

SHERIFFDOM OF GRAMPIAN, HIGHLAND AND ISLANDS AT ABERDEEN

[2019] SC ABE 11

ABE-B298-18

NOTE BY SHERIFF ANDREW MILLER

in the cause

GEORGE McCALLUM NIBLOCK  
AS CONVENOR OF ABERDEENSHIRE ENVIRONMENTAL FORUM

Pursuer

against

ABERDEENSHIRE COUNCIL

Defender

**Pursuer: Whittle;**  
**Defender: Ingram;**

ABERDEEN, 19 December 2018

**Interlocutor**

The sheriff, having resumed consideration of the cause: Refuses the pursuer's third crave, repels the pursuer's second plea in law, Sustains the defenders' second plea in law and therefore Refuses the pursuer's opposed motion for an order in terms of section 91(12) of the Environmental Protection Act 1990; Finds the pursuer liable to the defenders in the expenses of the cause, as taxed; and Allows an account thereof to be given and remitted to the Auditor of Court to tax and report thereon.

**NOTE:****Introduction**

[1] In terms of a judgment issued on 31 October this year ('the judgment') I refused the pursuer's crave for a litter abatement order in terms of section 91(6) of the Environmental Protection Act 1990 ("the 1990 Act") in relation to a 6.8-mile stretch of the A96 dual carriageway between the northern border of the Aberdeen City Council local authority area, where it adjoins the Aberdeenshire Council local authority area, and the town of Inverurie, Aberdeenshire ('the road').

[2] That judgment continued consideration of the pursuer's third crave, which sought an award of expenses in favour of the pursuer in terms of section 91(12) of the 1990 Act in the event of such an adverse finding, and the wider question of liability for the expenses of the action, to a further hearing. The date originally assigned for that further hearing, namely 14 November 2018, proved to be unsuitable and the hearing was continued until 12 December, when it called before me.

[3] As at the proof, the pursuer was represented by his solicitor Mr Whittle and the defenders by their solicitor Mr Ingram. Having heard their submissions I made avizandum.

**The relevant provisions of the 1990 Act**

[4] Section 91(12) of the 1990 Act provides as follows:

"Where a... court is satisfied on the hearing of a complaint under this section—  
(a) that, when the complaint was made to it, the highway or land in question was defaced by litter or refuse or, as the case may be, was wanting in cleanliness, and  
(b) that there were reasonable grounds for bringing the complaint, the court shall order the [defender] to pay such reasonable sum to the [pursuer] as the court may determine in respect of the expenses incurred by the [pursuer] in bringing the complaint and the proceedings before the court.

Paragraph [97] of the judgment sets out my understanding of the purpose of this provision.

[5] As noted in paragraph [97] of the judgment, section 91(12) appears to impose a duty on the court to make an award of expenses in favour of the pursuer so long as the conditions set out in paragraphs (a) and (b) are met, leaving room for discretion only in relation to the issue of what would constitute a “reasonable sum” for these purposes. The requirements of section 91(12) appear to me to be cumulative, in the sense that both of parts (a) and (b) require to be satisfied before an award of expenses under this provision will be appropriate.

### **Submissions**

[6] Mr Whittle submitted that the first leg of the cumulative test in terms of section 91(12) of the 1990 Act was satisfied by the evidence led at proof. Also, findings in fact 17 and 36 and paragraphs [42] and [145] of the judgment supported the assertion that, when the pursuer’s complaint was made, by the raising of his summary application, the highway or land in question was defaced by litter or refuse or, as the case may be, was wanting in cleanliness. That evidence came in particular from various passages in the pursuer’s affidavit and from the photographs taken by him on 25 March 2018 showing the condition of various locations along the road at that time. Also the defenders’ (undated) written response to the pursuer’s section 91(5) notice, which it was agreed that the pursuer never received prior to the raising of the action, made it clear (at page 5) that, as at the date of that response, the carriageway had not been swept since the completion of “targeted sweeping” in October 2017.

