SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2019] SC EDIN 12

PN75/18

NOTE BY SHERIFF PETER JOHN BRAID

in the cause

DANIEL GRAHAM

Pursuer

against

ENVIRO-CLEAN (SCOTLAND) LIMITED

Defenders

EDINBURGH, 12 February 2019

NOTE

[1] The pursuer's motion 7/7 of process (to interpone authority to a joint minute and to grant various ancillary orders regarding expenses) called before me on 4 February 2019, having previously been continued. The motion was opposed by the defenders only in so far as it sought sanction for the employment of junior counsel. That part of the motion is in the following terms:

> "To certify the cause as suitable for the instruction of junior counsel for the purposes of providing an opinion on quantum; preparing initial writ (*sic*); preparing for and attending initial consultation with the pursuer; preparing adjustments and statement of valuation of claim for the pursuer; preparing for and attending consultation on tender with the pursuer; and preparing for and attendance at pre-trial meeting".

[2] The ground of opposition had shifted since the motion was first lodged and argued, but is now in the following terms:

> "Sanction for counsel is agreed. However, the extent of input sought is excessive in a case of this value and complexity, being dealt with by this experienced PI firm. In particular, it is within the competence of an experienced PI specialist to:
> - carry out the initial consultation with the pursuer;
> - draft the initial writ;
> - draft adjustments; and
> - draft a statement of valuation of claim;
>
> The extent of counsel's fees recoverable from the defenders ought to be restricted".

[3] Both parties favoured me with written submissions, supplemented by oral ones. Both parties wish the court to micro-manage counsel's fees, but in different ways. The parties' respective positions may be summarised as follows. The pursuer wishes sanction to be granted specifically for every piece of work undertaken by counsel, the rationale for this apparently being a desire to remove any possible argument before the auditor as to which counsel's fees are to be allowed and which are not. The defenders, on the other hand, as the opposition to the motion makes clear, wish sanction to be restricted, so as to exclude the various pieces of work specified. Their position is that the only pieces of work done by counsel for which they are willing to pay are the opinion on quantum (which, ironically, may be an extra-judicial expense), preparing for and attending a tender consultation and preparing for and attending the pre-trial meeting. Somewhat contradictorily, perhaps, the defenders' position is also that the court should simply grant sanction for counsel (that is, for the whole proceedings) and that thereafter the extent and amount recoverable from the defenders should be within the remit of the auditor. The pursuer's objection to that was, as I understand it, twofold: first, that the auditor might not allow that which ought to be allowed; and, second, it might take up to a year for any taxation to take place.

[4] Before discussing those submissions further, it seems to me, and indeed it was apparent from parties' submissions both on paper and during the hearing, that there is a degree of confusion as to the nature of the court's role in deciding whether or not grant

sanction, and what the effect of granting sanction is. There also appears to be some confusion as to what the court expects in a motion for sanction. Accordingly, it may be helpful to set out some basic principles, or at least observations, for the guidance of agents in future. Before doing that, it is helpful to remind ourselves of the terms of the provision which now regulates the granting of sanction for counsel in the sheriff court, namely, section 108 of the Courts Reform (Scotland) Act 2014. It provides:

> **"108 Sanction for counsel in the sheriff court and Sheriff Appeal Court**
> (1) This section applies in civil proceedings in the sheriff court or the Sheriff Appeal Court where the court is deciding, for the purposes of any relevant expenses rule, whether to sanction the employment of counsel by a party for the purposes of the proceedings.
> (2) The court must sanction the employment of counsel if the court considers, in all the circumstances of the case, that it is reasonable to do so.
> (3) In considering that matter, the court must have regard to—
> (a) whether the proceedings are such as to merit the employment of counsel, having particular regard to—
> (i) the difficulty or complexity, or likely difficulty or complexity, of the proceedings,
> (ii) the importance or value of any claim in the proceedings, and
> (b) the desirability of ensuring that no party gains an unfair advantage by virtue of the employment of counsel.
> (4) The court may have regard to such other matters as it considers appropriate.
> (5) References in this section to proceedings include references to any part or aspect of the proceedings.
> (6) In this section—
> *"counsel"* means—
> (a) an advocate,
> (b) a solicitor having a right of audience in the Court of Session under section 25A of the Solicitors (Scotland) Act 1980,
> *"court"* , in relation to proceedings in the sheriff court, means the sheriff,
> *"relevant expenses rule"* means, in relation to any proceedings mentioned in subsection (1), any provision of an act of sederunt requiring, or having the effect of requiring, that the employment of counsel by a party for the purposes of the proceedings be sanctioned by the court before the fees of counsel are allowable as expenses that may be awarded to the party.
> (7) This section is subject to an act of sederunt under section 104(1) or 106 (1)."

[5] From the above, it seems to me that the following observations can be made:

1. As is clear from subsections (1) and (6) read together, the significance of sanction being considered by the court is not to allow the court to determine whether or not

the fees of counsel are allowable for any particular piece of work. That is a matter for the auditor. However, the auditor cannot allow counsel's fees for any piece of work unless sanction has been granted. Thus, sanction is a necessary, but not sufficient, prerequisite for counsel's fees to be allowed on taxation.

2. The correctness of the foregoing is underlined by remembering that sanction need not be granted after the event. It may also be (and occasionally is) granted at the outset of the case. The court cannot possibly approve counsel's fees for work, before it is undertaken. There is no difference in principle between sanction which is granted before, and after, the work has been done.

