SHERIFFDOM OF SOUTH STRATHCLYDE DUMFRIES AND GALLOWAY

AT DUMFRIES

NOTE

(Objections to Auditor's report, rule 32.4, OCR 1993)

by

SHERIFF GEORGE JAMIESON

in the cause A32/16

DONALD GEDDES HEUCHAN **PURSUER**

against

ALISTAIR FLANAGAN **DEFENDER**

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Dumfries 22 September 2016

Act: Laurie Alt: Gibson

The sheriff, having resumed consideration of the Note of Objections, Sustains the defender's objections to the Report by the Auditor of Court dated 17 May 2016, Appoints the cause to the Procedure Roll on a date to be hereafter fixed by the sheriff clerk in order – (1) to determine further procedure in relation to taxation and decerniture in respect of the expenses; and (2) to hear any submissions anent any expenses occasioned by the Note of Objection.

Sheriff George Jamieson

NOTE

[1] At the Continued Options Hearing on 6 August 2015, Sheriff Mohan assigned a "Preliminary Proof on the Pursuer (*sic*) crave one", which eventually called before me on 23 October and 4 December 2015.

[2] On the second of those dates, having heard submissions from Mr Laurie, the pursuer's solicitor and Mr Wilson, the defender's counsel, I made a finding that the parties had *not* entered into a compromise in respect of the defender's claims in connection with the business of Road Rentals Ltd.

[3] This was contrary to the declarator sought by the pursuer in terms of crave 1 of his initial writ; having so decided, I thereafter allowed parties an opportunity of further considering their positions in light of the finding I had made. This resulted in a number of procedural continuations, culminating in a settlement by way of Minute of Acceptance and Tender.

[4] The defender objects to the Depute Auditor's Report anent the expenses of these hearings insofar as she disallowed the defender's solicitor's travel time and expenses in connection with attendance at the "Preliminary Proof" on 23 October and 4 December 2015. I heard from parties' solicitors on these objections on 1 September 2016, when I made *avizandum*. My decision is as follows.

Depute Auditor's Discretion

It is perhaps unfortunate that the hearings on 23 October and 4 December 2015 were described as a "Preliminary Proof". It is not clear how this came about from the interlocutor of 6 August 2015 for it does not specify whether this was done on the motion of the parties, or the sheriff's own motion. What, in effect, was done was the separation of a specified issue (crave 1) from the amount for which decree might be pronounced, as permitted by rule 29.6(1), OCR 1993.

If the pursuer had been successful in obtaining declarator in terms of crave 1 that the parties had entered into a compromise, then the defender's counterclaim would have come to an abrupt end because no further sums would have been found due to him. The parties' eventual settlement reflects the sum due *by the pursuer to the defender* in the sum counterclaimed, £85,621.

Unfortunately, the interlocutor of 19 July 2016 erroneously grants decree *in favour of the pursuer*, rather than the defender, resulting in an extract decree having being issued to the defender's solicitors whereby the *defender* is to pay to *the pursuer* the sum of £85,621.

Be that as it may, the essential point is that the "Preliminary Proof" was of decisive importance to this case; upon the decision made at it, the whole course of the litigation eventually turned.

The Depute Auditor, perhaps understandably in the circumstances described above, viewed these hearings as "not a principal diet" in reaching her decision about travelling time.

This was a material error and, as such, the objections are at large for my consideration.

There were some other matters, as follow, upon which I considered the Depute Auditor materially erred in the exercise of her discretion.

Local Practice

It appears from the Note of Objections that the Depute Auditor consulted the sheriff clerk as to whether there was any local practice about taxation of travel time. The Depute Auditor states she was informed, not of a practice, but of a direction issued from the bench at Dumfries Sheriff Court some years previously. No written record exists of any such local practice, or judicial direction to the effect that travel time will not in any circumstances be allowed for non-local solicitors.

I have consulted with Sheriff Mohan about this. Neither of us is aware of any such practice or direction. While we take no exception to such a direction having been issued in the past, we do not now associate ourselves with it.

We wish to make it plain that in our view no such practice, if it ever existed, continues to apply in Dumfries Sheriff Court.

General regulation 15 of the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Procedure) 1993 is plain in its terms:

"In addition to the matters set out in the Table of Fees, travel time at a rate of £35 per quarter hour may be claimed on cause shown at the discretion of the Auditor".

There is therefore no special rule applicable only to Dumfries Sheriff Court that travel time will not in any circumstances be allowed for non-local solicitors.

