OUTER HOUSE, COURT OF SESSION

[2022] CSOH 36

F72/18

OPINION OF LORD MENZIES

In the cause

STEPHEN McCALLION

Pursuer

against

LORRAINE BANFORD OR McCALLION

Defender

Pursuer: Byrne; Jones Whyte LLP
Defender: Trainer; DAC Beachcroft Scotland LLP

6 May 2022

[1] In this action for divorce with ancillary conclusions, evidence was led at proof over several days in August and September 2019. After hearing evidence and submissions for the parties the Lord Ordinary made avizandum on 17 September 2019. He issued his opinion on 23 October 2019, and a hearing on final orders was held on 29 November 2019, on which date the Lord Ordinary issued his final interlocutor. This dealt, in some detail, with numerous aspects of the dispute between the parties, including orders for contact with the parties' children, sale of heritable property, and many very detailed provisions regarding heritable and movable property. Paragraph 13 of the interlocutor found the pursuer liable to

the defender in respect of 50% of the expenses of and occasioned by the preparation and conduct of the proof; *quoad ultra* found no expenses due to or by either party.

[2] In due course, the defender's account of expenses was subject to taxation by the Auditor of the Court of Session. The Auditor refused to allow anything in respect of several items in the defender's account. The defender lodged a Note of Objections to the Auditor's Report which contained objections on eleven grounds (many of which were linked to each other).

[3] The Auditor lodged a minute in response. In brief summary, the Auditor's position was that with regard to the entry for 21 January 2019 for court fees due for fixing the proof, although the pursuer did not object to this fee, the Auditor's role is not limited to considering matters raised by paying parties, and even if there is no objection the Auditor still requires to allow only such charges as the Auditor determines are reasonable.

[4] With regard to the other Grounds of Objection the Auditor was of the opinion that preparation for a proof can only truly commence after parties have finalised their pleadings, ingathered and lodged all of their evidence and attended to all incidental procedural matters required in advance of a proof. The Auditor was and remains of the opinion that the highlighted work is not work undertaken in preparation for or conduct of the proof. If it were, the auditor is of the opinion that there would be no distinction to be made between an award of the expenses for the preparation and conduct of a proof and an award of the expenses of process, on the basis that all of the required work in conducting a court action could be said to have been undertaken "in preparation" for the definitive hearing in that court action and the intention when awarding something other than the expenses of process can only be of a restrictive nature. The weight which the defender attaches to the words "occasioned by" is misplaced, and again if the defender's interpretation were correct there

would be no distinction between the award in the present case and an award of the expenses of process. Written submissions were lodged on behalf of both the pursuer and defender, and these were supplemented by oral submissions by counsel at a hearing before me.

Submissions for the defender

[5] Counsel for the defender no longer insisted on grounds 1, 4 and 5 of the Note of Objections, but submitted that all the other grounds should be sustained, on the basis that the Auditor had misinterpreted or misunderstood paragraph 13 of the Lord Ordinary's interlocutor of 29 November 2019. Under reference to *Stuart* v *Reid* [2015] CSOH 175, it was accepted that the court would be slow to disturb the Auditor's decision if the Auditor has properly exercised his discretion; it will not substitute its own views for those of the Auditor and it will not attempt to tax an account itself; but the court will intervene if the Auditor did not have sufficient materials on which to proceed or his decision is unreasonable. The Auditor's interpretation of the court's interlocutor of 29 November 2019 was wrong, and his decision was unreasonable.

[6] All of the grounds relied on fell within the phrase "the expenses of and occasioned by the preparation and conduct of the proof". The inclusion of the words "occasioned by" showed a clear intention by the court to award all expenses incidental to the defender's proof preparation. It was accepted that there was a difference between "the expenses of process" and "the expenses of and occasioned by the preparation for the proof", but the specific terms of the order were important. It was open to the court, for example, to make an award of expenses from a certain date, should the court have sought to restrict the pursuer's liability in terms of preparation. It did not do so. The Auditor's position was unduly restrictive and did not accord with the court's intention.