3. It follows from the above that the best outcome for a party seeking sanction is sanction for the whole proceedings (hereinafter referred to as blanket sanction). The greater includes the lesser. So, to the extent that the pursuer's motion was predicated on a belief that he would be better off by having sanction granted for particular pieces of work, rather than blanket sanction, that belief is misconceived.

4. Where counsel has been employed throughout the case, then the court would expect blanket sanction to be sought (unless the pursuer, for some reason, does not seek sanction for a specific piece of work done by counsel).

5. Accordingly, in cases where counsel has been so employed, any practice whereby a party routinely seeks sanction for specified work (however that practice came about) should cease. While section 108 makes clear that sanction may be granted for the whole proceedings or any part thereof, subsection (2) also makes clear that the court must consider all the circumstances *of the case* (emphasis added). While this will not invariably be so, it is likely that in most cases the circumstances will either justify sanction being granted for the whole case, or not at all. For

example, matters such as importance or value, complexity and difficulty are such that they generally pervade the whole case, not simply parts of it.

6. Where counsel has been instructed for only part of the case, the guidance above still applies. The auditor cannot allow counsel's fees for more work than counsel did. Thus, if counsel were instructed only for the proof then it makes no difference in practice whether sanction is sought for the proof or the proceedings. That said, if counsel was in fact instructed only for part of the case, it would perhaps be helpful to the opposing party to know that sanction was sought only for that part, if only to avoid unnecessary opposition. However, the submissions accompanying the motion should also make clear what work was done (see below).

7. Where a motion for sanction is intimated, the first question for the opposing party is whether or not sanction should be granted at all. In many cases there will be no issue. In other cases the opposing party's position will be that counsel should not be sanctioned at all and, indeed, most opposed motions are argued on that basis. However, it is also open to a party to argue (or parties to agree in a joint minute) that sanction should be granted for certain parts of the case but not others. For example, it might be conceded that there were difficulties surrounding a proof (perhaps one which involved the leading of child witnesses) which did justify counsel but that otherwise the case was not of such complexity or importance to merit counsel.

8. However, it should be borne in mind that counsel, once instructed, is likely to do the sort of work which counsel typically does, that is (to quote *Macphail*, para 12.21): "to "advise, draw pleadings and appear in sheriff court proceedings". To that list, in personal injury actions, might be added the preparation of statements of valuation, and attendance at pre-trial meetings.

9. However, under reference to 5 above, a case will generally either merit sanction for the employment of counsel, or not. In general, it will not be appropriate for the court to allocate work which would normally be done by counsel, as between counsel and the instructing solicitor, in a case which merits the employment of counsel.

10. Ultimately, it will always be for the auditor to decide whether counsel's fees for a particular piece of work should be allowed or not. In carrying out that exercise, I would not expect the auditor to disallow a piece of work simply because it was done by counsel, where blanket sanction has been granted. So, necessary pleadings (such as the initial writ) should generally be allowed. Whether the work done was excessive (irrespective of who did it) or whether counsel's fees are reasonable will always be matters for the auditor.

11. By the same token, if the court were to sanction a particular piece of work – for example, an opinion pre-litigation – it would be open to the auditor to rule that the work done was not an expense of process and disallow the charge on that basis.

12. Finally, none of the foregoing detracts from the need to specify in the motion the submissions in support of the motion (helpfully, at least in the case of e-motions, Form G6A contains a section headed "Submissions in support of motion (if required)" for this to be done). This will often entail a description of the work done by counsel.

[6] Drawing all of the above together and applying it to the motion before me, it can be seen that the pursuer's approach is misconceived on several levels. He cannot be in a better position by specifying the work done by counsel, for which sanction is sought, than he would be if blanket sanction were granted. Even if sanction for counsel's opinion on

quantum pre-litigation were granted, that would not prevent the auditor from ruling that such an expense was extra-judicial. Equally, the defenders' position is misconceived to the extent that it is founded on a belief that once sanction has been granted, the auditor may disallow an item simply because it was done by counsel and not by the solicitor. Further, there is an inherent inconsistency in the defenders' assertion that parts of the action are suitable for employment of counsel, but not others. Finally, I hope that the assertion by counsel for the pursuer that it takes up to a year for an account of expenses to be taxed by the sheriff court auditor is not correct, but even if it is, that can play no part in my reasoning one way or the other.

[7] That all said, in the present case, before granting sanction to any extent, I still require to be satisfied that the section 108 test is met. Agreement of the parties is not conclusive although it is a factor to which much weight falls to be attached. I note that the opening sentence in the defenders' written submissions is that "it is agreed that this cause is suitable for sanction for counsel". In those circumstances not a lot more need be said, particularly having regard to the value of the cause (which settled for a not insignificant five-figure sum). Although liability was admitted, the defenders advanced a number of arguments regarding causation. Calculation of quantum was therefore not a straightforward matter. Having regard to all the circumstances, I do consider that the instruction of counsel, from the outset, was reasonable. The defenders argue that the drafting and other items to which they take exception were all matters which were within the competency/experience of a specialist personal injury firm; but that is not the test.

[8] Accordingly, I have granted (blanket) sanction for the employment of junior counsel.

[9] The expenses of the motion (including the previous hearing) also require to be determined. Although the pursuer in my view ought to have sought blanket sanction, in

substance he has been successful. The defenders wished sanction not to be granted for the bulk of the work done by counsel, and they have been unsuccessful. I will therefore also award the expenses of the motion (including both hearings) to the pursuer.