[7] As to the second leg of the section 91(12) test, Mr Whittle submitted that there were reasonable grounds for bringing the complaint. The pursuer had resorted to legal proceedings only after a period of eight years during which he had engaged with the defenders in relation to his concerns about the general standard of street cleanliness across

Aberdeenshire. The case of *Hemming MP v Birmingham City Council* [2015] EWHC 1472 (Admin) could be distinguished on the basis that it was agreed that the defenders' written response to the pursuer's section 91(5) notice was not received by the pursuer prior to the raising of the action. He had not raised the action in the knowledge of steps taken by the defenders to address the concerns identified in his notice. Finally, the pursuer had raised the action in his capacity as convenor of Aberdeenshire Environmental Forum, a group which seeks to raise and facilitate the discussion of environmental issues as a matter of public interest.

[8] Accordingly Mr Whittle invited me to make an order in terms of section 91(12) of the 1990 Act to order the defender to pay the pursuer's expenses as taxed, notwithstanding the refusal of the substantive orders craved by the pursuer.

[9] For the defenders Mr Ingram began by providing the court with information concerning a meeting between the defenders and BEAR Scotland on 8 November 2018, at which the issues raised in paragraphs [156] and [157] of the judgment were discussed. The discussion included the issue of how to improve communication between the agencies so as to allow the defenders more realistic opportunities to take advantage of planned roadworks in order to carry out litter-picking work on and around the road. BEAR Scotland also confirmed that they accepted responsibility for the removal of animal carcasses from the carriageway, on being made aware of the presence of same.

[10] Although the defenders had accepted that some locations along the road had required attention in the sense that litter was present there, paragraph [145] of the judgment confirmed that, at most, all the pursuer had proved was that, at the dates of various photographs taken by him, there were some locations along the road at which items of litter were present on or adjacent to the road or dirt or detritus was present on the road surface.

This did not satisfy the requirements of section 91(12)(a) of the 1990 Act. In any event the judgment recognised (paragraph [154]) that, by virtue of the nature of the cyclical nature of the littering and road cleanliness issues affecting the road and the various procedures the defenders had in place prior to the raising of the proceedings to address those issues, such issues which the pursuer had shown to exist at the time when proceedings were raised were not due to breach by the defenders of their duties under section 89(1) and (2) of the 1990 Act.

[11] So far as section 91(12)(b) of the 1990 Act was concerned, Mr Ingram submitted that the pursuer did not have reasonable grounds for bringing his complaint in relation to this entire 6.8-mile stretch of road, rather than focussing on particular, identified points along the road in relation to which he wished to offer to prove a breach of the relevant duties by the defenders.

[12] Mr Ingram invited me to refuse the pursuer's motion for an order under section 91(12) of the 1990 Act. He invited me to make an award of expenses in favour the defenders, on the basis of the general principle that expenses follow success.

[13] In a brief response Mr Whittle opposed the defenders' motion for an award of expenses. He reiterated the pursuer's position that his decision to raise these proceedings had followed a period of eight years or so of dialogue with the defenders, which had not been concluded to his satisfaction, and highlighted the information provided by Mr Ingram about discussions between the defenders and BEAR Scotland which may bring about improvements in practice, which may not have resulted but for the pursuer's decision to raise these proceedings.

**Decision and reasons**

[14] I refuse the pursuer's motion for an order under section 91(12) of the 1990 Act finding him entitled to recover the taxed expenses of the action from the defenders.

[15] The judgment makes it clear (paragraphs [132] to [135]) that I took the view that the pursuer's decision to address the condition of this entire stretch of road, rather than the condition of specific sites along the road, did not give rise to any issue of competency but did have the effect of requiring the pursuer, in order to succeed, to establish that the requirements of section 91(6) of the 1990 Act could fairly be said to have been satisfied, on the evidence, not in relation to particular sites or locations along the road but in a consistent manner in relation to the entire 6.8-mile stretch.

