FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 15
CA134/16

Lord President
Lord Drummond Young
Lord Malcolm

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion by

JAMES MICHAEL SHANLEY

Pursuer and Reclaimer

against

LORIMER STEWART

Defender and Respondent

Pursuer and Reclaimer: party
Defender and Respondent: Ferguson QC; Clyde & Co

22 March 2019

Introduction

[1] This is a reclaiming motion in respect of the interlocutor of the commercial judge dated 4 October 2018 repelling the pursuer's objections to reports of the Auditor on both parties' accounts of expenses. The case concerns primarily the scope of the Auditor's jurisdiction to investigate issues of unreasonable or improper conduct during the taxation

process and the scope of the court's power to interfere with the Auditor's determinations on specific items in an account.

Background

[2] The pursuer sued the defender for damages, ultimately of £800,000. The defender had been the accountant dealing with personal tax affairs of the pursuer and his wife and those of companies, which the pursuer controlled and which operated in the construction and property development spheres. The averments in this action alleged negligent mishandling solely of the pursuer's own tax, in consequence of which HM Revenue and Customs had obtained decree against him for payment of tax liabilities and penalties. The pursuer was sequestrated in August 2008, shortly after he and his family had emigrated to Australia. He returned to Scotland and secured a recall of the sequestration.

[3] The pursuer's action was raised on the eve of the quinquennium in July 2013. The pursuer averred that, having dealt with his own tax affairs for about a year, he had decided to reinstruct the defender, in relation to his personal, family and corporate tax affairs, because he considered that he would not be able to deal with HMRC from the other side of the globe. HMRC had been seeking payment of in excess of £45,000. The pursuer maintains that, on or about 7 July 2008, he had told them that he was arranging both to instruct the defender and to pay the sums allegedly due. At the core of the pursuer's complaint was that, although he had provided the defender with "pre signed cheques", the defender did not act as instructed; ultimately resulting unnecessarily in the pursuer's sequestration. The sum sued for consisted of losses associated with the pursuer's return to the UK, the recall of his sequestration, the effect on his, and his wife's, creditworthiness and his requirement to

obtain a bridging loan. When the record closed on 18 March 2015, it was averred that his total losses were £5,254,000.

[4] A procedure roll was fixed for 23 September. On the day before the hearing, the pursuer lodged a minute of amendment. The hearing was discharged. The recast claim had four conclusions: £161,712.31, being the cost of returning from Australia; £9,341.10, being attributable to the recall of the sequestration; £1,227,728, for loss of rental income from a house in Edinburgh and business profits which would have been generated by a nursery operated at that house; and £331,302, for increased taxation which the pursuer's wife had incurred as a result of her return to the UK (the pursuer having averred that his wife had assigned her claim to him). Another procedure roll was fixed for 13 July 2016. The pursuer tendered a further minute of amendment on 12 July, when the hearing was again discharged. This minute deleted the pursuer's third and fourth conclusions and supporting averments. The only remaining heads of damage were the costs associated with his return from Australia and the recall of the sequestration.

[5] On 9 November 2016, the action was remitted to the commercial court. On 14 November, the defender lodged a tender of £15,000. The pursuer did not immediately accept it. On 22 November, the defender admitted liability. Subsequently, the pursuer sought to reintroduce the abandoned heads of claim. On 9 February 2017, the commercial judge refused to allow the relative amendment and adjustments; recording that the pursuer had been advised that his pleadings could be directed only to allegations of breach of contract and/or negligence on the part of the defender and quantification of loss.

[6] On 10 November 2017, the pursuer accepted the tender. On 30 November 2017, the commercial judge: found the defender liable to the pursuer in expenses to the date of the

tender; refused to apply the agent and client scale; and allowed the pursuer an additional fee only under head (e) of RCS 42.14(3) (importance of the cause to the client). He found the pursuer liable to the defender in the expenses which post-dated the tender.

[7] On 21 December 2017, the commercial judge certified two persons, who had been instructed by the pursuer, as skilled (RCS 42.13A). On 19 April 2018, another skilled person was certified.

[8] The pursuer lodged an account of expenses, including outlays, which totalled in excess of £253,610. He claimed an uplift of 300% as the additional fee. £84,240 of the account was a claim for fees which the pursuer charged as a party litigant (cf Act of Sederunt (Expenses of Party Litigants) 1976, para 2 as amended). The defender sought recovery of £40,833.40. The Auditor taxed off £225,675.21 from the pursuer's account (including the whole of the claim for party litigant fees) and £7,065.35 from the defender's account. The pursuer lodged notes of objection to each of the Auditor's reports.