[7] Having regard to the specific grounds founded on:

21 January 2019 – These are court dues paid in connection with fixing the diet of proof. These were directly occasioned by the proof. This entry was not objected to by the pursuer at the diet of taxation. Counsel accepted that the auditor can restrict fees not objected to by any party, but it was relevant that the pursuer, as the paying party, understood this particular entry as one which fell within the award made by the court.

2 April 2019 – These were fees in connection with the preparation and attendance of parties at a pre-proof case management hearing. This hearing decided about procedure at the proof, including the lodging of a joint minute of admissions and (importantly) requiring parties to lodge affidavits from all witnesses except experts from whom a report has been lodged, said affidavits to stand as their evidence in chief. This hearing would not have occurred but for the pending proof diet.

17 June 2019 – This was a fee for preparing an affidavit for a supporting witness on behalf of the defender.

29 July 2019 – This also related to a fee for preparation for, and attendance at, a pre-proof case hearing. The sole purpose of such a hearing is in anticipation of and in preparation for the diet of proof.

12 August 2019 – These were fees relating to a pre-proof consultation between agents, counsel and client. The purpose of the consultation was to discuss the impending proof, state of preparation and issues for proof. A consultation prior to proof is a natural and essential step in preparation.

14 August 2019 - These were fees in connection with preparing affidavits for the defender and her witnesses, preparing inventories of productions in anticipation of

presenting that evidence at proof, perusing the evidence lodged by the pursuer and his witnesses and perusing inventories of productions lodged by the pursuer as supporting evidence of his case. Affidavits are an alternative to parties giving oral evidence in court and therefore cut down the length of the evidence at the hearing itself. But for the lodging of affidavit evidence, the costs of the proof would have increased and would have, on the Auditor's assessment, been competently claimed for by the defender. The preparation and consideration of affidavit and documentary evidence is critical to preparation for proof.

19 August 2019 – These again relate to affidavit and production evidence lodged by the pursuer which required to be considered by agents in preparation for the pending proof diet on the following day.

29 November 2019 – These fees related to a hearing on final orders fixed following the issuing of the Lord Ordinary's opinion. Such a hearing is typical in financial provision cases where the court requires to be addressed about the orders to be made and how it is proposed the court should give effect to the propositions it has found established. This incidental procedure only arises as a result of the proof. It is a continuation of the diet of proof and should properly be characterised as forming part of the diet of proof.

[8] With regard to the authorities, counsel referred to *Wood* v *Miller* 1960 SC 86, and in particular to the opinion of the Lord Justice Clerk at 98. She accepted that it is not the function of a judge reviewing an exercise of a discretion to substitute his own view of the material under consideration, and that the decision of the Auditor stands in a not dissimilar position to the verdict of a jury. In that case the Inner House held that the Lord Ordinary's criticism came only to a disapproval of the relative weight attached by the Auditor to the

various elements involved. The court held that if, on a scrutiny of the Auditor's reasons it clearly appears that he has misstated or mistaken or misunderstood the material put before him there may well be grounds for interfering. Counsel submitted that this was the position in the present case. The authority of *Irma Robertson* v *David Robertson* (unreported) 14 March 2001 could be distinguished from the present. In that case the Lord Ordinary found the defender liable to the pursuer in the expenses occasioned by the diet of proof held on three specified dates – there was no mention of expenses of and occasioned by the preparation for the proof. Indeed, Lord Eassie observed that he made it clear in the oral expression of his opinion that the award was restricted to these three actual days in court, and it is clear from his opinion that the award did not extend to preparation but just to the proof itself. The precise wording of the award of expenses was critical.

