FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 30
A20/19

Lord President
Lord Tyre
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LORD CARLOWAY, THE LORD PRESIDENT

in the reclaiming motion

in the cause of

MARGARET JANIS KIRKWOOD

Pursuer and Reclaimer

against

THELEM ASSURANCES

Defenders and Respondents

Pursuer and Reclaimer: Smith KC, Black; Blacklocks
Defenders and Respondents: Middleton KC; Brodies LLP

_____

19 July 2023

Introduction

[1] The pursuer, who lives in Scotland, opted to instruct English solicitors as her primary agents in what became a Court of Session action in respect of an accident in France. The action settled in her favour. She obtained an award of expenses against the defenders. The English solicitors had instructed Edinburgh agents to act in the cause, but the latter's involvement amounted to little more than acting as correspondents.

[2] The issue is whether, and to what extent, the pursuer is able to recover from the defenders the fees charged by the English solicitors. The Auditor taxed off the whole of their fees. He determined that it was not reasonable for the proper conduct of the cause for the pursuer to have instructed English solicitors. The Lord Ordinary upheld the Auditor's decision (2022 SLT 1016). The pursuer challenges his reasoning. Although that is the point raised, the case involves a wider issue concerning solicitors from another jurisdiction conducting litigation in Scotland.

Background

[3] The pursuer was involved in a road traffic accident when she was on holiday in France in 2015. The pursuer instructed Irwin Mitchell, solicitors, Birmingham, to pursue her claim. Irwin Mitchell do have offices in Glasgow, but it is not suggested that the solicitors in that office were involved nor was it said that the Birmingham office employed a Scottish qualified agent. Irwin Mitchell engaged Blacklocks, Solicitors, Edinburgh, essentially to assist them, as local agents, in what became a Court of Session litigation. The litigation settled on 4 March 2020. The defenders were found liable to pay the pursuer's legal expenses, as taxed; that is on a party and party basis.

[4] Blacklocks lodged an account for taxation. This totalled £260,629.11. That comprised of their own fees of only £8671.47 plus VAT, but it added a figure for outlays of £250,223.35. Of this, £250,177.35 was contained in an account of Irwin Mitchell's fees and outlays. It is necessary, for a proper understanding of the issues, to delve some depth into the nature of the accounts to see for what work each firm was charging.

[5] The first entry in Blacklocks' account is dated 9 November 2018. It refers to a telephone call with the defenders' agents about accepting service of a summons. The second

is "Agency making up and lodging process", "Framing Inventory of Productions" and "Agency lodging summons". There is a clear inference from this that Blacklocks did not regard themselves as principals and that they were acting merely as agents, as if they had been instructed by another firm in Scotland. There is no indication that Blacklocks had taken instructions from the pursuer (or anyone else) or that they had instructed counsel to draft the summons. There is no entry that they had perused or otherwise considered the summons before its service on the defenders.

[6] This is all in contrast to the Account of Expenses, which detailed the charges said to have been incurred by the pursuer to Blacklocks and Irwin Mitchell, Birmingham. This document commences with a table of hourly rates charged by various named persons, ranging from solicitors of over 8 years experience (£295 to £395 over the years 2016 to 2020) to trainees and paralegals (£140 - £145). The rates charged by the solicitors are substantially higher than those chargeable by Scottish agents in a party and party account over these years (£140 - £148). The account is a detailed one which starts in February 2016 with communications with the pursuer's son. In July, the solicitors visited the pursuer in Kilmarnock and charged sums for so doing according to their hourly rate. The court assumes that these rates are reasonable when judged according to the practices of solicitors in England.

[7] Irwin Mitchell spent some time communicating with a French avocat with a view to obtaining medical and police reports relating to the accident. They also intimated a claim to the defenders. Liability was admitted in August 2016. Irwin Mitchell then obtained the local Kilmarnock medical records; charging, as they would also do with the many other records and reports subsequently recovered, for perusal. An interim payment of damages was requested and expert medical employment reports instructed and obtained.

[8] In April 2018, Irwin Mitchell telephoned Scottish junior counsel; advising him of the background and enquiring about his availability. The following month, there is an entry for "Preparation of all papers for Counsel" which is charged as "Instructing Counsel to prepare Pleadings". This was for a Court of Session summons. Meantime, care reports had been obtained. The summons was revised by counsel and Irwin Mitchell charged for considering the updated draft. Throughout, there are charges for numerous communications with various potential professional or expert witnesses, counsel and the pursuer. By the time Blacklocks are mentioned In Irwin Mitchell's account, in December 2018 (cf above), the fees charged had totalled about £20,000 with a similar figure having been incurred as outlays.

