OUTER HOUSE, COURT OF SESSION

[2022] CSOH 75

CA9/20

OPINION OF LORD HARROWER

in

NOTE OF OBJECTIONS

for the pursuer

In the cause

DAVID JOHN WHITEHOUSE

Pursuer

against

(FIRST) THE CHIEF CONSTABLE OF POLICE SCOTLAND and
(THIRD) THE LORD ADVOCATE

Defenders

Pursuer: R Dunlop, KC, Dean of Faculty; A & W M Urquhart
Third Defender: D Ross, KC; Scottish Government Legal Directorate

5 October 2022

The issue

[1] Additional fees in the Court of Session, in proceedings commenced before 29 April 2019, are governed by Chapter 42.14 of the Rules of the Court of Session 1994 (Chapter 42.14). Chapter 42.14 was revoked by SSI 2019 No 74 in respect of proceedings commenced on or after 29 April 2019, and replaced with provisions regarding what is now called an "additional charge" (SSI 2019 No 75). In this action, which began life in 2016, an

issue has arisen concerning the proper interpretation of Chapter 42.14: does the entitlement to an additional fee apply to the proceedings as a whole, or does it apply only to work done up to the date of the award? Neither party suggested that any assistance could legitimately be derived from the new provisions regarding the additional charge. Similarly, nothing in this opinion is intended necessarily to have any application to the new rules.

Procedure

[2] In this matter, the pursuer claimed damages against the defenders for *inter alia* unlawful detention and arrest and malicious prosecution. Raised as an ordinary action, the third defender's plea of absolute immunity from civil suit was upheld at debate, but repelled following the pursuer's successful reclaiming motion, when a proof before answer was allowed. On 26 August 2020, the case having by this stage been transferred to the Commercial Roll, the diet of proof was fixed to take place in January 2021. On the same date, the commercial judge found the third defender liable to the pursuer for the expenses of the action to date, except insofar as already dealt with, on an agent and client, client paying basis, albeit subject to certain exclusions. On 29 September 2020, insofar as the action was directed against the third defender, the commercial judge restricted the proof to quantum, and found the third defender liable to the pursuer for the expenses that had been excluded from the previous interlocutor, once again on an agent and client, client paying basis. In the same interlocutor, he also found the pursuer's agents entitled to charge an additional fee under reference to heads (a), (b), (c), (e) and (f).

[3] Eventually, both defenders settled the claims against them, and by interlocutor dated 22 December 2020, the proof was discharged, with the third defender being found liable to the pursuer, again on an agent and client, client paying, basis for expenses incurred up until

17 December 2020. Thereafter, the proceedings continued against the third defender only, primarily in order to resolve issues raised in a so-called *Iomega* minute, in which the pursuer sought the court's permission to use and disclose documents recovered in the action for the purpose *inter alia* of reporting suspected criminal conduct and co-operating with investigations and inquiries. These issues having been resolved substantially in the pursuer's favour, the third defender was found liable to the pursuer, by interlocutor dated 4 February 2021, for the expenses of process from 18 December 2020 to that date, and, by interlocutor dated 14 April 2021, for the expenses associated with the *Iomega* minute, in both cases on a party and party basis. All of the above interlocutors finding the third defender liable to the pursuer in expenses were accompanied with the usual decerniture for payment of those expenses as taxed by the Auditor of court.

[4] In due course, the pursuer made up accounts in respect of the awards of expenses dated 4 February 2021 and 14 April 2021 and submitted them for taxation ("the pursuer's accounts"). So far as the award of expenses dated 22 December 2020 was concerned, parties had reached agreement, without the need for taxation. According to the third defender, this was on the basis that an additional fee would very likely have been granted by the court if it had been applied for, rather than any concession that the additional fee awarded in September 2020 applied to work carried out subsequently.

[5] At taxation of the pursuer's accounts, the pursuer submitted that the additional fee applied to the whole process and included all awards of expenses in his favour. He referred to certain email correspondence between the pursuer's solicitors and the commercial judge's clerk in which the commercial judge was reported as being of the view, under reference to the decision in *Masterton* v *Thomas Smith & Sons (Kirkoswald) Ltd* 1998 SLT 699, that "the award [of an additional fee] applie[d] to expenses incurred after the interlocutor as well as

before". The third defender submitted that the commercial judge's opinion, as reported by his clerk, was not binding upon the Auditor, having been set out in an informal exchange of emails in which the third defender had no opportunity to participate. In any event, *Masterton* was distinguishable, he argued, since in that case, the Auditor was held to be entitled to take account of all work carried out *prior* to the additional fee being awarded; whereas, in the present case, the pursuer was seeking an uplift in relation to work carried out *after* the additional fee had been awarded.

[6] The Auditor, by minute dated 7 April 2022, accepted the third defender's submissions. He was of the opinion that certain factors listed in Chapter 42.14 as being relevant to the award of an additional fee could only be determined "on work done", and that it could not have been intended that the Auditor, when taxing an *interim* account of expenses, should require to determine the level of additional fee for the whole process. For these reasons, he was on the view that, the court having made no award of an additional fee in respect of the period to which the pursuer's accounts related, it was not open to him to fix an additional fee.