Submissions for the pursuer

[9] Counsel for the pursuer moved the court to refuse the defender's objections. He adopted the Auditor's response in its entirety; he submitted that the Auditor had reasonably exercised his discretionary judgment, there was no unreasonableness and the court should not interfere with the Auditor's decision. Counsel advanced six propositions:

1. The onus of showing that the Auditor's judgment should be disturbed rests on the defender.

2. The scope of this hearing was review, not appeal. He referred to Lord Woolman's observations in *Stuart* v *Reid*, particularly at paragraph 25, and *Wood* v *Miller* particularly per Lord Justice Clerk Thomson at 98.

3. The court can only disturb the Auditor's findings if they were unreasonable – it cannot substitute its own judgment.

4. The words "occasioned by" are intended to be restrictive, not expansive – see Lord Eassie's remarks at paragraphs [9] and [10] of *Robertson* v *Robertson*.

5. An interlocutor promotes certainty, not ambiguity.

6. The decision as to what amounts to preparation involves an evaluative judgment which turns on the judgment of the Auditor. The court is not best placed to disturb this.

[10] Counsel submitted that there was no particular principle at stake in this matter – the defender was merely seeking to inject uncertainty into the interlocutor of 29 November 2019. In any event, the hearing on that date as to final orders cannot be regarded as part of the proof or preparation therefor – it was clearly a post-proof hearing.

[11] If the court was not with him, counsel submitted that the matter should be remitted back to the Auditor, because the court was not in a position to tax matters itself.

Discussion and decision

[12] The Auditor is clearly correct to observe that an award of the expenses of and occasioned by the preparation and conduct of the proof is different from, and more restrictive than, an award of the expenses of process. In order to give effect to such an award, it is necessary for the auditor to consider each item in an account, and determine whether that item falls within the specified category, and if so, to go on to determine whether the charges are reasonable.

[13] In most proceedings in the Court of Session, parties are required to set out their position in written pleadings, which must set out a relevant case in law with adequately specified averments of fact which, if proved, will result in the remedies sought being granted. The preparation of these written pleadings, and any discussions or challenges to

their relevancy or specification, or particular legal challenges, will not normally fall within the category of "expenses of and occasioned by the preparation and conduct of the proof". So, the drafting of the summons or defences, adjustments to the pleadings, minutes of amendment or answers thereto, specifications for the recovery of documents required to make the pleadings more specific (as opposed to documents sought for evidential purposes at proof), and preparations for and attendance at a debate on the procedure roll, will not normally be recoverable by virtue of an award such as was made in this case (but would normally be recoverable under an award of expenses of process.)

[14] Once a proof has been allowed, it is likely that many (or most) of the expenses will fall to be categorised as being of and occasioned by the preparation and conduct of the proof. It does not follow that all items of expenditure incurred after the allowance of a proof will necessarily fall to be so categorised – there may be charges which (as in this case) relate to late changes to the pleadings by way of minute of amendment which may not fall properly within this categorisation. It would be a mistake to lay down a rigid rule of classification that every charge up to a particular date falls outwith the categorisation, and every charge after a particular date falls within it. It is necessary for the Auditor to consider each individual charge, and decide whether the work charged for is properly to be categorised as relating to the pleadings, or is of and occasioned by preparation and conduct of the proof – and to justify that decision.

[15] It does not appear that this is the exercise which the Auditor carried out in this case. He has proceeded on the basis that:

> "preparation for a proof can only truly commence after parties have finalised their pleadings, ingathered and lodged all their evidence, and attended to all incidental procedural matters required in advance of a proof."

He observes that the highlighted work is not work undertaken in preparation for or conduct of the proof – if it were, there would be no distinction to be made between an award of the expenses for the preparation and conduct of the proof, and an award of the expenses of process. This is a misunderstanding, and suggests that the Auditor did not consider each individual charge and decide whether or not it fell reasonably and properly within the terms of the court's award.