[9] The account charges fees for perusing defences and for a conference call with counsel in early 2019. At the same time Blacklocks were charging "agency" in respect of the lodging of the open record and productions, enrolling for a commission and diligence and consenting to an extension of the adjustment period. Irwin Mitchell continued to ingather new or up to date reports relative to *quantum*. An open record consultation involving Irwin Mitchell and counsel was held in March 2019. Blacklocks do not seem to have attended this. Their fees during this period were confined to post box type work. Thereafter there are fees from Irwin Mitchell for perusing a specification and adjustments and for conference calls with counsel.

[10] The Irwin Mitchell account as lodged contains some duplicated pages (see eg Appendix pages 38 *et seq* and 57 *et seq)*. In May 2019 they instructed Blacklocks to proceed with a motion for *interim* damages, but they instructed counsel for this. A consultation between counsel and experts took place, but Blacklocks were not involved. Blacklocks charged only "agency" fees in relation to lodging the closed record and fixing a proof for November. Meantime counsel drafted a statement of proposals and adjustments for Irwin

Mitchell. They continued to be in contact with each other over sundry matters, including a By Order hearing in June. Irwin Mitchell included as outlays, court dues for various steps in process which they had paid to Blacklocks. They continued to ingather reports and to communicate directly with counsel. A further conference call with counsel to discuss valuation was held in September as was a consultation in Glasgow. Again Blacklocks were not involved. They were not involved either in the consultation between counsel, Irwin Mitchell and a French legal expert later that month.

[11] Counsel prepared a valuation of the claim and Irwin Mitchell charged for perusing and revising it. They also charged for the preparation of an inventory of productions. Further charges were included in relation to finalising a schedule of loss in early October. In the same month, a conference call with counsel relative to "preparation for Proof" occurred. Irwin Mitchell charged for the preparation of an inventory of productions at the end of the month. A pre-trial meeting took place in Edinburgh on 19 November. Irwin Mitchell charged for this. By the end of the year the account comprised £76,199.50 in fees and £85,011.15 in outlays (mainly counsel's and expert witness fees).

[12] In early January 2020, Irwin Mitchell instructed senior counsel for the proof which had been rescheduled for 10-13 March. A meeting with senior and junior counsel was arranged. Several further consultations, this time with experts, ensued. Irwin Mitchell charged for "Preparation for proof" and for writing to witnesses with dates for attendance. Blacklocks charged for citing the witnesses. There were substantial fees to counsel and experts in the run up to the proof. The case finally settled at £475,000 on 4 March. The total fees charged by Irwin Mitchell were £92,936.50 plus VAT with £138,593.55 in outlays. Blacklocks' modest £8,671.47 included £2,952 for the preparation for the taxation and £328 for their attendance at it.

Legislation Rules and Practice

[13] The fees for solicitors in relation to the Court of Session are regulated by Act of Sederunt, notably the Rules of the Court. The reference to solicitors in this context is to those agents who are duly authorised to conduct litigation before the court (RCS 1.3(1)). This generally means a solicitor who is qualified in Scotland (Solicitors (Scotland) Act 1980 ss. 4 and 25; see also s. 23(1)).

[14] It is the court's understanding, although it is a matter for the Faculty of Advocates, that, although counsel may accept instructions from a solicitor who is a member of the Law Society of England and Wales on behalf of their client under the direct access rules (Direct Access Instructions (October 2020) Schedule, para 3(a)), they cannot do so in relation to the conduct of litigation in Scotland (*ibid* para 2.3; Guide to the Professional Conduct of Advocates (7th ed, Oct 2019, rev Jan 2022) para 8.3.4(c) and (f)). As the Faculty's website states in clear terms:

> "In proceedings before the Scottish Courts, an Advocate may only be instructed by a Scottish solicitor or other person authorised to conduct litigation in Scotland".

[15] The rules regarding taxation of expenses are contained in Chapter 42. RCS 42.10(1) provides that:

> "Only such expenses as are reasonable for conducting the cause in a proper manner shall be allowed."

This has been replaced by the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019. However, these proceedings were commenced prior to the coming into force of the 2019 Rules. RCS 42.10(1) still applies to these proceedings.

