



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 5
XA16/20

Lord Turnbull
Lord Doherty
Lord Tyre

OPINION OF THE COURT
delivered by LORD TURNBULL

in the

NOTE OF OBJECTIONS

by

ABERDEEN COMPUTER SERVICES LIMITED

Appellant

against

THE SCOTTISH LEGAL COMPLAINTS COMMISSION

Respondent

Appellant: I Leask (Lay Representative)
Respondent: Byrne; Anderson Strathern LLP

24 January 2023

[1] This decision of the court arises out of an appeal to the Court of Session brought by Aberdeen Computer Services Ltd (“the appellant”) against a decision of the Scottish Legal Complaints Commission (“the Commission”). Ms Iris Leask is the appellant’s director. She acted as party representative for it in the proceedings which were concluded in the appellant’s favour by an interlocutor pronounced on 20 January 2021. That interlocutor

included an order finding the Commission liable to the appellant in the expenses both of the appeal and of the application for leave to appeal. The interlocutor required the account of expenses, when lodged, to be remitted to the Auditor of Court ("the Auditor") to tax.

[2] The court is now concerned with a note of objections to the report of the Auditor. Ms Leask continues to appear for the appellant.

[3] The background to the current issue is this. In 2011 a Judicial Factor was appointed to the appellant. Subsequently, acting on its behalf, Ms Leask instructed a firm of solicitors in Aberdeen to provide legal advice in connection with the appointment and discharge of the Judicial Factor. She became dissatisfied with that advice and, in April 2017, she submitted a complaint to the Commission concerning the firm and two of its solicitors.

[4] Acting under the terms of the Legal Profession and Legal Aid (Scotland) Act 2007, and the Rules of the Scottish Legal Complaints Commission 2016, the Commission proceeded to investigate the complaints made. Twelve issues were identified which became the subject of eligibility decisions issued on 20 December 2017 and 21 June 2019. In between those dates an investigation report dated 27 July 2018 was issued and finally, on 10 October 2019, a determination report was issued along with a determination decision.

[5] On 13 February 2020 the appellant was granted leave to appeal against the decision of 10 October 2019. The challenge included a ground alleging procedural impropriety. In due course, the Commission came to accept that there had been procedural impropriety in respect of its decision making in respect of some of the issues identified for determination.

[6] By its decision of 20 January 2021 the court allowed the appellant's appeal, quashed the two eligibility decisions, the investigation report, the determination report and the determination decision. The court of new remitted the twelve identified issues to the

Commission for investigation and determination and made the award of expenses mentioned above.

[7] The appellant submitted an account of expenses which came to just under £47,000. A diet of taxation was then fixed at which the Auditor considered written submissions on behalf of both the appellant and the Commission. After various exchanges between himself and Ms Leask the Auditor issued his report on 20 April 2022. In that report he stated the amount of expenses due by the Commission as taxed at the sum of £5,559.49.

[8] The procedure for challenging a report by the Auditor is set out in Rule of Court 42.4 which provides that a party to the cause may object to the Auditor's statement by lodging in process a note of objections within 14 days after the date of the statement. This is the course which was followed by Ms Leask acting on the appellant's behalf, although the time limited was extended to permit her to do so. The Rule of Court provides that on intimation of a note of objections the Auditor shall lodge a minute stating the reasons for his decision in relation to the items to which objection is taken in the note. The Auditor complied with this requirement by minute and note lodged with the court on 7 June 2022.

[9] Rule 42.4(3) provides that after the minute of the Auditor has been lodged in court the party who lodged the note of objections shall, in consultation with any other party wishing to be heard, arrange with the Keeper of the Rolls for a diet of hearing before the appropriate court.

[10] Despite various reminders sent to Ms Leask by the Commission no diet of hearing was fixed. In the absence of any response to their enquiries as to her intention, a motion was enrolled on 28 October 2022 to repel the objections in the appellant's note. After further e-mail exchanges between the appellant, the Commission and the court, parties were informed that a hearing for the opposed motion had been fixed for 9 December and that if

the appellant's opposition to the Commission's motion was successful the court would proceed immediately to a hearing on the note of objections. Written submissions were ordered to be lodged by 25 November. In light of the communications between the parties the Commission did not insist on its motion and the court proceeded to hear the parties on the note of objections.