[7] In due course, the case called before me for a hearing on the Auditor's minute, at which the pursuer moved the court to sustain its notes of objections (numbered 177 and 178 of process), and remit the matter to the Auditor with a direction to reconsider the additional fee.

Submissions

[8] The Dean of Faculty, appearing for the pursuer, argued that on a proper interpretation of Chapter 42.14, the additional fee covered the whole proceedings. Chapter 42.14 required the court, in several provisions, to have regard to "the cause",

when determining whether to allow an additional fee, for example, the complexity of the cause, the importance of the cause, and the amount or value of money or property involved in the cause. "Cause" was defined as "any proceedings" (Chapter 1.3). It would still be open to the Auditor, once an additional fee had been allowed by the court, to treat different parts of the cause differently. The case of *Masterton* was clear Outer House authority that an award of an additional fee applied to the whole proceedings, even work covered by an *interim* award of expenses that had already been taxed and paid. There would be practical difficulties restricting what is covered by the additional fee to work done up to the date of the award, since there would always be work required to be done after it was granted, even if that involved nothing more than framing the account, negotiating it and submitting it for taxation. The Dean of Faculty referred also to *Hill* v *Stewart Milne Group* [2016] SC 892, where the Inner House held it was competent for them to award an additional fee not only in relation to the proceedings that took place before it, but also to the proceedings that occurred in the sheriff court.

[9] Mr Ross, appearing for the third defender, adhered to the submissions made to the Auditor. Neither *Masterton* nor *Hill* vouched the proposition that an award of an additional fee applied to work post-dating the interlocutor. The pursuer's position produced anomalous results. For example, an additional fee might appear justified at an early stage in proceedings because of the complexity or difficulty of, say, a time-bar issue. However, once that issue had been resolved, the entitlement to an additional fee should not necessarily be carried forward to subsequent stages in the proceedings where these had become more or less routine. The Auditor had been right to question how he could determine the level of an additional fee for the whole process, at a stage when he could not yet know the whole circumstances of the case or what work would yet be done. In general, the Auditor's

practice was to apply a single level of uplift to the whole proceedings. To reduce the level of uplift to nil for a certain stage in proceedings only would amount to deciding that no additional fee was justified, something which would "fly in the face" of the court's decision to award it in the first place. Finally, as the commercial judge recognised, in his opinion issued in relation to the *Iomega* minute (*Whitehouse* v *Chief Constable of the Police Service of Scotland* [2021] CSOH 33), the action effectively came to an end when the defenders settled the claims against them. What happened thereafter, while part of the same process, was in effect a separate issue to which different considerations applied.

Decision

[10] I begin by confirming that I have taken no account of the email correspondence exchanged between the pursuer's solicitors and the commercial judge's clerk. That correspondence, parties were agreed, was entirely irrelevant to the sole question before me, which was one of interpretation of the court's interlocutor of 29 September 2020 allowing the additional fee.

[11] Neither party argued that *Masterton* was incorrectly decided. The discussion focussed on how that decision should be interpreted, in relation to which it is necessary, briefly, to set out its procedural history. The pursuer had received an *interim* award of damages, with a decerniture against the defenders for the expenses of process to date, without reference to an additional fee. That *interim* account of expenses had been taxed and paid. Upon subsequent final disposal of the case, the pursuer received further damages, and the court decerned against the defenders for the expenses of process with allowance of an additional fee. Lord Osborne held that references in Chapter 42.14 to "the cause" must be understood as a reference to the litigation "in all its aspects", involving a

consideration of "the whole circumstances of the action concerned" (p702E-F). In the result, the Auditor was directed to have regard, when fixing the additional fee, to the whole work done in the case and not just that done subsequent to the *interim* award of expenses (p702L).

[12] In the course of his submissions, the Dean of Faculty sought to explain, using simplified figures, how this would work in practice. He figured the example of a final account in the sum of £20,000, showing an *interim* award of expenses of £10,000 already taxed and paid. If the Auditor allowed an uplift of, say, 100% on the account as a whole, then the total final account sum would become £40,000, with a balance still due of £30,000. Mr Ross took issue with this explanation, as involving a re-opening of the taxed account. As I understood him, Mr Ross was of the view that the additional fee in *Masterton* only applied to the value of the work included in the later account. In other words, it applied as a percentage uplift on the fee allowed for the work carried out subsequent to the *interim* award of expenses, albeit that it was an uplift justified, at least in part, by reference to work that had been carried out prior to that *interim* award. So far as Mr Ross was concerned, if I might adapt the Dean's simplified example, the 100% uplift would be applied only to the second tranche of work done valued at £10,000, bringing out the lesser balance of £20,000 still due.

