



OUTER HOUSE, COURT OF SESSION

[2025] CSOH 108

A360/24

OPINION OF LORD BRAID

In the cause

(FIRST) DOUGLAS GEORGE SPENCE AND (SECOND) KAREN MAY SPENCE

Pursuers

against

DAVID BURRELL GRAHAM

Defender

Pursuers: Thomson KC; DWF LLP

Defender: Massaro; Clyde & Co

21 November 2025

Introduction

[1] In October 2020, the pursuers purchased a property in West Lothian from one Garry Walker, which Mr Walker had developed. The defender had previously provided Mr Walker with two Professional Consultant's Certificates (PCCs) in the standard form issued by the Council of Mortgage Lenders, respectively dated 27 September 2019 and 10 January 2020, certifying that the property had been constructed to a satisfactory standard and in general compliance with the drawings approved under the building regulations. The pursuers allege that the property contained numerous defects. They initially raised an action for damages against Mr Walker, founding on his breach of contract. On 12 April

2024, they obtained a decree in that action for the sum of £500,000 plus expenses. Mr Walker being insolvent, there is no prospect of recovering any sums from him, and the pursuers have now trained their sights on the defender, on the ground of his alleged negligence in providing the PCCs. In the present action, they seek damages of £1 million. The action is defended and is wending its way through the court.

[2] The pursuers' motion for certification of seven skilled persons whom the pursuers wish, in due course, to call as expert witnesses called before me. Not only do the pursuers seek certification in respect of future work still to be done by the witnesses, they also seek retrospective sanction in respect of work already carried out. Therein lies the rub, since all but one of the witnesses were previously instructed by the pursuers in connection with their action against Mr Walker, and they prepared, or at least began preparing, reports originally intended to be used in that action. The motion is opposed (other than in relation to two witnesses, where there is a measure of agreement, noted below). The issue which arises is whether it is competent, and if so, whether it is, or may be, appropriate in the circumstances of this case, to recover from a party in one action expenses which were initially incurred in respect of a different party in a previous action. The pursuers submit yes; the defender, no. It should be noted that none of the witnesses were certified as skilled persons in the Walker action, and no recovery of their charges was sought, or will be achieved, in that action.

Act of Sederunt (Taxation of Judicial Expenses Rules) 2019

[3] The recovery of the fees charged by expert, or skilled, witnesses is subject to the control of the court and of the auditor of the Court of Session. In particular, certification of skilled persons is governed by Act of Sederunt (Taxation of Judicial Expenses Rules) 2019. Rule 4.5, insofar as it applies to this action, provides:

- “4.5.—(1) No charge incurred to a person who has been engaged for the purposes of the application of that person’s skill is to be allowed as an outlay unless—
- (a) the person has been certified as a skilled person in accordance with rule 5.3 (certification of skilled persons); and
 - (b) except where paragraph (4) applies, the charge relates to work done, or expenses incurred, after the date of certification.
- (2) Where a person has been so certified, the Auditor is to allow charges for work done or expenses reasonably incurred by that person which were reasonably required for a purpose in connection with the proceedings, or in contemplation of the proceedings.
- (3) The charges to be allowed under paragraph (2) are such charges as the Auditor determines to be fair and reasonable.
- (4) This paragraph applies where—
- ...
- (b) the [court] 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.”

[4] Rule 5.3 provides, insofar as applicable to this action (it not being disputed that paragraph (5) applies):

- “5.3.—(1) On the application of a party the court may certify a person as a skilled person for the purpose of rule 4.5 (skilled persons).
- (2) The court may only grant such an application if satisfied that—
 - (a) the person is a skilled person; and
 - (b) it is, or was, reasonable and proportionate that the person should be employed.
 - (3) The refusal of an application under this rule does not preclude the making of a further application on a change of circumstances.
- ...
- (5) Where this paragraph applies, 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.”