[16] The first ground of objection insisted on (numbered 2 in the Note of Objections) relates to 21 January 2019 which was for "paid court dues for proof". A proof had been allowed by interlocutor of 14 November 2018, and a date assigned by interlocutor dated 20 December 2018. The defender advanced two arguments in her Note of Objections (1) that this was covered by the award (2) that this was not objected to by the pursuer. The Auditor in his minute deals with the second ground of objection at some length (at paragraphs 3 and 4), and points out that his role is not limited to considering and determining matters raised by paying parties. In this I think he may be correct. But he does not go on to consider the first ground; at least, he does not justify his decision on it. Paying the court dues for a proof is a necessary pre-condition of proceeding with the proof. There is no point in paying the dues if it is not the intention to go to proof, and the proof cannot proceed if the dues have not been paid. It appears to me that this charge must fall within the category of an "expense occasioned by the preparation and conduct of the proof" – its only purpose is to enable the proof to proceed. There is nothing in the Auditor's minute which provides a reasoned justification for the decision to the contrary.

[17] Ground 3 relates to a charge on 2 April 2019 for instructing counsel for a pre-proof case management hearing, attending that hearing, paying counsels fees for attendance, and paying court dues. This was a hearing assigned by the court by interlocutor dated

20 December 2018, at the same time as assigning a 4 day proof, as part of the process of ensuring that all necessary steps for the proof were in place, and making detailed provisions for how the proof would proceed. At the hearing the court appointed parties to lodge a joint minute of admissions by close of business 1 week before the proof diet, and appointed parties to lodge by close of business 5 days before the proof diet affidavits from all witnesses (except experts from whom a report had been lodged), said affidavits to stand as their evidence in chief. This charge was focussed entirely on the forthcoming proof, and the arrangements for evidence at the proof. It is difficult to see how this could be described as anything other than expenses of and occasioned by the preparation and conduct of the proof. The Auditor does not deal with this ground of objection individually, but contents himself with the general observation in paragraph 10 of his minute that the highlighted work was not work undertaken in preparation for or conduct of the proof, otherwise there would be no distinction between this award and an award of the expenses of process. As discussed above, I consider that this is a misunderstanding of the position, and a misinterpretation of the court's award.

[18] Grounds 4 and 5 are no longer insisted on. Ground 6 relates to the entry for 17 June 2019, namely the affidavit of Michael McDonald, a supporting witness for the defender. By two interlocutors (2 April and 29 July 2019) the court appointed parties to lodge affidavits of witnesses, which would stand as their evidence in chief. If the defender had not lodged an affidavit of Mr McDonald, his evidence would not have been available to the court. In these circumstances, I consider that the preparation and lodging of Mr McDonald's affidavit clearly falls within the category of an expense of and occasioned by the preparation and conduct of the proof.

[19] Ground 7 relates to an entry for 29 July 2019, for instructing counsel for, and attending at, a pre-proof hearing (the earlier proof having been discharged). Like the hearing on 2 April 2019, this was a hearing assigned by the court; it was focussed entirely on the preparation for the proof assigned for about 3 weeks later. For the same reasons as I have given in relation to ground 3 above, I consider that this falls within the court's award of expenses, and the Auditor's decision to abate it is an error of law based on his misunderstanding of the court's award.

[20] Ground 8 relates to the second, third and fourth entries for 12 August 2019. These relate to charges for a pre-proof consultation with counsel. The consultation was some eight days before the first day of the proof. The defender submits that a consultation prior to proof is a natural and essential step in preparation. Apart from the general opinion expressed by the auditor at paragraph 10 of his minute (referred to above), he does not address this point specifically. I agree with the defender's submission; this is a normal (possibly essential) step in preparation for a forthcoming proof, and falls within the award of expenses.

[21] Ground 9 relates to the first, second, fourth, fifth and seventh entries for 14 August 2019. These relate to perusing affidavits of the pursuer and his witnesses, and for preparing an affidavit for the defender. As indicated earlier, the court had appointed parties to lodge affidavits, which would stand as the evidence in chief of the witnesses. For the reasons I give above in relation to ground 6, I consider that these fall fairly and squarely within the category of expenses of and occasioned by the preparation and conduct of the proof, and the Auditor erred in law in deciding otherwise. The same applies to ground of objection 10, which relates to a charge for 19 August 2019 (the day before the proof commenced) for perusal of an affidavit by a witness for the pursuer.

