SHERIFF APPEAL COURT

[2021] SAC (Civ) 2
GLW-A653-17

Sheriff Principal M W Lewis
Sheriff Principal A Y Anwar
Appeal Sheriff N Ross

OPINION OF THE COURT

Delivered by Sheriff Principal M W Lewis

in an appeal in the cause

CABOT FINANCIAL UK LTD

Pursuer and Respondent

Against

CATHERINE WEIR

Defender and Appellant

Defender and Appellant: Smith QC; Flexlaw Ltd
Pursuer and Respondent: Massaro, Advocate; Shoosmiths LLP

13 January 2021

Introduction

[1] The principal matter for determination in this appeal is whether as a matter of law an award of expenses on an agent/client, client paying basis provides a full indemnity to the successful party for all expenses and in this particular case whether that includes a success fee under a speculative fee agreement.

Background

[2] The pursuer is a finance company. As part of its business, it purchases debt. In July 2017 the pursuer sued the defender for payment of the sum of £7,277.52. The pursuer avers that on 27 June 2016 it acquired from Lloyds Banking Group title to, and was assigned, the right to payment of various debts including a debt allegedly owed by the defender to Lloyds Banking Group.

[3] At the outset of this litigation the defender was unrepresented. From an early stage she challenged the pursuer's title to sue and its compliance with the statutory enforcement procedure prescribed by the Consumer Credit Act 1974. The pursuer failed to respond to these crucial issues; failed to lodge essential documents despite order of the court; lodged heavily redacted documents; and eventually on the morning of a second diet of proof abandoned the action. The sheriff criticised the basic failures of the pursuer to lodge the documents it founded upon, to provide evidence of the assignation on which it purported to rely, or the document purportedly triggering liability. These criticisms appear entirely justified and his decision to award expenses to reflect the poor conduct of the pursuer, on reliance on these failures, was not challenged.

[4] The decision on whether to make an award of expenses and if so on what basis is a matter for the discretion of the sheriff. Having heard argument, the sheriff awarded the expenses of process against the pursuer for the period up to 26 October 2017 on a party/party basis and for the period from 27 October 2017 onwards on an agent/client, client paying basis. He did so to mark his disapproval of the manner in which the pursuer had conducted the litigation from the date upon which "the potential deficiencies in the pursuer's proof of title ought to have been manifest to even the most careless corporate litigant".

The audit and objection

[5] The defender lodged two accounts of expenses for taxation, the first being the party/party account and the second being the agent/client, client paying account. At the diet of taxation an issue arose concerning a charge for a "success fee" sought by the defender in the second account. In support of that charge the defender's agent provided the auditor with a copy of the Letter of Engagement with the defender which made provision, among other things, for payment of fees and outlays. The Letter of Engagement was not at that stage disclosed to the pursuer. The auditor subsequently reported. He allowed the success fee which represented 70% of the taxed fees of the defender's agent.

[6] The pursuer lodged a note of objections to the auditor's report challenging that charge. (The pursuer objected to another element within the auditor's report but it has no bearing on this appeal). A hearing took place before the sheriff at which the pursuer argued that the auditor had erred in allowing the success fee because (i) the Letter of Engagement had not been disclosed to the pursuer's agent thus denying the pursuer the opportunity to make submissions thereon; and (ii) it is properly characterised as an "extra-judicial" expense and as such not covered by the award. Separately the pursuer pointed to a term in the Letter of Engagement which, it submitted, had the effect of placing a cap of 25% on the extent of the success fee.

The Letter of Engagement

[7] The relevant provisions are these:

> "If you win the case (see further below what constitutes a "win"), 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 and advocate's or solicitor-advocate's fees from your opponent.

If you lose the case, you pay our outlays and your opponent's judicial (court) expenses and outlays (if any) … If you ultimately go on to win the case, you pay our success fee." (Penultimate paragraph, page 1).

"Our fees (and any success fee) are subject to VAT at the prevailing rate. The hourly charge out rate for your solicitor is £220.00/hour." (Final paragraph, page 1). A success fee is defined as "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." (Paragraph 3, page 2).