[9] The Auditor noted that, in large part, the pursuer's objection consisted of a general complaint about the conduct of the litigation by the defender. This, the Auditor held, was not competent since it did not involve a challenge to specific items allowed, disallowed or abated. The Auditor explained that he had fixed the additional fee uplift at 20% as it had only been allowed by the court under one head (out of seven).

[10] On specific items, the Auditor allowed only the block pre-litigation fee because much of the work which had been done by the pursuer's law agents and the accountants instructed, namely PKF Francis Clark and Forth Forensic Accountants, was unconnected with the action as ultimately pled by the pursuer. He disallowed a pre-action consultation because it was not vouched in agents' file. Even if it had been, it did not relate (at least in

large part) to the eventual case. He disallowed the fees of English counsel, given that Scottish agents and counsel had been instructed and the summons had been served before English counsel had expressed an opinion. If that counsel had been acting as an expert, he had not been certified as such.

[11] The Auditor disallowed a fee for a report from PKF Francis Clark as it was not discoverable in the papers. He abated a fee to about £3,230 in respect of a report from the same firm because most of it did not relate to the action. It was an historical survey of the pursuer's tax affairs, and those of his companies, in so far as dealt with by the defender. He disallowed the fees for a report by Forth Forensic Accountants because it did not deal with the claims ultimately made by the pursuer, but with others by the pursuer and his wife against HMRC and the Clydesdale Bank, as well as the defender. The Auditor abated fees for consulting with both accountancy firms because neither had been reasonably required in relation to what was a straightforward case.

Commercial judge's decision and reasons

[12] The commercial judge described ([2018] CSOH 101) the pursuer's account of expenses as "remarkable". It dwarfed the £15,000 settlement. The judge reasoned that the Auditor's task was to allow such expenses as were reasonable for conducting the litigation in a proper manner (Macfadyen, *Court of Session Practice*, Division L, Chapter 6, Accounts and Taxation, (Lord Carloway), paras [705]-[710] and[714]; RCS 42.10(1)). He had the power to disallow items which had been caused by a party's own fault or incurred in respect of an unsuccessful part of the case (*ibid* paras [705]-[710]; RCS 42.5(2)). Those principles applied

equally to the assessment of the remuneration to be paid to persons whom the court had certified as skilled.

[13] The pursuer's contention, that the Auditor ought to have investigated allegations of misconduct on the part of the defender and his agents, had been correctly rejected as incompetent. Taxation procedure was designed to deal with objections to specific items in the Auditor's report. It was not a procedure which could be invoked to make other forms of general protest. The normal restrictive principles in respect of the review of discretionary decisions applied (*Wood* v *Miller*, 1960 SC 86, per LJC Thomson at 98).

[14] In terms of the specific objections, the commercial judge was not satisfied that the Auditor had erred in the exercise of his discretion. In each case, the objection was no more than a disagreement with the Auditor's assessment. The Auditor had not taken into account irrelevant factors, nor left out of account any relevant factors, nor acted unreasonably. The additional fee uplift of 20% had been within the range of outcomes open to the Auditor. He had been entitled to conclude that the instruction of English counsel had not been a reasonable expense. In allowing some of the fees of the skilled persons, but disallowing large parts of them, the Auditor had directed himself to the correct test and applied his knowledge and experience to the material. In fixing the pre-litigation fee, the Auditor had regard to the fact that most of the work done at that stage had no relevance to the case as finally pled. He was entitled to disallow a pre-litigation consultation with counsel, because he was not satisfied that it had taken place and he did not consider it to be a reasonable expense. Finally, the judge was not satisfied that there was any proper basis for interfering with the Auditor's taxation of the defender's account. No relevant specific objections to it had been advanced.

Submissions

[15] The pursuer's revised grounds of appeal were seven in number. First, the commercial judge's thinking was "flawed". He erred in thinking that the settlement figure had been dwarfed by the account of expenses. The pursuer had accepted the tender during a period of stress. His law agent had let him down. He had developed health problems. He had assumed that, in accepting the tender, he would "get [his] costs back". It had taken him nine years to prove that the defender had been at fault. This was because of the deliberate withholding of documents by the defender and his law agents. These agents had originally offered to pursue the case for £20,000, yet had later acted for the defender in tendering £15,000 and charging £35,000 for their work post tender.

[16] Secondly, the action had not been conducted in a proper and fair manner. The judge erred in not taking into account the defender's concealment of the true facts; a matter which had necessitated extra work. The judge erred in not allowing the pre-litigation expenses charged by the firms of accountants. An earlier judge had deemed these works to be reasonable. The sum allowed (£3,250) was below the amount which any expert would have charged for the work.

