Pursuer regarding Tender", includes a commitment fee.

[13] This is a question of construction of the court's interlocutor. Contrary to the defender's solicitor's submission, unlike certain other aspects of an auditor's decision-making, I do not consider this to be a question of whether the auditor has exercised a discretion unreasonably. Contrary to the pursuer's solicitor's submission, I also do not think it is appropriate to ask whether the auditor has adopted an excessively "narrow" or "simplistic" approach. There is no warrant to interpret an award of expenses either in a way

that tends to favour the receiving party or the paying party. The question is simply what the interlocutor truly means. It is a question of law.

Consulting on a tender has no necessary connection to attendance at a proof

[14] Obviously, consultation on a tender might occur at a point far removed from a proof.

It cannot be taken to entail any fee for commitment to the proof.

A preparation fee is for work done, a commitment fee is for lack of work

[15] A fee for preparation for a proof, and commitment to that proof, are distinct. A fee for preparation is for work actually done. Preparation for a proof might be at some point significantly in advance of the proof, depending on the occasions available to counsel to prepare. A commitment fee is, by its nature, not for work actually done. Rather, it is for the lost opportunity to accept instructions for other work. The scale of commitment fees, and how far in advance they are incurred, is dictated by market convention arising from the general availability of other remunerative work at short notice. Chargeable preparation might occur before a commitment fee is properly chargeable, and at the point any commitment fee is chargeable there might still be preparation to be completed. So, one is a fee for work, the other for the absence of work, and they might be incurred at different times.

Conclusion

[16] Accordingly, the auditor was not entitled to admit that part of counsel's fee that was for his "inability to accept alternative commitments" for the proof that did not proceed.

Additional observations

[17] Had sanction been sought, I think it likely that it would have been granted. I have noted already the terms in which such sanction could have been obtained for particular work.

[18] The difficulty might have been avoided entirely had sanction been sought instead for the “proceedings” generally. The rule that an interlocutor granting sanction for “proceedings” has no retrospective effect (2019 Rules, rule 5.4(5)) does not apply to proceedings under the Ordinary Cause Rules, Chapter 36 (2019 Rules, rule 5.4(4)(a)). This was noted by Sheriff McGowan in *Finlay v Borders Health Board* [2019] SC EDIN 99 at paragraphs 15-16, whose judgment is quoted and summarised in I Nicol and J Flett, *Expenses: A Civil Practitioner’s Handbook* (2022), paragraphs 7.28, 7.29(7).

The fee for the skilled witness

[19] Professor Giddins had been cited to attend for the first 2 days of the proof. He submitted an invoice including the equivalent of 2 days’ attendance at court for the discharged proof at £2,500 per day.

The abatement

[20] The auditor abated the charge so that the equivalent of 1 day was payable, reasoning that:

“.... it would have been reasonable to have considered the timetabling of Professor Giddins evidence in advance of the proof commencing. ... it would have been reasonable for Professor Giddins to have been cited to attend the proof for one day and not for the duration of the proof.” (minute, paragraph 9).

The objection

[21] The pursuer's solicitor objects that:

"Had the pursuer only cited Professor Giddins on, for example, the first day of the proof diet, he would have been placing himself at unnecessary risk. The proof may not have been able to proceed that day. The proof may have started late. Even if the proof diet proceeded as allocated there was no guarantee that Professor Giddins' evidence-in-chief and cross-examination would have proceeded and concluded on the first day of the Proof diet." (note of objections, paragraph 6).

[22] The pursuer's solicitor submits that the auditor's stance was not reasonable (written submissions, paragraph 22). In the absence of any competing witness cited for the defender, both examination-in-chief and cross-examination would be anticipated to last more than a day (*ibid*). The auditor's reasoning implies that the surgeon ought to have been cited only for the first day of the proof, but that would have placed the pursuer at "prejudicial risk", as there was a "real and appreciable risk" that his evidence would run onto a second day for which he might not be available, with the result that the proof would have to be continued to a later date to complete his evidence (paragraph 23).

Scheduling the surgeon for day 2

[23] I think the pursuer's solicitor has read the auditor's reasoning too narrowly. He does not say that the surgeon should have only been cited for *the first* day, but rather for only *one* day.

[24] I raised with the pursuer's solicitor the possibility that the surgeon could have been cited to attend for the *second* day only, with other witnesses' evidence led after the pursuer gave evidence on day 1. The pursuer's solicitor accepted this might have been possible, though noted the risk of all of the pursuer's case, apart from the surgeon's evidence, being completed before the conclusion of the first day of proof.

Decision

The court's role in reviewing the auditor's decision

[25] The objection to this aspect of the auditor's decision is not that he has wrongly interpreted the interlocutor. Rather, it is said that his assessment is unreasonable.

[26] This aspect of the auditor's decision entails the classic exercise of judgement as to what is reasonable to charge the paying party for conducting the proceedings in a proper manner.

[27] For assessments that do not concern the course that a particular hearing took (where the presiding sheriff might have some advantage over the auditor), the court's role is limited. The sheriff's task in such a case is of a kind that is immediately recognisable to anyone familiar with judicial review (*Tods Murray WS v Arakin Ltd* (No 2) 2002 SCLR 760, paragraph 12). If the auditor has committed some error of principle or some other error of law, if he has failed to adequately explain his decision, if he has taken account of irrelevant matters or left out of account relevant matters, or (despite avoiding all these errors) if he has arrived at an outcome no reasonable auditor ought to have arrived at, the court can intervene, but not otherwise.

The auditor's decision was reasonable

[28] The auditor's decision, properly understood, is that steps could have been taken to ensure that the surgeon's evidence was scheduled to occupy no more than a single day of proof (not necessarily the first day). I did not understand the pursuer's solicitor to exclude the possibility of this. This seems not to have been considered in advance of the proof, given the surgeon was cited to attend the entire diet of proof. That being so, the auditor was

entitled to conclude that the pursuer's solicitor had failed to demonstrate that it was necessary to cite the surgeon for more than 1 day.

[29] The auditor's approach strikes me as somewhat exacting, given the various exigencies that might arise during a proof. The pursuer's solicitor's concern about a proof day finishing early due to lack of available witnesses is one which is legitimate and, indeed, to be encouraged. But the auditor was entitled - given his professional familiarity and experience across a broad run of civil litigation both as litigator and auditor - to conclude that sufficient necessity for incurring an additional charge of £2,500 had not been shown such as to make it a proper charge against an opponent.