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. If you win, you are liable to pay our outlays, solicitor/client fees and advocate's or solicitor-advocate's fees (if any) and the success fee. Normally, however, you will be able to recover part or all of our outlays and solicitor/client fees and advocate's or solicitor-advocate's fees (if any) from your opponent. The court, through the Auditor of Court will decide how much you can recover if we and your opponent cannot agree the amount. If the amount agreed or allowed by the court does not cover all our work, you pay the difference." (Final paragraph, page 2).

The sheriff's decision

[8] Before the sheriff, the defender's agent had maintained that disclosure of the Letter of Engagement was inappropriate as its contents were confidential and commercially sensitive. The sheriff concluded that the failure to disclose the Letter of Engagement to the

pursuer's agent breached basic principles of fairness. Concerns about confidentiality and commercial sensitivity were trumped by the logical and equitable necessity to disclose the document to the opposite party if that document were being relied upon to extract a success fee. That decision was not challenged on appeal.

[9] In relation to the success fee, the sheriff held that the charge ought not to have been allowed by the auditor. The sheriff noted the differences between an account due to be paid by a client to the client's solicitor, which he termed a "client account" and a solicitor's account that is to be charged against, and is payable by, a third party, which he termed a "judicial account". The sheriff then considered the three different modes of taxation of a judicial account, namely party and party, agent and client (third party paying), and agent and client (client paying). He identified that the account of expenses was a judicial account taxed on an agent/client, client paying basis, and that consequently the "process rule" applied (Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993, Schedule 1, regulation 6). With reference to the 1993 Act of Sederunt and a number of authorities, which we consider below, the sheriff decided that the effect of the process rule limits expenses to the proper expenses of process. He concluded the success fee was akin to an extra-judicial step adopted to enable or assist the defender to enter the proceedings in the first place and was largely if not entirely, aimed at protecting the interests of the defender's solicitor who had chosen to act on a speculative basis.

[10] The sheriff rejected a submission by the defender that a success fee may be likened to an additional fee or percentage increase under the 1993 Act of Sederunt, Schedule 1 paragraph 5(b). The former, he said, is a matter of contract whereas the latter derives from express judicial sanction granted within the court process. This matter was not explored during the appeal.

[11] On the third and final matter, the sheriff observed that the defender did "win" in that she secured decree of absolvitor, the effect of which was to reduce her liability to the pursuer in respect of the principal sum (£7,277.52) to nil. On that basis the success fee must be capped at 25% of the principal sum.

Grounds of appeal

[12] There are four issues raised in the Note of Appeal.

(1) The defender asserts that although the sheriff correctly identified the difference between a client account and judicial accounts, he misunderstood the distinction at taxation as between a solicitor/client, client paying account and a solicitor/client, third party paying account. The effect of an award of expenses on the former basis is that the payer steps into the shoes of the client which means in the present case that the pursuer requires to pay all that the defender undertook to pay to her solicitor in terms of the Letter of Engagement. In other words the award provides the entitled party (the defender) with a full indemnification from the paying party (the pursuer).

(2) The defender also challenges the sheriff's analysis of the application of the process rule asserting that paragraph 1 of Schedule 1 of the Act of Sederunt 1993 applies to the taxation of party and party accounts only and has no application in relation to solicitor/client accounts.

(3) In expanding the foregoing proposition the defender maintains that the sheriff was wrong to conclude that a solicitor's success fee is not a proper expense of process in the context of an account being taxed on a solicitor/client, client paying basis.

(4) The defender maintains that the sheriff erred in his interpretation of the Letter of Engagement and ought not to have placed a cap on the success fee.

Decision

[13] It is necessary to go back to basic principles in relation to the distinction between fees payable by a successful litigant to his/her solicitor and what may be recovered from an successful party by way of an award of expenses, the bases on which an award of expenses may be made by the court, and the process rule.

[14] Where the contractual relationship of solicitor and client is created, the solicitor will usually provide the client with a letter of engagement and within that letter set out a structure for payment of fees and outlays. We adopt the sheriff's description of the fee note or invoice rendered by the solicitor to the client as a "client account", and the solicitor's account that is to be charged against a third party as a "judicial account"

1. The Letter of Engagement in this case expressly incorporates a speculative fee agreement. A speculative fee agreement is a type of "no win no fee" funding arrangement under which an enhanced fee will normally be applied in the event of a successful outcome.