[16] When the rule refers to reasonable expenses for conducting the cause, it is to the conduct of the cause by a person who is entitled to do so; ie a Scottish agent. That agent

may have lodged a detailed account (Table of Fees, Chapter I), using the relevant quarter hourly rate for work such as proof preparation and attendances, perusal of documents etc, or the block of fees in resect of the various steps in the progress of the cause (Chapter III, Part V). These blocks provide a good guide to what is involved in the conduct of a cause in a proper manner.

The Auditor's report

[17] The defenders objected to Irwin Mitchell's account. They argued that it had not been reasonable for the proper conduct of the litigation for the pursuer to have instructed English solicitors. They asked the Auditor to disallow Irwin Mitchell's fees. The Auditor agreed with the defenders. He allowed a total sum of £136,783.20; made up of Blacklocks' abated fees plus VAT and a number of outlays which Irwin Mitchell had incurred, including counsel's fees.

[18] The Auditor reasoned that the first question was whether it was reasonable for conducting the cause in a proper manner to instruct foreign solicitors. If it was, the next question was what work undertaken by the foreign solicitors was admissible on a party and party basis (RCS 42.10; *Scottish Lion Insurance Co* 2006 SLT 606 at para [8]). The rates to be applied to any work which was admissible would be those set by the law and practice in the foreign jurisdiction. It was not reasonable for conducting the cause in a proper manner for the pursuer to have instructed Irwin Mitchell in Birmingham. The pursuer's permanent residence was in Scotland. The accident was in France. Nothing was to be gained in respect of the specialism of the English solicitors that was not readily available from a number of Scottish agents. The instruction of English solicitors invariably resulted in the party, who was found liable, requiring to pay expenses at a higher rate than they would have, had the

matter been dealt with by Scottish agents. That would be the result in this particular case. This was because such an arrangement often led to additional work being undertaken, including liaising with the Scottish agents. The hourly rate applicable was often greater than the hourly rate allowed in Scotland. Allowance of recoverable work on a time basis was often more favourable to the payee than the Scottish method of allowing some work on a time basis, and some on a sheetage or page basis.

The Lord Ordinary's decision

[19] The Lord Ordinary referred to the Auditor's wide discretion (*Shanley* v *Stewart* 2019 SLT 1090, at paras [25]–[26]). It could not be said that the Auditor had exercised his discretion unreasonably. The relevant test for the purposes of this action was whether the charges of the English solicitors were expenses which were reasonable for conducting the cause in a proper manner (RCS 42.10(1)). The Auditor applied his mind to this test and concluded that it was not met. The action was raised, and remained, in the Court of Session. It was not immediately apparent that it was reasonable for conducting the cause in a proper manner for the pursuer to instruct English solicitors. She was entitled to do so, but it did not follow that the expense of doing so should fall on the defenders. If the charges by Irwin Mitchell were allowed, the pursuer would effectively be able to recover the charges from the defenders on an agent and client scale. The defenders had only been found liable to pay the pursuer's expenses on a party and party basis. In all these circumstances, the Auditor's decision could not be categorised as unreasonable.

[20] The Auditor's decision was confined to the circumstances of the case. He had not suggested that there was a general principle against the allowance of charges by English and other foreign solicitors. It was possible to conceive of numerous situations in which the

Auditor might, in particular circumstances, reach the view that it was reasonable to instruct English solicitors.

Submissions

Pursuer

[21] It did not matter whether the pursuer could have instructed Scottish agents; the question was whether it was reasonable for her to instruct English solicitors. The pursuer's instruction of Irwin Mitchell could not be said to have been unreasonable. Irwin Mitchell had a vast amount of experience in litigating claims arising from foreign accidents, including enforcing Scottish judgments against foreign companies. It was accepted that, if Irwin Mitchell had been running the litigation, that was not what should have happened.

[22] The Auditor's decision was not inviolate. It was challengeable on judicial review grounds (*Shanley* v *Stewart* at para [25]). The Auditor had misinterpreted *Scottish Lion Insurance Co*, which followed *Wimpey* v *Martin Black & Co* 1988 SC 264. He had interpreted it as laying down a gateway test whereby only if he determined that English solicitors were "properly employed" in the Scottish litigation did he require to go on to consider whether their charges were justified. That was an error. The test in *Scottish Lion* (at para [8]) was whether it was unreasonable to engage an English solicitor for a particular charge on the account.