[22] Ground 11 is in a different category. As explained in the defender's written submissions, this ground was originally stated to refer to incidental procedure on 10 June 2019, but what was intended to be objected to was the Auditor's treatment of an incidental hearing which followed the proof, on 29 November 2019. Permission was sought to amend the grounds of objection; no opposition was made to this, and I granted permission. However, I am not persuaded that the Auditor fell into any error in respect of this ground. The Lord Ordinary heard evidence and submissions over 6 or 7 days between 20 August and 17 September 2019. On the latter date he made avizandum. His opinion was issued on 23 October 2019, and on that date he appointed parties to be heard By Order on 30 October to determine the orders necessary following the issuing of his opinion. That By Order hearing was thereafter discharged twice, and was eventually held on 29 November 2019, when numerous detailed orders were made regarding contact arrangements with the children, sale of property and specific provisions as to liability for costs of certificates, marketing, acceptance of offers, delivery of a car, occupancy of the property pending sale, delivery of moveable property, and the award of expenses discussed here.

[23] The defender submits that this hearing was a continuation of the diet of proof and should properly be characterised as forming part of the diet of proof. I disagree. I consider that the proof ended when the Lord Ordinary made avizandum. Clearly the hearing on 29 November 2019 was linked to the Lord Ordinary's findings and decisions in his opinion issued on 23 October, but it is stretching matters too far to describe it as part of the proof. It was a consequence of the proof (or perhaps more accurately, of the Lord Ordinary's Opinion, which was issued after the proof,) but many events might be regarded as a consequence of the proof. The award of expenses related to the expenses of and occasioned by the preparation and conduct of the proof. I consider that this formula relates to the

period before the proof began, and during the days in which evidence was heard and submissions were made. That period ended when the Lord Ordinary made avizandum on 17 September 2019. I do not consider that the expenses of the hearing on 29 November 2019 are covered by this award.

[24] In reaching the views expressed above, I should make it clear that I am in complete agreement with the six propositions set out by Lord Woolman at paragraph [25] of *Stuart* v *Reid*. In particular, I have been mindful that I should be slow to disturb the Auditor's decision if he has properly exercised his discretion, that the court will not substitute its own views for that of the Auditor, it will not attempt to tax an account itself, but the court will intervene if the Auditor did not have sufficient materials to proceed, or his decision is unreasonable. I have felt obliged to disturb the Auditor's decision because I have reached the view that, in the various respects mentioned above, it is unreasonable and flows from a misunderstanding of the court's award. This is not, as Lord Justice Clerk Thomson put it in *Wood* v *Miller*, only a disapproval of the relative weight attached by the Auditor to the various elements involved, amounting to my simply substituting my own view of the relevant factors. Rather, to the extent that the Auditor has given reasons, it clearly appears to me that he has mistaken or misunderstood the award of expenses, and has disallowed charges which clearly fall within that award.

[25] The circumstances, and the award, in *Irma Robertson* v *David Robertson* appear to me to be quite different from the present case and I did not find that case to be of assistance.

[26] So, for these reasons, I sustain the second, third, sixth, seventh, eighth, ninth and tenth objections for the Defender as stated in her note of objections (for the avoidance of doubt, these relate to charges on 21 January, 2 April, 17 June, 29 July, 12, 14 and 19 August 2019.) I refuse the eleventh objection.

[27] Because the Auditor has reached the view he did on the interpretation of the court's award, he did not carry out a valuation exercise with regard to these items of the defender's account of expenses. The court is not in a positon to carry out such an exercise itself, nor should it attempt to do so. For this reason, I shall remit the matter back to Auditor to tax these elements of the account.