[5] The effect of these rules is that if the pursuers succeed in due course in obtaining an award of expenses against the defender, they may recover the charges incurred by them to their expert witnesses only if those witnesses have been certified by the court under rule 5.3. The test has generally been said to be whether, viewed objectively at the time of instruction, it was reasonable and proportionate to employ the witnesses: see, for example, *Philip v*

Scottish Ministers [2021] CSOH 52. (As so framed, that may beg the question as to whether retrospective sanction should also be granted, and the wording “is, or was” in rule 5.3(2)(b) may suggest that, at least where, as in the present case, the litigation is still progressing (which was not the case in *Philip*), the court should first ask itself whether, looking to the future, it is reasonable and proportionate that the witnesses be employed, before then turning to the separate question of whether certification should be retrospective. At any rate, it is not contentious that the test is an objective one, and that the matter must not be judged with the benefit of hindsight depending on the outcome of the case.) Further, the combined effect of rules 4.5 and 5.3 is that even if the witnesses are certified, the pursuers will be unable to recover any charges in respect of work done to date, unless the court also makes a determination under rule 5.3(5). It should be noted, however, that even where the court grants certification, and irrespective of whether the court makes a rule 5.3(5) determination, rule 4.5(2) provides that the auditor is to allow charges for work done or expenses reasonably incurred by the witness which were reasonably required *for a purpose in connection with the proceedings, or in contemplation of the proceedings* (emphasis added). Thus, it is for the auditor to determine whether the work or expenses were reasonably required for that purpose, or in contemplation of the proceedings. It follows that if the auditor determines that the work was not reasonably required for a purpose in connection with the proceedings or in contemplation of the proceedings, the charges for the work will not be recoverable from the defender, regardless of what the court has certified.

The reports in question

[6] The witnesses for whom certification is sought have all prepared expert reports.

Dr Scott Andrew Crerar, a civil engineer, provided a report on the septic tank.

Gordon Morris, an engineer, provided a report on the central heating system. Those reports were instructed in 2023 and were expressly provided for the action against Mr Walker.

David Cameron, a civil engineer, carried out an external and internal infrared thermography survey on 21 April 2023, his report being dated 2 June 2023. Alastair Welch, a chartered building surveyor, provided what was described as a technical inspection report, which considered matters such as the insulation levels to the property; cold bridging at windows and doors; the height of the damp proof course; the height or depth of the foundations; wall cavity vents; and the floor joists carrying the master bedroom ensembles. That report was based upon two inspections, one on 21 June 2023 and the other on 11 March 2024, and the report itself was dated 13 November 2024. That report was supplemented by a structural report from Ross Vinter, structural engineer, dated 14 November 2024 based upon two inspections carried out on 27 March 2024 and 29 April 2024. Those two reports were therefore based on inspections carried out while the Walker action was proceeding (in the latter case, also on an inspection carried out subsequently) but were not prepared until around the time the present action was raised. Peter Drummond, architect, has prepared a report specifically for the purposes of this action. Finally, Corrinne McLeish, chartered quantity surveyor, has prepared a quantum report, setting out the cost of rectifying all the defects. It was instructed in November 2023 – when the Walker action was ongoing – but not finalised until later, being dated 8 October 2024.

[7] The defender does not oppose certification of Mr Drummond, including in relation to work already done. He does not oppose prospective certification of Ms McLeish, but does oppose retrospective certification for her. Otherwise, certification is opposed, root and branch, in respect of all witnesses.