Appellant's submissions

[11] In her note of objection Ms Leask specified six matters upon which she sought to challenge the Auditor's assessment:

- Outlays incurred on 15 November 2019 and March 2020 for delivering documents to the court by courier which were disallowed in whole.
- Outlays incurred on 19 November 2019 and 20 March 2020 for serving documents on the Commission by messengers-at-arms which were disallowed in whole.
- The cost of printing paper purchased on 30 August 2021 and a toner cartridge purchased on 17 March 2021 which were disallowed.
- The rate of £35 per hour allowed in respect of the time reasonably expended by Ms Leask on work connected to the appeal.
- The amount of time allowed by the Auditor as reasonably required in connection with the proceedings.

- The sum charged as fee fund dues.

It was explained in the note that documents were delivered to the court by courier as Ms Leask did not trust the postal service having been let down by it on an earlier occasion. For similar reasons she chose to use messengers-at-arms to serve documents on the Commission. In addition, she had understood from the court administrative staff that this was the appropriate method of service. The invoice for the fee paid on 20 March 2020 could not be located at the time of the taxation, but had since been discovered and was tendered with the note of objections.

[12] In addition to these points of challenge Ms Leask identified a further two matters which she submitted ought to have been included in the sum of taxed expenses:

- Travel time of 9 hours in relation to her appearance at the Court of Session.
- An uplift in the total allowed to reflect the difficulties and hardship which she explains she has had to face in dealing with these proceedings over a lengthy period of time.

[13] In her oral submissions Ms Leask sought to emphasise the financial loss to her company which she contended had accrued over the years since she had first instructed the solicitors who were the subject of her complaint. She considered that the work which she had undertaken in preparation for presenting the appeal was worth far more than the hourly rate of £35 awarded by the Auditor. She explained that she had set out an hourly rate of £225 in her account of expenses as this was the rate which the appellant had been charged by the solicitors complained about. Whilst she recognised that the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019 prohibited the Auditor from awarding a party litigant more than two-thirds of the rate which would have been allowed had the work been

undertaken by a solicitor, she submitted that she ought to have been allowed an hourly rate which was much nearer to that two-thirds maximum. She also contended that the sum charged as fee fund dues ought to be repaid as she had been unfairly penalised in the setting of this sum due to a mistake on her part in the manner in which she had drafted the account of expenses.

Submissions for the Commission

[14] Counsel for the Commission outlined the restricted scope of a challenge to the Auditor's taxation. The court's power of review was limited, akin to that available in a judicial review and its function was restricted to detecting any failures in law (*Tods Murray v Arakin* (No 2) 2002 SCLR 759). The court was not permitted to substitute its own view for that of the Auditor, whose decision stood in a similar position to the verdict of a jury (*Wood v Miller* 1960 SC 86). Accordingly the court should not interfere with the weight attached to any matter by the Auditor. The process of challenge by way of note of objections did not permit an examination of any alleged irregularity in procedure in the process of taxation (*Urquhart v Ayrshire and Arran Health Board* 2000 SLT 829). The application of these principles to the complaints made by the appellant demonstrated that the note of objections should be repelled.

[15] Despite these submissions one concession was made. Entry no 216 in the taxed account of expenses was the fee of £273.64 paid by the appellant to Scott & Co., Messengers-at-Arms to serve documents connected with the appeal on the Commission on 19 November 2019. Without elaborating on the reason for doing so, counsel informed the court that the Commission was prepared to accept the legitimacy of this charge and invited the court to uphold the note of objections to this extent. The identical charge at entry no. 509 in the

account, for service of documents on 20 March 2020, remained properly disallowed as no vouching of it had been tendered to the Auditor.

Decision

[16] It is the function of the Auditor to determine the level of recoverable fees to which a party holding an award of expenses is entitled. In doing so he is required to apply the terms of the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019. Paragraph 3.10 of the Rules provides:

- 1) “Where the entitled party was not represented by a solicitor the Auditor may, subject to paragraph (3), allow a reasonable sum in respect of work done by the entitled party which was reasonably required in connection with the proceedings.
- 2) In determining what would be a reasonable sum the Auditor is to have regard to all the circumstances, including –
 - a) the nature of the work;
 - b) the time required to do the work;
 - c) the amount of any earnings lost during that time;
 - d) the importance of the proceedings to the entitled party; and
 - e) the complexity of the issues involved in the proceedings.
- 3) Any sum allowed under this rule must not exceed two thirds of the charges that would be allowed under this Chapter if the same work had been done by a solicitor.”

