FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 64
XA8/21

Lord President
Lord Turnbull
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the appeal from the Sheriff Appeal Court

CABOT FINANCIAL (UK) LTD

Pursuers and Respondents

against

CATHERINE WEIR

Defender and Appellant

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Pursuers and Respondents: MacGregor QC, Massaro; Shoosmiths LLP
Defender and Appellant: Smith QC; Flexlaw

30 November 2021

Introduction

[1] This appeal concerns the scope of an award of agent and client, client paying, expenses. The issue is whether a "success fee", which is payable under an agreement between a party to a litigation and her solicitor in the event of success, can be recovered from the unsuccessful party in terms of such an award. There is a subsidiary issue about the construction of the agreement in relation to the amount of the fee.

Facts

[2] The pursuers are a debt purchase company. They averred that, in 2016, they had purchased a debt of £7,277.52 owed by the defender to the Lloyds Banking Group. The defender disputed that the debt was due to the pursuers. Having initially defended the action without legal assistance, the defender engaged solicitors on 5 January 2018. On that date, she accepted the solicitors' "Terms of Business – Speculative Fee Agreement".

[3] The terms were somewhat repetitive in nature but included the following:

> "Paying Us
>
> If you win the case … you are liable to pay our outlays, solicitor/client fees and a success fee. … You may be able to recover a proportion of our outlays and solicitor/client fees … from your opponent.
>
> If you lose the case, you pay our outlays and your opponent's judicial (court) expenses and outlays … If you ultimately go on to win the case, you pay our success fee.
>
> … The hourly charge out rate for your solicitor is £220.00/hour.
>
> …
>
> Success Fee
>
> This is: **70%** of the solicitor/client fee.
>
> The total of the success fee will not be more than 25% of the damages or settlement you win.
>
> …
>
> What Happens if You Win?
>
> … a 'win' is defined as any resolution to the litigation that results in an agreement or a court award which reduces your liability to the pursuers in the action, whether this be partial or full…
>
> …
>
> The Court, through the Auditor … will decide how much you can recover ... If the amount … does not cover all our work, you pay the difference."

[4] The pursuers failed to lodge the necessary documentation to vouch their claim, having been directed to do so by interlocutor dated 27 October 2017. They abandoned the

action on the morning of a second diet of proof; the first diet having been discharged on the pursuers' motion, because an essential witness was not present. By interlocutor dated 10 July 2018, the sheriff awarded the defender the expenses on a party and party basis up until 26 October 2017, and on an agent and client, client paying, basis from that date.

[5] The defender lodged two accounts of expenses; one for the period during which she was a party litigant and one when she was legally represented. The Auditor reports that these were framed in terms of, respectively, Chapters II and III of the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993. The latter is essentially a time and line, as distinct from a block fee, account. As part of the solicitors' account, the defender sought reimbursement of the success fee. The Auditor considered that the test which he ought to apply was whether the agreement "was one to which other prudent or sensible clients would have agreed". Having regard to his knowledge of solicitors' normal hourly rates in "this day and age", the Auditor allowed the success fee. The effect of this was to allow solicitors' fees of £5,632 and a 70% uplift of £3,942.40.

The sheriff

[6] In a very detailed judgment, the sheriff considered that there was a distinction between a "client account", which was payable by a client to his solicitor, and, a "judicial account", which was payable by a third party, usually an opponent. In the former, the client is liable to his solicitor for all expenses reasonably incurred, even although they could not be recovered from the other side, and for any expenses which he has specially authorised (MacLaren: *Expenses* at 509). A judicial account proceeds on one of three bases: party and party; agent and client, client paying; or, agent and client, third party paying.

[7] The "process rule" applied to all judicial accounts. Expenses chargeable against the third party, notably an opponent, were limited to the proper expenses of process (1993 Act of Sederunt; Schedule 1, General Regulations, para 6). All extra-judicial expenses (*Milligan* v *Tinne's Trs* 1971 SLT (Notes) 64, Lord Thomson at 64), ie those not incurred for conducting the cause (*McNair's Ex* v *Wrights Insulation Co* 2003 SLT 1311, Lord Carloway at 1315; *McGraddie* v *McGraddie (No. 2)* 2015 SC (UKSC) 45 at para [16]) were not chargeable to the third party. A success fee was not a sum which was incurred for conducting the cause. It was to enable or to assist a party to conduct the cause. It was not recoverable from an opponent, even when the account was to be taxed on an agent/client, client paying basis.