The pursuers' pleadings

[8] The pursuers' pleadings, insofar as relevant to the present motion are, in summary, as follows. They aver, in Article 3 of condescendence, that the construction of the property was not completed to a satisfactory standard, nor to the standard required by their contract with Mr Walker. The defects in the property are identified by reference to the reports of Mr Welch, Mr Vinter, Mr Cameron, Mr Morris and Mr Crerar, which are all incorporated into the pleadings. Without prejudice to that generality, there then follow more detailed averments about: inadequate insulation within the property, spoken to by Mr Vinter's report; various defects itemised in Mr Morris's report, including defects in the staircase, a poor standard of finish caused by the removal of a partition wall, defects in the damp proof course and cavity vents, unsatisfactory floor surfaces and defects in the external rendering; inadequacies of the heating system and defects in the plumbing, under reference to both Mr Welch's report and Mr Morris's report; and a collapse of the septic tank structure, under reference to Dr Crerar's report. The pursuers then go on to aver that in issuing the PCCs the defender failed to use the knowledge, skill and care of a reasonably competent architect exercising ordinary skill and care; and, in particular, that such an architect would have identified the various defects which existed within the property. The defender's position in response is, first, that the existence of the defects is not known and not admitted; and second, that many of the duties desiderated by the pursuers extended beyond those of an architect of ordinary competence in relation to the provision of a PCC.

Submissions

Pursuers

[9] Senior counsel for the pursuers submitted that the correct approach was for the court to strive to achieve substantial justice. When it came to whether certification should be retrospective or not, the court generally focused on whether the other party would thereby be prejudiced. The present action had in all practical senses been contingent upon the action against Mr Walker. The pursuers had to prove, both, the presence of extensive defects, and a breach of professional duty on the part of the defender. Their averments about the presence of defects were (in effect) denied by the defender and had to be proved, which would be achieved by leading expert evidence. Certification, if granted, would not mean that the experts' charges would necessarily be recovered from the defender as part of any award of expenses. They might be disallowed by the auditor. Alternatively, it would be open to the court in making any award of expenses to make such provision as it considered appropriate, such as by finding that retrospective charges were not recoverable. The defender's arguments for not granting certification would remain open to him. Conversely, if certification were *not* granted, the charges could never be recovered by the pursuers under any circumstances, which would result in the defender receiving an unjustifiable windfall and the pursuers being denied substantial justice. The logical consequence of the defender's argument being correct was that the pursuers ought to have instructed an entirely new set of experts, specifically for the purposes of the present action, which made no sense.

Defender

[10] Counsel for the defender submitted that the pursuers were unjustifiably trying to pass on costs which had been incurred for a different action, to the defender in this action.

With the exception of Mr Drummond and Ms McLeish, it had not been shown that it was reasonable and proportionate to instruct any of the witnesses for the purposes of this action. Some of the reports, such as that in relation to the septic tank, bore no relation to what could be expected of the architect of reasonable competence exercising ordinary skill and care. As was apparent, all of the reports to which exception was taken had been instructed for the Walker action, or while it was ongoing, and two of them had been expressly prepared for that action. While it was acknowledged that the pursuers could not “unknow” what was in the reports, and that it made sense for people to take things from the reports, it did not follow that it was reasonable to certify all five witnesses who were objected to. It was unsatisfactory to leave it to the auditor to decide whether charges had been unreasonably incurred; the auditor would take his lead from the court. It was accepted that it was reasonable and proportionate to instruct Mr Drummond, since his evidence bore upon the question of whether the defender had been negligent, and retrospective sanction for him was not opposed. Insofar as Ms McLeish was concerned, the defender accepted that expert opinion evidence on quantum would be required, and certification of her for the future was not opposed, but the pursuers had not shown cause to certify her retrospectively.

Decision

[11] There are two discrete issues: first, whether, in relation to each witness, certification should be granted at all; and second, if so, whether the pursuers have shown cause for not having applied for certification before the work was done. As for the first of those, I accept the pursuers’ submission that in order to succeed in their action, they will require to prove the existence of defects, and the cost of putting them right. Although counsel submitted that the pursuer’s averments were not denied, the effect of their being not known and not