2. In terms of sections 61A(3) and (4) of the Solicitors (Scotland) Act 1980 a solicitor representing a client in litigation may agree to act on a speculative basis. In practice, there are three different types of funding arrangement:

(1) The solicitor may agree to accept party and party expenses with a success fee payable by the client of up to 100% of the fee element of the judicial account (Act of Sederunt (Fees of Solicitors in Speculative Actions) 1992);

(2) A solicitor may agree to accept agent and client expenses in the event of the case being successful without any percentage increase for success – this will include work carried out prior to commencement of the court action together with any other work carried out by the solicitor which the auditor considers to be fair and reasonable; and

(3) A solicitor may enter into a written fee agreement with the client stating an hourly rate and a success fee calculated as a percentage uplift of that rate.

[15] In this action the speculative fee agreement falls within category (3) above. The hourly rate is stated as £220 per hour; the fees are chargeable on a solicitor/client basis; and the success fee is calculated as a percentage uplift of that rate.

[16] Where the solicitor seeks to recover his fees directly from his client the starting point is the terms of any letter of engagement, but in addition elements of protection are built in to ensure that the client is not faced with excessive and unjustifiable fees and that the solicitor is able to recover all fees and outlays reasonably incurred on behalf of the client in the conduct of the litigation even although those expenses cannot be recovered from the other party (MacLaren: *Expenses*, p 509). If the client wishes to challenge the account or parts of it, he may seek taxation and this will be carried out by the auditor on the basis of a solicitor/client, client paying account.

[17] For judicial accounts, the general rule understood by all civil practitioners is that "the cost of litigation should fall on him who has caused it" (Macphail: *Sheriff Court Practice* (Third Edition) at para 19.07; *Shepherd* v *Elliot* (1896) 23 R. 695, per L.P. Robertson at p 696). There are exceptions to that rule which permit the court in the exercise of its discretion to

modify the expenses of a successful party (Macphail, paras 19.08-19.12) but these do not arise in the present case.

[18] At the commencement of a court action, and throughout the life of a defended court action, the amount of judicial expenses likely to be payable to an opponent is opaque. Additionally there is a gap, often a substantial gap, between what a successful litigant has to pay his/her solicitor and what that litigant may recover from the unsuccessful party by way of judicial expenses. These issues were highlighted by the defender's solicitor in the Letter of Engagement.

[19] Recovery of the costs of litigation from the losing party is through an award of expenses made by the court. The decision as to whether to make an award of expenses is one for the exercise of discretion of the court (Macphail, para 19.03). That discretion includes decisions on which party will be liable for the expenses, the bases upon which expenses are to be awarded, and the scale upon which the account of expenses is to be assessed or taxed.

[20] In judicial proceedings an account of expenses is to be taxed on one of three bases ordered by the court, namely; (1) party/party, (2) solicitor/client, third party paying, or (3) solicitor/client, client paying (Macphail, para 19.33).

[21] The most common mode of taxation is party/party. In a taxation of an account of expenses on that basis the successful party is only entitled to such expenses as are reasonable for conducting the litigation in a proper manner (Act of Sederunt 1993, Schedule 1, Regulation 8). The chapter on Expenses in "*Court of Session Practice*" (edited by LP Carloway et al; Bloomsbury loose-leaf, updated to August 2019) at paragraphs L[705] – [711] adopts similar wording when describing the difference between expenses recoverable on a party/party scale and those on a solicitor/client, third party paying basis. This type of

taxation, governed by regulations 6 and 8, is the most rigorous and is the least generous to the entitled party.

[22] There is a further limitation in relation to recoverable expenses on a party/party basis and that is set out in Regulation 6 of the 1993 Act of Sederunt. This is commonly referred to as 'the process rule'. It provides:

> "The expenses to be charged against an opposite party shall be limited to proper expenses of process subject to this proviso that precognitions, plans, analyses, reports and the like (so far as relevant and necessary for proof of the matters in the record between the parties), although taken or made before the bringing of an action … may be allowed."