[8] The defender's calculation of the success fee was incorrect. The success fee was capped at 25% of the defender's win. As the defender had achieved absolvitor, her solicitors were entitled to 25% of the sum which had been sued for (ie £1,819.38), rather than 70% of their whole fees (£3,942.40).

The Sheriff Appeal Court

[9] The Sheriff Appeal Court held that the sheriff's assessment of the distinction between a client account and a judicial account and his categorisation of the modes of taxation was correct. An award of expenses on a solicitor and client, client paying, basis did not provide an indemnity to the payee. It was still limited by the process rule, which applied as it did to party and party awards. An award on a solicitor and client, client paying, basis was still limited to what was reasonable. The sheriff's interpretation of the Letter of Engagement, and therefore his calculation of the success fee owed by the defender to her solicitors, was correct.

Submissions

Defender

[10] The defender submitted that, in respect of both the client paying and third party paying bases, a third party actually pays. It was the recoverable amounts which differed. The sheriff ought to have recognised that, even although the opponent was to pay the account, he did so on an indemnity basis. That basis required the other party to pay the amount which the client had become obliged to pay to the solicitor. Failure to proceed upon this basis effectively converted the interlocutor into one of third party paying. An interlocutor which stated "client paying" was one which caused the paying party to step into the shoes of the client. All charges which the client was liable for were thus payable (Hastings: *Expenses* at 48).

[11] The sheriff erred in holding that only the expenses of process were allowed. No restricted meaning was intended from the use of the words "of process" (*McNair's Ex* v *Wrights Insulation Co*; see *Milligan* v *Tinne's Trs* at 65 and *McLean* v *Zonal Retail Data Systems* [2009] CSOH 12). Other than that it must be in respect of work reasonably undertaken to conduct the cause, a recoverable outlay could be incurred before an action commenced or defences were lodged. Expenses of process included all those which a client incurred to defend or pursue a cause. If the client entered into a success fee arrangement, that was an expense of process. *McGraddie* was of no assistance as it involved a party and party account.

[12] The sheriff erred in his interpretation of the agreement. The defender had not obtained damages or a settlement. On that basis the clause did not apply. There was no cap and the Auditor had been correct in his determination.

Pursuers

[13] The pursuers maintained that the sheriff and the Sheriff Appeal Court were correct in rejecting the contention that a client paying basis provided the entitled party with an indemnity. There were two limitations on what could be recovered in an account of expenses awarded on an agent and client, client paying scale. The first was that expenses which are unreasonably incurred or excessive in amount cannot be recovered. The second was that expenses which are extrajudicial, that is those incurred other than in conducting the case, cannot be recovered. The test of what was recoverable was set out in the 1993 Act of Sederunt (General Regulations, paras 6 and 8). The first of the two restrictions was summarised in *Stair* v *Stair* (1905) 13 SLT 446 (at 446). An agent and client scale allowed a party considerably more than simply reasonable expenses for the conduct of the case (Macfadyen ed: *Court of Session Practice: Expenses* at para [711]). A reasonable sum would be allowed for any work reasonably incurred. Work would be presumed to have been reasonably incurred if it had the client's express or implied authority. The second of the two restrictions excluded expenses which were not part of the process of conducting the case (*Milligan* v *Tinne's Trs* at 65). An award of expenses in a judicial process did not cover items which were not part of that process, but amounted to extrajudicial charges. The process rule applied to an agent and client, client paying, award (Macphail: *Sheriff Court Practice* (3rd ed) para 19.47, citing *Milligan*). The process rule was widely recognised and had been applied to prevent the recovery of sums paid for "before the event" and "after the event" insurance policies (*McNair's Ex* v *Wrights Insulation Co*, approved in *McGraddie* v *McGraddie (No. 2)* at paras [12]-[19]).

[14] A success fee was, as a matter of ordinary language, not part of the expenses of process. The Taylor Report (*Review of Expenses and Funding of Civil Litigation in Scotland*) had

proceeded on the basis that success fees were irrecoverable (Chapter 7, para 4; see also *Campbell* v *MGN (No. 2)* [2005] 1 WLR 3394 at para [41]). A success fee was a creature of statute and not one payable for the conduct of the cause. It was a mechanism to fund the conduct of litigation. It was a bonus for risk. The terms of engagement distinguished between fees payable for the conduct of the cause and the success fee.