[16] Paragraph [92] of the judgment explains the approach which I took to the interpretation of the expressions "...defaced by litter or refuse..." and "...wanting in cleanliness..." which appear in section 91(6) of the 1990 Act. It seems to me that I must interpret those expressions in precisely the same way where they appear in section 91(12) of the 1990 Act.

[17] Paragraph [102] of the judgment explains the approach which I applied to the meaning and operation of section 91(6) as a whole.

[18] Applying those passages, paragraphs [144] and [145] of the judgment set out the reasons for my conclusion that the pursuer had not established that the requirements of section 91(6) of the 1990 Act could fairly be said to have been met in a consistent manner with regard to this stretch of road as a whole. Thus I was not satisfied that the pursuer had established that the condition of the road or the adjoining land along the whole of this stretch, either when the proceedings were raised by him or at the time when the court had to decide whether to grant the litter abatement order craved by him, inferred a breach of the

defenders' duties under section 89(1) and (2) of the 1990 Act with reference to the entire stretch of road.

[19] Applying that reasoning to the pursuer's crave for an order under section 91(12) of the 1990 Act, it follows that I am not satisfied that, when the pursuer made his complaint (by raising these proceedings), "...the highway or land in question was defaced by litter or refuse or, ..., was wanting in cleanliness..." within the meaning of section 91(12)(a) of the 1990 Act. Therefore I am not satisfied that the first leg of the test for the grant of an order in terms of section 91(12) is satisfied. It follows, given that the requirements of section 91(12) appear to be cumulative, that I cannot make the order sought by the pursuer.

[20] For completeness however, so far as the second leg of the test is concerned, I am not satisfied that it was reasonable for the pursuer to direct this action towards the entire 6.8-mile stretch of the road and the adjoining land, rather than towards particular locations along the road at which he hoped to establish breaches of the relevant statutory duties. I do not accept the argument that the pursuer should be regarded as having had reasonable grounds to raise this action because he perceived himself to be acting in the public interest and because he had spent a number of years previously discussing his wider complaints with the defenders. Ultimately his complaint was not established after proof. It appears that the pursuer chose to direct this action against this stretch of road not solely because of particular concerns which he had about the condition of the road but because he had designated the road as representative of his wider concerns about the standard of street cleanliness throughout Aberdeenshire. In my view that is not a legitimate use of the legislation.

[21] For these reasons I refuse the pursuer's crave for an order in his favour under section 91(12) of the 1990 Act.

[22] I now consider the defenders' motion, having regard to the general principles which govern the court's wide discretionary powers in relation to liability for expenses, for an order finding the pursuer liable to the defenders in relation to the expenses of the cause. It appears to me that that motion was competently made at the appropriate point in the proceedings, even in the absence of a crave or plea in law for the defenders seeking an award of expenses in their favour (Macphail, *Sheriff Court Practice*, 3<sup>rd</sup> Edition, paragraphs 19.03 and 19.04).

[23] It seems to me that there is no reason to depart from the general principle that expenses should follow success. The observations in the judgment which have been the subject of subsequent discussion between the defenders and BEAR Scotland were made in the course of refusing the substantive orders sought by the pursuer. It is no doubt to be hoped that relevant agencies would take note of the terms of a judgment in a case of this nature, dealing with the duties of organisations which carry out functions which may affect the wider community. However I see no reason why that should affect the question of liability for the expenses of the action.

[24] Accordingly in my view it is appropriate that the defenders be entitled to recover the taxed expenses of defending this action from the pursuer, in the representative capacity in which he brought the action, and I shall make an order to that effect. The process of quantifying the expenses to which the defenders ought to be entitled may be complicated by the fact that, as I understand it, they were represented by their own in-house solicitors. However Mr Ingram stated that the defenders had nevertheless been put to some expense in defending this action. The issue of quantification of the defenders' expenses is a matter for consideration by the Auditor of Court in due course.