The solicitor who visited his client at his home

Mr Flanagan said in his evidence that he had originally instructed a local solicitor who, upon becoming aware that Mr Laurie was acting for the pursuer, visited him at his home to advise him of the formidable nature of his opponent. As a result, he lost confidence in the local bar, and sought advice elsewhere. Taking this *pro veritate accipitur*, it explains *why* he sought advice from a non-local solicitor. Indeed, he took advice from English solicitors. Earlier proceedings between the parties took place in Leeds High Court. It is notable that the pursuer in his initial writ sough interdict against institution of further proceedings in England.

The Depute Auditor comments that "there are 25 firms operating in the jurisdiction of Dumfries Sheriff Court who could have been employed as local agents for these two preliminary proof diets".

In fact, only a few firms regularly undertake agency work in Dumfries Sheriff; and the same, limited, number of firms would be available to undertake civil litigation.

The choices open to the defender would therefore in fact have been very limited in numerical terms alone, and restricted even further – (a) by the loss of the one firm in which the defender had lost confidence; and (b) by Mr Laurie having taken instructions for the pursuer.

The General Regulations

The Depute Auditor refers to general regulation 8 in terms of which she had discretion to disallow charges she judged irregular or unnecessary. Although she also refers to general regulation 15, which makes specific provision for travelling time, I think it is of importance to note – (a) these are distinct regulations; and (b) general regulation 15 is a relatively new innovation in taxation practice.

It was added by rule 2(6) of the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment) 2014 with effect from 1 March 2014.

In my opinion, this is a special regulation which derogates from general regulation 8.

The Depute Auditor comments that "more recently such entries are regularly added to Judicial Accounts and there is an expectation that they will be allowed". She noted a previous taxation in which a local agent had been instructed to assist counsel with a multiple day proof. In her opinion, as it seems, it would not have been reasonable for the principal agent to have travelled from Edinburgh to assist counsel. This view seems in turn to have been informed by case law, and a general taxation practice that,

absent special circumstances, a local agent would have been expected to have been instructed to assist counsel.

I do not take issue with the practice approved in *Sharp v Kennedy* , 2 April 1984 (Ayr Sheriff Court, unreported), *Henderson v Henderson's Executor* 2000 SLT (Sh Ct) and *Lloyds TSB v Aslam*, 30 April 2014 (Glasgow Sheriff Court, unreported), which all emphasised the approach that, absent special circumstances, a local agent ought normally to have been instructed. Absent special circumstances, the attendance of the principal agent was not to be regarded as a proper expense of process (as opposed to a proper charge on an agent – client account).

However, it is a practice which predates the introduction of general regulation 15 by rule 2(6) of the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment) 2014 with effect from 1 March 2014.

Parties' agents, in their submissions to me, sought to draw parallels, or to distinguish the case law from the circumstances in this case. In the event, I think that would be a rather fruitless exercise.

The matter should be judged solely on the basis of what general regulation 15 says, applied to the facts and circumstances of each case; as previously quoted herein:

> "In addition to the matters set out in the Table of Fees, travel time at a rate of £35 per quarter hour may be claimed on cause shown at the discretion of the Auditor".

It is perfectly understandable why solicitors now regularly claim travel time, standing the introduction of this general regulation in 2014. There is however no automatic entitlement to it. I would make the following comments about general regulation 15:

1) If travel time is allowed on taxation, the Auditor *must* allow £35 per quarter hour.
2) She can however determine whether the time spent in travel was reasonable, and if necessary abate accordingly, but once reasonable travel time has been allowed, it must be calculated at £35 per quarter hour.
3) Reasonable travel time means only the time reasonably spent in travel from A – B. Allowance may be made for variations in travel time based on ordinary considerations of delay normally involved in travel from A – B.
4) The party claiming travel time must satisfy the Auditor that there is "cause shown" for incurring that cost.
5) But it is a matter for the Auditor's discretion what, in any given case, amounts to cause shown. The sheriff will interfere with the exercise of that discretion only if in doing so she materially errs in law, or in her understanding of the facts, or if her decision is one that no reasonable Auditor would have made, or a question of principle arises.
6) In approaching the question of "cause shown", she should no longer be guided by the decisions in *Sharp v Kennedy*, *Henderson v Henderson's Executor*

and *Lloyds TSB v Aslam*, to the effect only a local agent's appearance is a proper expense of process, absent special circumstances.