[17] Thirdly, the judge erred in ignoring the earlier decision by a different judge on the reasonableness of the pre-litigation costs. Fourthly, he erred in holding that the Auditor could not carry out an investigation into the cause of the expense. Fifthly, he had erred in not allowing the fees of English counsel. It had been reasonable to engage his expertise on duty of care. The judge erred in failing to take into account the fact that the summons had been served to stop the prescription period expiring whilst English counsel considered the

matter. Sixthly, the judge had erred in considering that an uplift of only 20% had been reasonable. Finally, he had erred in holding that he had no basis for interfering with the Auditor's taxation.

[18] The defender responded by complaining that the pursuer's grounds of appeal were not brief, specific propositions (RCS 38.18(1)) specifying the grounds upon which the reclaiming motion should be allowed. His first complaint (grounds 1, 2 (part) and 4), that the Auditor ought to have taken into account his allegations of misconduct, had been correctly rejected by the commercial judge on the basis that the note of objection process was designed to deal with objections to specific items and not to allow those of a general nature in relation to the conduct of the litigation (*Gupta* v *Ross* 2005 SLT 548 at para [6], approving *Urquhart* v *Ayrshire and Arran Health Board* 2000 SLT 829 at paras [8-9]). In any event, although the defender had failed to lodge certain documents following their recovery by commission and diligence, the pursuer had received copies of all the relevant documents.

[19] The pursuer's second complaint (ground 2 (part)), about the recovery of the accountants' fees, had been properly dealt with by the commercial judge, who recognised the limited scope for the review of the Auditor's decision (MacFadyen ed.: *Court of Session Practice* Div L paras [207-710]; *Wood* v *Miller* (*supra*) at 98). The judge had correctly determined that the Auditor had made no error. The third complaint (ground 5), that the summons had been instructed to prevent the cause prescribing pending receipt of English counsel's opinion, was irrelevant. There was no basis stated for impugning the Auditor's reasoning. Finally (ground 6), the level of uplift was properly reasoned and, as the judgment of a specialist tribunal, could not be faulted.

[20] The pursuer had not challenged the refusal of his motion for expenses on an agent and client scale. The fact that a person had been certified as skilled did not mean that everything charged by that person was allowable on a party and party taxation (ground 3).

Decision

[21] RCS 38.18(1) provides that:

> "Grounds of appeal shall consist of brief specific numbered propositions stating the grounds on which it is proposed to submit that the reclaiming motion should be granted."

This rule requires that the grounds of appeal address the core issue or issues, in respect of which it is submitted that the judge erred (*Percy* v *Govan Initiative* 2012 SCLR 476, Lady Paton at para [9]). The first ground does not meet this requirement. It states that the commercial judge's thinking was "flawed" and that he had "erred", but it does not go on to explain the manner of the error beyond a vague generalisation. The same applies to the sixth ground, which states that the commercial judge erred by upholding the uplift. The seventh ground states only that the judge erred in holding that there was no proper basis for interfering with the Auditor's taxation.

[22] The first element of ground 2 (litigation not conducted in a proper and fair manner), ground 4 (power to investigate misconduct) and the final element of ground 5 (also relating to the conduct) can be taken together. Although these grounds meet the formal requirements of RCS 38.18(1), they misunderstand the general expenses regime and the role of the Auditor in the taxation process. The pursuer was awarded expenses up to the date of the tender. The normal scale upon which such expenses are taxed is party and party. In examining a particular item in an account, the Auditor is tasked with allowing "only such

expenses as are reasonable for conducting the cause in a proper manner" (RCS 42.10(1)). In that exercise, he may disallow items which relate to an unsuccessful part of the procedure (RCS 42.5(2)).

[23] An account taxed on a party and party basis will provide the party holding the award with a sum which represents the reasonable costs of pursuing the cause. It is not designed to provide compensation for having to deal with improper or unreasonable conduct by the opposing party. Where such conduct is demonstrable, the party holding the award can seek expenses on the much enhanced agent and client scale. The pursuer sought such an award, but his application was refused. That refusal was not reclaimed. In that situation, there is no scope at this stage for any inquiry into the defender's general conduct of the litigation as it impacted on the pursuer's expenses.

[24] The scale is thus set and the Auditor must tax the account on that basis (*McGregor* v *Ballachulish Slate Quarries Co* 1908 SC 1, LP (Dunedin) at 3). He will do so by looking to see whether the specific items charged were reasonable for the proper conduct of the case. In order to do this, the Auditor must understand what the case was about. He did this, quite reasonably, by reference to the pleadings in their fully evolved state. This was an action for negligence against the defender which caused the pursuer to incur the cost of: (1) recalling the sequestration (about £9,500); and (2) returning from Australia to the United Kingdom. The pursuer had sued for about £162,000 for the return journey, but that claim was entirely unrealistic and, as already noted, the action settled for a global sum of £15,000. The Auditor's task was to have regard to what was reasonable to conduct what was ultimately a relatively low value claim.