[17] Paragraph 4.2 of the Rules provides that outlays reasonably incurred in order to conduct the proceedings in a proper manner are to be allowed.

[18] As submitted by counsel for the Commission, the role of the court when dealing with objections to a report by the Auditor of court is a limited one. It was explained in the opinion of the court delivered by the Lord President (Carloway) in the case of *Shanley v Stewart* 2019 SLT 1090 at paragraph 25. What the Lord President said in that case was:

“In carrying out his task, the auditor is afforded a wide discretion. He sees a very large number of accounts over a considerable range of cases (*Jarvie v Greater Glasgow Primary Care NHS Trust* [2006] CSOH 42, Lord Carloway at para [39]). The court has no equivalent experience (*Glasgow Caledonian University v Liu* [2016] CSIH 91, Lord Brodie, delivering the Opinion of the Court, at para [7]). Accordingly,

'[i]t is not the function of a Judge reviewing an exercise of a discretion to substitute his own view of the material under consideration. The decision of the Auditor stands in a not dissimilar position to the verdict of a jury. If the Auditor had no material to go on, his exercise will fall, but if he had material, then, so long as the decision reached on it was not unreasonable, it cannot readily be upset.' (*Wood v Miller* 1960 SC 86, LJC (Thomson) at p. 98).

The available grounds of objection are analogous with those available in a judicial review (*Tods Murray WS v Arakin Ltd* (No 2) 2002 SCLR 759, Lord Mackay at p. 764). The court can only interfere if, for example, the Auditor has:

'misdirected himself in law or has taken irrelevant circumstances into account or has failed to take into account relevant considerations or has misunderstood the factual material put before him. Where, as will very often be the case, his decision depends on the exercise of discretion, it will only be susceptible to being overturned where it is such that no reasonable decision-maker could come to that conclusion.' (*Glasgow Caledonian University v Liu, supra*, para 6)".

[19] This summary of the legal position was set out by the Auditor in the note attached to his minute of 7 June 2022. It is therefore clear that although Ms Leask appeared for the appellant as a party representative, she had the benefit in advance of the hearing of an explanation of the legal position and of guidance as to the limits of the court's powers in this matter. In particular, she ought to have understood that the court would not substitute its own assessment for that of the Auditor.

[20] It is against this background that the court has to examine the reasons given by the Auditor for his decision in relation to the items to which objection was taken in the note.

[21] The Auditor informs the court that no such explanation for using the courier service as is now stated was placed before him. Based upon his knowledge and experience he concluded that the costs of engaging a courier to deliver documents to the court were not reasonably incurred in order to conduct the proceedings in a proper manner. In relation to the second outlay incurred to messengers-at-arms, that of 20 March 2020, the Auditor explains that the outlay for that date was not vouched by way of the receipt which is now tendered.

[22] The Auditor's assessment of these matters was carried out according to the tests set out in paragraphs 3.10 and 4.2 of the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019 and in the exercise of the discretion afforded to him by virtue of his experience in such matters. His decision cannot be revisited on the basis of information not placed before him, and his assessment in respect of these matters cannot be challenged on the grounds now advanced.

[23] The Auditor informs the court that he allowed the outlay of £15 for printing paper, as he was invited to do, and allowed the cost of toner cartridges except for the outlay on 17 March 2021, as no further printing was reasonably required on or after that date. There is no valid challenge to his assessment in relation to these matters.

[24] In relation to the time charge rate, the Auditor informed the court that he sought to identify a reasonable sum by way of hourly rate in respect of the work reasonably required to be undertaken by Ms Leask in connection with the proceedings. He applied his knowledge and experience of similar matters in deciding on the hourly rate of £35. No fault in the Auditor's approach has been identified in submissions. No particular rate is suggested as being more appropriate, beyond a suggestion that the Auditor should have settled on 2/3 of the hourly rate allowable to a solicitor. The appellant's submissions in support of this point cannot be given effect to. They amount to no more than a disagreement with the Auditor's assessment and with the exercise of his judgement.