[23] The Auditor ought to have assessed whether the amounts charged by Irwin Mitchell for each item were reasonable, rather than taxing off their fees in their entirety (*Commissioners for HM Revenue &* Customs v *William Grant & Sons Distillers* [2009] CSIH 23 at para [4]). He ought to have consulted an English taxing master and the relevant English scale of charges in order to assess the level of charge. A particular item in an account of

expenses should only be disallowed if it could be said that no competent solicitor acting reasonably would have incurred it (*Malpas* v *Fife Council* 1999 SLT 499, at 501). Charges by a foreign solicitor may be more reasonable than those of a Scottish agent. The decision would give the defenders a windfall. Had Scottish solicitors been instructed, they would have been paid significantly higher expenses than those charged by Blacklocks. Any shortfall would have to be borne by the pursuer. The Auditor's concern, that overcharging would result from time spent by Irwin Mitchell communicating with the Scottish agents, could have been dealt with by taxing off any such charges.

[24] The Auditor's conclusion that, as a generality, English solicitors charged more than Scottish solicitors, and that therefore it was not reasonable to instruct them, was manifestly ill-founded. That was a statement of policy whereby any charges by English solicitors would be disallowed. That was a fettering of the Auditor's discretion. He had done the same in *School and Nursery Milk Alliance, Ptnrs* [2023] CSOH 32 at para [5]). This had been disapproved on a note of objections (*ibid* at para [16]). If the Auditor had not even looked at the items in the account, he could not say that there had been higher charging in this case. If it was unreasonable to instruct English solicitors, it did not follow that their charges would be unreasonable.

Defenders

[25] The Auditor's discretion was wide. The grounds for interfering with his decisions were limited (*Shanley* v *Stewart* at para [25]; *CJC Media (Scotland)* v *Sinclair* [2020] CSOH 93, at para [7]; *McCallion* v *McCallion* [2022] CSOH 36, at paras [8] and [24]). He would have to have erred in law, misused the factual materials before him or acted in a manner that no other reasonable Auditor would have done. Even if the Lord Ordinary had been so minded,

he would not have been entitled to come to a different view from the Auditor, without such an error in the Auditor's decision. If an English solicitor was properly employed in a Scottish litigation, he would be entitled to be remunerated for his work according to an English scale of remuneration (*Scottish Lion Insurance Co* at para [8]). That was the test which the Auditor had applied. It was the correct one.

[26] It was not submitted that the Auditor should not, or could never, allow foreign solicitors' fees. On the contrary, it was positively submitted that such an expense could be allowed where it was reasonable to have incurred it. Where, however, an English solicitor was the principal agent, the issue demanded much closer scrutiny. In this case, it was not reasonable for the pursuer to have instructed Irwin Mitchell as her principal agents. The Auditor did not decide that, as a matter of general policy, English solicitors' fees could never be recovered. He had said that English solicitors' fees would invariably be higher than those of Scottish solicitors, meaning usually, but not always. He observed that this was an occasion where greater expense would be incurred. He came to this conclusion on the basis of case-specific reasoning. He had directed himself to the correct test and applied his knowledge and experience to the material which was specific to this case (*Shanley v Stewart* at para [14]).

[27] Neither *Wimpey* v *Martin Black & Co* nor *Scottish Lion Insurance Co* was directly in point. In contrast to the present case, in *Wimpey* it was conceded that it had been reasonable for English solicitors to have been instructed. The court considered the approach to be taken after it had been determined that the English solicitors were properly or reasonably employed. In *Scottish Lion*, the court was concerned with whether to allow an additional fee to both Scottish and English agents.

[28] It was not unfair for the pursuer to bear the expenses which had been disallowed. The fee arrangements between her and Irwin Mitchell were not known, but it was understood that she had some legal expenses cover from Direct Line Insurance. Irwin Mitchell had a Glasgow office and employed Scottish solicitors. They were experienced solicitors, and they, or Blacklocks, ought to have known the Scottish rules. A party was entitled to spend as much as he wanted on the cost of legal representation, but he could only recover what was reasonable from the opposing party.

Decision

[29] It is important that litigation in Scotland is: (a) conducted by those whom the court has authorised to do so; and (b) subject to the expenses regime which the court has devised. The former is concerned with not only the efficiency of the system; that is that causes are conducted by those fully conversant with Scots law and procedure. It is also to ensure that those conducting it are subject to the disciplinary rules either exercised by the court itself of delegated by the court to the Faculty of Advocates or the Law Society of Scotland. It is manifest that this litigation was not being conducted by solicitors authorised by the court. On that ground alone, the Auditor would have been bound to tax off Irwin Mitchell's fees in so far as they related to the general conduct of the litigation.