[25] 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,

> "It 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 he reached on it was not unreasonable, it cannot readily be upset." (*Wood* v *Miller* 1960 SC 86, LJC (Thomson) at 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 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]).

[26] As the commercial judge recognised, once the Auditor has taxed the account, the objection procedure is limited to permitting objections to specific items in the Auditor's report; it is not for dealing with objections of a different nature (*Gupta* v *Ross* 2005 SLT 548, Lord Osborne, delivering the opinion of the court, at para [6], approving *Urquhart* v *Ayrshire and Arran Health Board* 2000 SLT 829, Lord Reed at para [9]).

[27] The specific items objected to were, first, the disallowance of most of the pre-litigation costs charged by PFK Francis Clark and Forth Forensic Accountants. It was

asserted that this was illegitimate because a different commercial judge had earlier certified the relevant persons as skilled. There is no merit in this argument. RCS 42.13A provides that, if the court has granted a motion for certification, charges shall be allowed for any work done or expenses incurred by the person certified, if they were reasonably required for a purpose in connection with, or in contemplation of, the cause. The charges to be allowed are such as the Auditor determines to be reasonable. Certification is a necessary pre-requisite for any charges in respect of a skilled person (*Clark* v *Laddaws* 1994 SLT 792). It does not follow that all of the work done by the skilled person is allowable. Rather, the Auditor has a duty to assess whether the work was reasonably incurred in the context of the litigation. As already observed, that assessment is afforded the deference accorded to discretionary decisions of specialist tribunals. The Auditor allowed £3,242.50 (rather than the £48,025 sought) for a report by PKF Francis Clark on the basis that it encompassed all work done by the defender on the pursuer's family and corporate taxes and not just the subject matter of the action. The Auditor disallowed the fee for the report by Forth Forensic Accountants because it did not address the claims made in the pleadings in their final form. The Auditor did allow a charge for a consultation with PKF Francis Clark. Two consultations in relation to a report produced by Forth were disallowed as the Auditor considered that neither was reasonably required, given the straightforward nature of the eventual claims. A fee of £2,000 for 8 hours' work to produce that report, and a fee for perusing eight pages of it, were considered reasonable. In all of this, nothing has been pointed to which showed that the Auditor misdirected himself in law, took irrelevant matters into account, failed to take into account relevant matters or misunderstood the material. The decision taken was within the scope of the Auditor's discretion and well-reasoned by him.

[28] The second specific item was the disallowance of pre-litigation expenses in excess of the standard pre-litigation fee on the basis that the majority of the work had no relevance to the case as ultimately pled. It is said that the Auditor had ignored a different commercial judge's determination. There was no such determination. This ground encompasses the abatement in full of counsel's consultation fee and the allowance of a fee for the perusal of an 11 page report by PKF Francis Clark. The Auditor noted that there was no reference to a consultation on the relevant date in the solicitors' file. Had the pursuer focused his claim in terms of his pleadings in their final form, this charge would not have been incurred. In relation to the report by PKF Francis Clark, there was no report of the relevant date or one of 11 pages. These abatements were entirely reasonable. Returning to the party and party scale, the Tables of Fees provide some guidance on what might be reasonable in the ordinary case (which this turned out to be). This is currently a fee, on the block Table (Chapter III), for agents of £738 (4.5 hours). The Auditor allowed such a fee, which was, again, entirely reasonable.

[29] The next specific item is the outlay incurred in instructing English counsel. The commercial judge's alleged errors included a failure to take into account that a summons had been prepared only to stop the time bar while English counsel's review was still being carried out. It would be most unusual for the Auditor to allow, as an expense reasonably incurred for the proper conduct of an action in Scotland, the fees of English counsel. Such counsel have no rights of audience in the Court of Session and it is difficult to see why it would be reasonable to instruct English counsel, given the instruction of, and advice by, Scottish counsel and solicitors on liability and quantum. Any advice from English counsel was superfluous. In any event, the Auditor considered, reasonably, that the case as finally

pled did not require this advice. If there had been a matter of English law to be considered, the matter may have been different. In that event, as the Auditor noted, certification as a skilled person would be needed.

[30] Finally, there is the uplift of 20%. The only head under which this was given (head (e) of RCS 42.14(3)). The effect of this is that the commercial judge did not consider that an additional fee was merited on the basis of any of the other heads, such as complexity, difficulty, number of documents, value or steps taken to limit the matters in dispute. In such circumstances, the uplift selected by the Auditor cannot be seen as unreasonable.

[31] The reclaiming motion must be refused.