7) She should not be guided by the concept that travel time be allowed only on "good cause shown" as decided at the AGM for the Society of Sheriff Court Auditors. The additional word "good" does not appear in general regulation 15, and places a greater onus on the party claiming the charge than is required by the general regulation itself.

8) While what amounts to "cause shown" will vary from case to case and depend on the facts and circumstances of each case, it will normally be resolved by the Auditor asking the question:

> "Was it reasonable for the solicitor who is claiming travel time personally to have attended the hearing in question?"

9) That in turn will depend on a number of considerations, including, but not limited to the following:

- The nature and value of the litigation, and its importance to the client.
- The nature of the hearing in question.
- The complexity of the proceedings.
- Whether it was reasonable or necessary for the client to have instructed a solicitor specialising in a specific area of law, especially one not local to the court's jurisdiction.

- The familiarity the principal agent had with the details of the case, as opposed to whether a local agent could reasonably have been expected to stand in for the principal agent.
- The availability of local agents to appear, through conflict of interest or other considerations.
- Any other special circumstances identified by the party claiming the travel time, and accepted as such by the Auditor/ Court.

Decision

The defender's solicitor states only in paragraph 5 of his Note of Objections that it was reasonable for him to have been in attendance at the "Preliminary Proof", as opposed to instructing local agents to appear.

I agree that that is the starting point. Was it reasonable for him, rather than a local agent, to assist counsel at the hearing? Details are lacking in the Note of Objection. Ordinarily I would have remitted to the Auditor to re-consider in light of the above guidance, but – (a) the disputed sum is not large, and further unnecessary expense should therefore be avoided, (b) the objection proceeds on a point of principle, and (c) I have knowledge of the hearing, having conducted the proof, and am therefore in the best position to answer that question.

The nature and value of the litigation, and its importance to the client: this was a complex commercial dispute of considerable value and importance to both parties.

The nature of the hearing in question: although referred to as a "Preliminary Proof", it was in fact a full blown proof, which was ultimately decisive of the dispute.

The complexity of the proceedings: These were complex proceedings, following on litigation in England, and with a crave to interdict further proceedings there.

Whether it was reasonable or necessary for the client to have instructed a solicitor specialising in a specific area of law, especially one not local to the court's jurisdiction: The defender instructed commercial solicitors in England who in turn instructed a well-known and competent Edinburgh firm specialising *inter alia* in commercial law. This was a perfectly reasonable approach in my opinion given proceedings had already taken place in England, and the defender had lost confidence in his local solicitor. His remaining choices of local solicitors would have been relatively few in number, and the litigation would not have been of a type they routinely undertook.

The familiarity the principal agent had with the details of the case, as opposed to whether a local agent could reasonably have been expected to stand in for the principal agent: This was an obvious factor to me.

There was also the need to foster good relations with the English solicitor who attended on a "watching brief". It would have been very unfair on a local agent to have stepped in to assist, far less a trainee solicitor.

The availability of local agents to appear, through conflict of interest or other considerations: a local agent *could* have been asked to appear, but for the factors identified above, I do not think this would have amounted to a reasonable request.

Any other special circumstances identified by the party claiming the travel time, and accepted as such by the Auditor/ Court: The need to be on hand to influence important procedural decisions, such as, what now, given the preliminary issue had been determined? Only the principal agent could have fulfilled that role. The English solicitor had no locus to give that advice, and counsel understandably deferred to the experience of his instructing agent in such "tactical" matters.

Travel Time *versus* Travel Expenses

General regulation 15 allows the solicitor to charge for travel time. There is also an outlay claimed for travel expenses for the first day of the hearing on 23 October 2015. I was not addressed on whether this amounted to double taxation, and therefore was an allowable outlay in addition to travel time. It may or may not be.

But as I did not have the benefit of submissions on this question, I do not propose to allow that particular entry.

The two entries for travel time are for 4 hours 5 minutes and 4 hours 20 minutes respectively. These variations are minor and explicable with reference to the ordinary exigencies of travel between Edinburgh and Dumfries. Both are reasonable amounts of time spent in such travel and I propose to allow these entries at £35 per quarter hour.

[5] Having so decided, it ought to be a straightforward arithmetical matter for parties to agree the final figure in respect of the whole taxed expenses on this account; it seems to me to be unnecessary for me to remit back to the Auditor for that to be done, or for me to carry out the calculation myself. I have appointed the cause to the Procedure Roll to consider that issue, decerniture for expenses, and also the question of any expenses arising from the Note of Objection Procedure.