[25] In relation to the time allowed, the Auditor reports that, of the just over two hundred hours claimed for, he allowed just under one hundred and thirty hours as reflecting work reasonably required in connection with the proceedings. Applying his knowledge and experience he concluded that the amount of time claimed for in respect of certain aspects of the work was excessive. He concluded that, along with work in respect of outlays

unreasonably incurred and arising on account of errors by the appellant, this could not constitute work reasonably required in connection with the proceedings. Again, the appellant is unable to identify any relevant fault or misdirection of the part of the Auditor. Disagreement with, or dissatisfaction with his assessment does not constitute a valid challenge. The appellant's complaint cannot be given effect to.

[26] The Auditor has also charged a sum as fee fund dues. This sum was not calculated on the basis of some mistake in the form of the account as presented, as Ms Leask appeared to think. It was calculated according to the table of fees payable in the Court of Session. It is a charge fixed according to a formula fixed by statutory instrument. It is not a sum calculated in exercise of the Auditor's discretion. It cannot be waived. In the present case the fee due was calculated in terms of schedule 2 part III paragraph 1 of the Court of Session etc. Fees order 2018. That paragraph provided (in common with the same paragraph in the previous order and in the current order dated 2022) that the fee was to be determined on the basis of the amount of the account as submitted. The order required the Auditor to charge a fee of, in effect, 5% on every £100 or part thereof claimed in the account as submitted by the party entitled. The total claimed by the appellant was £46,960.60 resulting in a charge of £2,351.

[27] In ordinary circumstances the fee charged is payable by the paying party but this is subject to revision if any of the account as submitted is taxed off or disallowed. The allocation of the fee fund dues as between the parties to a taxation was explained by Lord Glennie in the case of *Honer v Wilson* 2007 SLT 54 at paragraph [10] as follows:

"It may be of interest to those who are unfamiliar with the niceties of taxation to note that although the fee fund dues are meant to be calculated on the amount *claimed*, the paying party is only required to pay that part of the fee fund dues which is attributable to the expenses *as taxed and found due*. This practice dates back at least to the first part of the nineteenth century: see MacLaren, Expenses at 429 and *Hogg v*

Balfour [(1835) 13 S 451]. In this way, the paying party is not prejudiced by the entitled party having inflated his claim (if he has); and indeed it acts as a disincentive to the entitled party to act in this way, since he knows that he will be left with the liability for such part of the fee fund dues as is attributable to the account of expenses submitted by him being excessive.”

[28] Following this approach the consequence for the appellant was that the Auditor found it liable for the fee fund dues to the extent of £2,085. That was a decision which accorded with the law and was a direct consequence of the excessive sum which the appellant chose to claim for expenses and outlays. However, since the respondent now accepts that the outlay of £273.64 already discussed ought to be recoverable, a consequence is that the recoverable fee fund dues ought to be increased by £13 from £266 to £279.

[29] There remain the appellant’s two final claims. In relation to the first of these, the claim for travel time, no such charge was included in the account of expenses and it was therefore not before the Auditor for assessment. Unsurprisingly, no such component featured in the taxed account. The Auditor cannot be criticised over his decision in relation to an item not claimed for and it is not the function of the court to assess the suitability of additional claims. The second claim, for an uplift, is one which lies out with the powers of the court at this stage, and is in any event not a competent claim in circumstances where the party was not represented by a solicitor.

[30] Finally, the court raised with counsel for the Commission a query about the arithmetic in the taxed account and requested a response to be submitted in writing to it and to Ms Leask. It allowed Ms Leask an opportunity to submit observations if she so wished in light of that explanation. Having seen an explanation on behalf of the Auditor and Ms Leask’s response the court is satisfied that the concern it raised has no substance. For the reasons set out above the note of objections will be sustained to the extent of allowing a further outlay of £273.64, and an additional sum by way of fee fund dues of £13, resulting in

the total taxed sum to which the appellant is entitled being £5,846.13. That apart, the challenges advanced by the appellant must be repelled.