admitted is to put the pursuers to their proof. For the moment looking only to the future and applying an objective test, it is reasonable that expert witnesses be instructed to report on the existence and extent of the defects and, if necessary, to give evidence at proof. Note that the matter is not to be judged by consideration of whether the pursuers are likely to succeed in proving every fact that they set out to prove. For that reason, it is of no moment that the defender argues that he could not be expected to have identified certain of the defects, such as in relation to the septic tank. If the pursuers are wholly unsuccessful, then it will matter not a jot which witnesses have been certified, and which not. If they are unsuccessful in relation to part of their case, it will be open to the court to modify their entitlement to expenses in such manner as it thinks fit at the time. Further, it was both reasonable and proportionate that a range of experts be instructed to cover the panoply of defects said to exist; and indeed, in principle, it was both reasonable and proportionate, and probably necessary, to instruct expert evidence before the action was raised. Insofar as the instruction of these particular experts is concerned, it cannot possibly be a bar to their being instructed in this action that they were previously instructed by the same pursuers in a different action. So to hold would be to require the pursuers to have instructed a whole raft of new experts which would achieve the very opposite of economy in litigation, one underlying purpose of the 2019 Act of Sederunt.

[12] Turning to consider the specific reports founded upon there is a reasonable correlation between the reports and the averments with one exception, that being the report of Mr Vinter, where I have been unable to identify, at least in the pleadings which are available to me, any specific reference to structural defects, nor does the pursuers' motion shed any additional light on why it is or was reasonable and proportionate to instruct him in this action. I therefore consider it appropriate to certify all witnesses as skilled persons,

other than Mr Vinter, in relation to whom I will refuse the motion *in hoc statu*. If the pursuers are able to provide additional information, the certification of Mr Vinter can be considered of new.

[13] Turning to the question of whether certification should have retrospective effect, in other words that it should cover work already done, having already held that it is no bar to certification that the witnesses were previously instructed in a different action, equally that can be no bar in principle to retrospective certification. Even if reports were prepared for the purpose of, or in contemplation of, a different action, they might have a dual purpose. Still less can it be a bar to certification that some or all of the work was done by the expert in relation to a previous action but the report itself was prepared for the present one. As soon as it is accepted that reports are necessary for the present action, as they are, the simple question is whether, in the words of rule 5.3(5), the pursuers have shown cause for not having applied for certification before the work was done. On any view, the pursuers were entitled to instruct expert evidence before raising proceedings, when it was not possible to seek sanction, because the action was not in existence. That in itself is sufficient cause to justify the court making the requisite determination. For completeness, I do not wholly accept the pursuer's submission that the court's focus is on whether or not the other party would suffer prejudice were the motion granted. Prejudice, or the lack thereof, is relevant at the stage where the court is considering whether or not to exercise its discretion under rule 5.3(5), but that stage is only reached where the party seeking certification has first shown cause (as here). Prejudice might have arisen in the present case only because of the pursuers' delay in making the motion after the action had been commenced – which senior counsel freely accepted was down to oversight – but I am satisfied that no prejudice has been caused by that. While it is not helpful to analyse the issue by asking whether or not the

defender will enjoy a windfall benefit should retrospective sanction not be granted, I do not consider that the result of this decision is inherently unfair: the defender may require to pay for the cost of expert evidence which the pursuer reasonably and proportionately requires in order to prove the action against him. I therefore propose to exercise my discretion by granting retrospective sanction for all six witnesses in question.

[14] Finally, I should emphasise that the effect of this decision is not necessarily that the pursuers will be able to recover any or all of the costs of the reports in question. It will remain for the auditor to determine whether, as a matter of fact, the reports were prepared for the purposes of the present action, or in contemplation of it. That provides a further safeguard against any unfairness to the defender.

Disposal

[15] I have granted the motion to the extent of granting certification in respect of all the witnesses specified in the motion, other than Mr Vinter in relation to whom the motion has been refused *in hoc statu*. I have also made a determination in terms of rule 5.3(5) that the certification, in all cases including Ms McLeish, has effect for the purposes of work done, or expenses incurred, before the date of certification.