[13] This discussion helpfully brought out a possible ambiguity in Lord Osborne's direction to the Auditor to "take into account" the whole work done in the case. In short, was the whole work done relevant only to the fixing of the percentage uplift, or multiplier, as Mr Ross argued, or did it also determine what was to be included in the multiplicand? In my view, the latter interpretation is to be preferred. It would make little sense for the Auditor to fix a percentage uplift, primarily by reference to work done under the earlier account, while applying that multiplier exclusively to work done under the later account.

This is particularly so where, as Mr Ross acknowledged in the course of his submissions, that later work may be entirely routine and not such as would of itself justify an additional fee. As I read *Masterton,* the work done under the earlier account was to be taken into account when fixing both the multiplier and the multiplicand for the additional fee. That is an arithmetical exercise which in no sense involves re-opening the earlier taxed account. Rather, since no additional fee had, at that stage, been awarded, the question of how much of the additional fee was to be attributed to the work done under the earlier taxed account had still to be fixed by the Auditor. The ruling in *Masterton* entitled him to determine the multiplicand by treating the taxed value of the work done under the earlier account as a notional figure, and adding that to his valuation of the work done under the later account; the resulting sum would then be multiplied by a factor, determined by reference to his assessment of the whole circumstances of the cause, to arrive at the additional fee.

[14] While in *Masterton,* the additional fee was awarded at the conclusion of the action, there is no reason why, in principle, an additional fee may not competently be awarded at an *interim* stage, where this is justified by the whole circumstances of the action, as they appear to the court at that time. Naturally, the court is not in possession of a crystal ball, and if it finds itself in the position where it is unable to determine whether an additional fee can properly be awarded, on the basis of the litigation "in all its aspects", then it may very well refuse the motion *in hoc statu*.

[15] The Auditor was no doubt correct to observe that certain of the factors relevant to a party's *entitlement* to an additional fee could only be determined by the court on "work done" as at the date of any award. However, it does not follow that the Auditor, when fixing the *amount* of that fee, is similarly constrained. The court's decision, at a particular stage, that only certain factors justify an entitlement does not fetter the Auditor's discretion

to consider the matter afresh when the case is brought before him, as he is always in a better position than the court to consider what weight should be attached to any of the factors justifying an award (*Gray* v *Babcock Power Ltd* 1990 SLT 693, at 696B-G, a decision under the predecessor Rule of Court 347(d)).

[16] It may therefore be that it is never strictly necessary for a party in any particular case to obtain more than one award of an additional fee. This prompts the question whether it would even be competent for the court to award an additional fee twice over to the same party. Although the Dean of Faculty would not be drawn on the point, there seems to me to be no reason in principle why an additional fee could not competently be granted twice. After all, the court's assessment of the whole circumstances of the case is only ever made on the basis of the circumstances as they appear to it at a particular point in time. In principle, therefore, a subsequent award of an additional fee might be made under reference to quite different heads to those that were thought sufficient to merit the award when first made. As it happens, though I was not referred to it in discussion, the pursuer had already at the conclusion of the reclaiming motion been awarded an additional fee under reference to heads (a), (b) and (e), while, as I have already noted, the commercial judge's later award of an additional fee was expressed to be justified under reference to heads (a), (b), (c), (e) and (f). None of this should necessarily present a problem for the Auditor, since, as I have already noted, he must consider the relevant heads afresh when the matter is brought before him.

[17] Mr Ross may or may not have been correct to observe that the practice of the Auditor, when fixing the amount of an additional fee at the conclusion of proceedings, was to apply a single percentage uplift. But it does not follow that it is necessary or, at an *interim* stage, appropriate, for him to proceed in this manner. He has a broad discretion, in

the exercise of which, he may competently apply different percentages to different parts of an account relating to different stages of the case. Mr Ross questioned whether an uplift of 0% could hypothetically be applied to a case in its entirety, consistently with the court having awarded an additional fee. It is unnecessary for me to decide that point, since in this case, an uplift had already been fixed in relation to an earlier stage in these proceedings. There is no sense therefore in which a nil percentage being applied to the pursuer's accounts, if that were indeed what the Auditor chose to do, would "fly in the face" of the court's earlier decision to award an additional fee. I would emphasise that I have said nothing about whether or not it would be appropriate for the Auditor to fix a nil or any other percentage to the pursuer's accounts, since that is a matter entirely within his discretion.

[18] This answers the Auditor's concern that he might be required, when taxing an *interim* account of expenses, to fix the level of the additional fee for the whole process. It is true that he must always have regard, when fixing any part of an additional fee, to the whole circumstances of the action. But on the pursuer's approach, he need only fix that part of the additional fee which he considers appropriate to allow on the particular accounts that are being taxed. Since he is not obliged to apply a single percentage to the whole case, he may apply different percentages to different stages of the case.

[19] For the foregoing reasons, I would sustain the pursuer's notes of objections and direct the Auditor to fix the amount, if any, of the additional fee in respect of the pursuer's accounts.