[30] The court has a duty to ensure access to justice. Part of the court's fulfilment of that duty is the maintenance of a detailed expenses regime which is designed to keep the costs of litigation at what the court considers to be a reasonable level. That level is fixed by the court after consultation with the profession and appropriate consideration by the Scottish Civil Justice Council and its Access to Justice Committee. The type of work for which solicitors will generally be allowed to charge is relatively clear; initially from the Table of Fees and

now the Taxation of Judicial Expenses Rules 2019. These are the only rules applicable to solicitors' fees in so far as they relate to the general conduct of an action. They apply only to those entitled to conduct litigation before the court; that is Scottish agents or those otherwise authorised by Parliament. They cannot be used to tax accounts of solicitors from other jurisdictions using different practices and rates.

[31] All of this is not to say that in a Scottish litigation the fees of English solicitors for particular pieces of work are not recoverable. Of course they are. Normally, however, the work has to have been instructed by the Scottish solicitors who are responsible for the general conduct of the litigation, in this case Blacklocks. There is no indication in this case that Blacklocks gave any thought to, or were even aware of, the work carried out by Irwin Mitchell. There is no suggestion that they considered that it was reasonable to instruct them for conducting the cause in a proper manner. Any such thought would have to have proceeded on the basis that the Scottish agents would be carrying out the bulk of the work but that it was reasonable for them to instruct English solicitors to carry out discrete pieces of work for particular purposes. These could include the ingathering of evidence which could only be achieved by a prolonged journey to a part of England not readily accessible to the Scottish solicitors. It might include advice on matters in English law and procedure. There are many other examples.

[32] In that type of situation the task of the Auditor is to decide, first, whether the particular items of work which were carried out by the English, or any other foreign, solicitor, were reasonably instructed by the Scottish agents for conducting the case in a proper manner (*Wimpey* v *Martin Black & Co* 1988 SC 264, Lord McDonald, delivering the opinion of the court, at 286 and 288). Secondly, the Auditor would then have to assess, as with any outlay, whether the fee charged was reasonable. The reasonableness of the fee

would have to be determined having regard to the charging rates in the relevant jurisdiction (*ibid*; followed in *Scottish Lion Insurance Co* 2006 SLT 606, Lord Drummond Young at 609), although the Auditor would remain the determiner of reasonableness. With English solicitors' fees, those allowed in English practice would normally be appropriate. The Auditor may have to make suitable inquiries in that regard. In order to enable an exercise of this type to be carried out, the Scottish agents would have to separate out, into specific outlays on their account, those items, for which it was reasonable to instruct English solicitors, from those concerned with the general conduct of the cause (*ibid*). There was no attempt to do that here. In these circumstance it was not for the Auditor to carry out such a time consuming, if not well nigh impossible, task by taxing Irwin Mitchell's account by looking at each individual item

[33] Were the court determining whether Blacklocks or the pursuer, in instructing English solicitors, were acting reasonably, for conducting the cause in a proper manner, it would have regard to the wide discretion which the Auditor has to determine such a matter (*Shanley* v *Stewart* 2019 SLT 1090, Lord President (Carloway), delivering the opinion of the court, at para [25]). The grounds of challenge are analogous to those in a judicial review. Where, as here, the Auditor's decision is one which engages his discretion, it will only be successfully reviewed on a note of objections if no reasonable Auditor could have reached it.

[34] As in *School and Nursery Milk Alliance Ptnrs* [2023] CSOH 32, the Auditor had regard to the higher rates which are generally charged by solicitors in England. The Auditor has extensive experience of such matters. He does not need extraneous material or evidence to support this. It will be obvious from the charges in the English solicitors' account. Here it was manifestly clear from the rates on the first page. The court must disagree with the Lord Ordinary in *School & Nursery Milk Alliance* (at para [16]) in relation to the need for

investigation into matters which are well within the Auditor's expertise. Equally, the Auditor does not require proof that engaging English solicitors to conduct litigation in Scotland, even if that were permissible, would result in higher levels of charging. This too is within his specialist knowledge.

[35] Even if the court required to consider whether it was reasonable to instruct English agents to carry out particular items of work, like the Auditor, the court would have quickly agreed with the Auditor's view that the significantly higher charge out rates in Irwin Mitchell's account militated strongly against this being so. There is no basis upon which the Auditor's approach, or the Lord Ordinary's reasoning, can be faulted.

[36] The reclaiming motion is refused. The court will adhere to the Lord Ordinary's interlocutors of 10 August 2022.