[15] The maximum liability under the Terms of Engagement was subject to a cap. A win was defined. Where a litigation was successfully defended, the Terms capped the success fee at 25% of the sum craved. That was the natural and ordinary meaning of the language used.

Decision

[16] A general award of expenses in favour of a party will normally result in the account being taxed on a party and party basis. The court may, as a mark of disapproval of a party's conduct, decide that the award should instead be on an agent and client basis. There are also certain categories of case where agent and client expenses are awarded.

[17] An agent and client award, in the context of a litigation, can be taxed on one of two bases: client paying or third party (or fund) paying. The latter may include an opponent in the litigation. The history of how these bases developed is set out in *Park* v *Colvilles* 1960 SC 143 (Lord Ordinary (Cameron) at 146). Although they had been in existence for "nearly a century" (*Park*, Lord Patrick at 153), they were first recognised in the Rules of Court in 1934 (Schedule, Section 2, General Regulation 10). Third party paying was expressly defined as covering "those expenses which would be incurred by a prudent man of business, without special instructions from the client, in knowledge that the account would be taxed". This definition was taken directly from *Hood* v *Gordon* (1896) 23 R 675, Lord McLaren at 676; see

MacLaren: *Expenses* at 509). Client paying was to cover "all expenses which it was within the mandate of the agent, express or implied, to incur". It covered "those expenses which are necessary and proper as well as those authorised by him" (see *Park* v *Colvilles*, Lord Patrick at 153 quoting the rule of court). It was more generous than third party paying.

[18] The distinction between a party and party account on the one hand and an agent and client taxation on the other has, historically, been substantial in practical terms. A party and party finding in the Court of Session permitted recovery only of such expenses as were "absolutely necessary" for the conduct of the litigation in a proper manner and "with due regard to economy" (Act of Sederunt (1896) General Regulations, para 4). Expenses to be charged against an opponent, whether on a party and party basis or on an agent and client basis, were limited to the proper "expenses of process" (*ibid* para 3). The General Regulations provided that the Table of Fees of Solicitors applied not only to party and party accounts but also those to be taxed on an agent and client basis. This continued with the consolidation of the Rules in 1965 (Act of Sederunt (Rules of Court, Consolidation and Amendment) 1965 Chapter VII, section 2, Table of Fees … General Regulations, rule 347). The definition of what was recoverable on a party and party taxation remained those expenses which were "necessary for conducting the case in a proper manner with due regard to economy" (rule 347(a)). The two different bases for agent and client expenses ceased to be distinguished in the rules. For both bases, what was recoverable was expressly stated to be "all expenses reasonable and necessary in the particular circumstances of each case, the rates of charges being regulated by the Table" (rule 347(b)). The 1965 Rules introduced the block fee system as an alternative to detailed charging, but only for party and party accounts; presumably because the detailed charging would continue to be the appropriate form of account for agent and client taxations.

[19] What has changed since then is what is allowed on a party and party taxation. The changes are described in *Ahmed's Tr* v *Ahmed (No. 1)* 1993 SLT 390 (Lord Penrose at 393). In 1974 (Act of Sederunt (Rules of Court Amendment No 6) 1974), the relevant rule of court (rule 347) was amended to permit "Only such expenses… as are reasonable for conducting the case in a proper manner". That remained the formulation in the 1994 consolidation (RCS 42.10), which made no reference to agent and client accounts. The new formulation was one which largely merged a party and party scale with an agent and client, client paying, scale and leaves the traditional definition of what is recoverable on the third party paying scale as anomalous; being apparently more rigid than the new party and party definition. In the 1994 rules, the Table of Fees was said to regulate only party and party accounts (RCS 42.16). The Taxation of Accounts Rules 2019, which apply to both the Court of Session and the sheriff courts, are not so limited and apply to taxations where one party is liable in expenses to another (rule 1.2.(1)) They provide that the Auditor is to allow "only such expenses as are reasonable for conducting the proceedings in a proper manner" (rule 2.2). The tables of charges apply generally (rule 3.1.(1)).

[20] For the sheriff court, the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993, which was in force at the time of the taxation in this case, provided that the Table of Fees applied only to "the taxation of accounts between party and party" (General Regulation, para 1). There was, as with the Court of Session, an option to charge block fees or to proceed on a detailed time and line account (Chapter III). At the inception of the Table, the hourly rate was just under £60 (*ibid* paras 1 and 2). By the time of the present action it had risen to about £164.

[21] The General Regulations, which are not restricted to party and party accounts (see also the earlier equivalent in the Act of Sederunt anent Fees of Solicitors … 29 March 1935 Schedule, General Regulations II, VII and IX), provided that:

> "6 The expenses to be charged against an opposite party shall be limited to proper expenses of process…"

The Regulations went on to allow certain pre-litigation, or pre-preparation of defences, expenses, notably the taking of precognitions and obtaining of reports.

[22] The General Regulations continued whereby:

> "8 In order that the expense of litigation may be kept within proper and reasonable limits only such expenses shall be allowed in the taxation of accounts as are reasonable for conducting it in a proper manner."

This reflects the test which was adopted in the 1994 consolidation of the Court of Session rules.

[23] The upshot of all of this is that, in the taxation of any account in respect of which there has been a finding in expenses in the course of litigation, whether the scale is party and party or agent and client, the allowable expenses must relate directly to the litigation; ie the process. The *dicta* to that effect in *Milligan* v *Tinne's Trs* 1971 SLT (notes) 64 (Lord Thomson at 65), *McNair's Ex* v *Wrights Insulation Co* 2003 SLT 1311 (Lord Carloway at 1311) and *McGraddie* v *McGraddie (No. 2)* 2015 SC (UKSC) 45, Lord Neuberger at para 16, are correct. As explained in *Milligan* (Lord Thomson at 65), the charges must be for work done as part of the judicial process and not for items which are incurred outside that process.

[24] Provided that principle is adhered to, the expenses are those which are deemed reasonable for conducting the action in a proper manner. That is not to say that the taxation of all accounts will produce identical results; far from it. In a party and party taxation, the solicitor may often elect to provide an account based on the block fees (chapter II). The

block amounts are in turn based on calculations related to the quarter hourly rates specified. In an agent and client taxation, the solicitor will include detailed charges in the account. The hourly rate selected is not restricted to that in the Table of Fees. The Auditor may allow a higher rate if, for example, that rate has been agreed between the agent and client; provided that it is not unreasonable. In this case, there was a base rate agreed at £220 per hour. Although significantly higher than that in the Table of Fees, it was not said to be unreasonable. Similarly, the Auditor will allow charges for work related to the litigation, which is not described in the Table, if that work has been instructed by the client. This again is subject to the qualification that the work was not unreasonable. In all of these respects, the Auditor and, on a Note of Objections, the courts retain a supervisory role in relation to any account following an award of expenses in a litigation. Extravagant claims may be disallowed even where these have been agreed between agent and client.

[25] The "success fee" in this case is not an expense which is part of, or directly related to, the process. It is a private arrangement between solicitor and client which is outwith the boundaries of the process; it is an extra-judicial item. It is a form of incentive to the agent to represent the client in the litigation. It is not related to the work which the solicitor does in carrying out that task. *Quantum valeat* that is made clear in the Terms of Business which distinguish between the "charge out rate" of £220 per hour and the success fee. The fee is an extra-judicial cost to the client. As such it is not an allowable item in the taxation of an account following upon an award of expenses, on whatever scale. The statements to this effect in the Taylor Report (chapter 7, para 4) and *Campbell* v *MGN (No. 2)* [2005] 1 WLR 3394 (Lord Hope at para [41]) are correct. In so far as Hastings: *Expenses* (at 48) equiparates a client paying basis to an indemnity, it is in error, although the use of "necessary" in the same

passage is now equally incorrect. For these reasons the principal grounds of appeal must be rejected.

[26] The Terms of Business put a cap on the success fee as "not … more than 25% of the … settlement you win". Construing the wording objectively, purposively, and in a manner which accords with common sense (see *Park's of Hamilton (Holdings)* v *The Scottish Football Association* [2021] CSIH 61, LP (Carloway) delivering the opinion of the court, at para [17]), it must be given some meaning where the claim for £7,277.52 was successfully resisted in its entirety. That figure must be taken as the "win" and the success fee cannot exceed 25% of it (ie £1,819.38).

[27] The appeal is accordingly refused.