[23] The two other forms of taxation (solicitor/client, third party paying and solicitor/client, client paying) vary in rigour and generosity depending on whether the account of expenses is charged against (1) the other party or (2) the solicitor's own client (Macphail; para 19.44, Maclaren; p 509.)

[24] Taxation on a solicitor/client, third party paying basis lies somewhere in the middle of the three modes of taxation. It is less generous than a taxation on a solicitor/client, client paying basis and not quite as rigorous as a taxation on a party/party basis (Macphail, para 19.46, MacLaren, p 509). The 1993 Act of Sederunt does not make any express provision for how such an account ought to be taxed. Expenses recoverable on this basis are not as extensive as those on an agent/client, client paying basis (*Court of Session Practice* (ibid) at paras L[705 – 711])

[25] In our view the process rule applies to this category of taxation also. Firstly there is nothing in the 1993 Act of Sederunt which would have the effect of dis-applying regulation 6. Hastings; *Expenses in the Supreme and Sheriff Courts* suggests that it includes all expenses incurred by "a prudent man of business" noting that the "limiting process rule is still applicable." (p 77 and 111). *Court of Session Practice* (ibid) notes that "a fair and reasonable

sum will be allowed for any work reasonably incurred. That work will be presumed to have been incurred if it had the client's express or implied approval. The sum will also be presumed reasonable on the same basis." (paragraphs L[705] – [711]).

[26] The third basis is taxation on a solicitor/client, client paying. This mode of taxation varies in rigour and generosity depending on whether the account being taxed is a client account (ie payable by the client himself) or a judicial account (payable by a third party opponent). This reflects the passages in Macphail and MacLaren referred to above.

[27] It was this assessment which drew criticism from senior counsel for the defender who submitted that the sheriff had wrongly introduced an entirely new categorisation, misapplied the process rule and had been led into that error by wrongly construing the dicta in *Hood* v *Gordon* (1896) 23R 675 and *Walker* v *Waterlow* (1869) 7M 751 by treating them as cases involving solicitor/client, client paying accounts. The essence of his submission was that a client paying account amounts to a full indemnity of all liability to one's own solicitor and that must be met by the paying party.

[28] We are not persuaded that the sheriff erred in the manner contended. The sheriff identified first of all a solicitor/client account and separately three categories of judicial awards of expenses, one of which is solicitor/client, client paying. The latter was imposed in exceptional circumstances to reflect the court's displeasure or disapproval of the unreasonable conduct of a party.

[29] Senior counsel referred us to Hastings (ibid; pp 112 and 113) in support of his submissions. There a distinction is drawn between solicitor/client, inter parties and solicitor/client, client paying. In relation to the former Hastings appears to provide that the basis of the taxation is the same as client paying, except that any expenses unreasonably or extravagantly incurred or unreasonable in amount are disallowed. It observes "the process

rule does not apply". In relation to the latter Hastings states that all expenses are allowable, including extravagant and unreasonable expenses, provided they have been expressly or impliedly approved by the client:-

> "An indemnity is obtained if the court order the expenses to be taxed as between solicitor and client, client paying when of course the process rule does not apply and all expenses are allowable which are reasonable and necessary for the party to obtain justice."

[30] We agree that *Hood* v *Gordon* and *Walker* v *Waterlow* involve taxation on a solicitor/client, third party basis and do not provide the support identified by the sheriff. It still, however, remains that law recognises a distinction in approach between the taxation of a client account and the taxation of a judicial account. We agree with the sheriff's assessment of the distinction between a client account and a judicial account and agree with his categorisation of the modes of taxation,

[31] The question is then whether the process rule applies to a solicitor/client, client paying account. The 1993 Act of Sederunt is of assistance insofar as regulation 6 is not expressly dis-applied to this category of account, and no authority has been identified which supports such a conclusion. In *Milligan* v *Tinne's Trustee* 1971 SLT (Notes) 64 the Lord Ordinary concluded that the recoverable items in a judicial account on a solicitor/client, client paying basis were limited to items properly characterised as "expenses of process" and not "extra-judicial expenses i.e. expenses which are not expenses of the judicial process" (page 65). That passage is approved in Macphail at para 19.45.

[32] In the course of submissions we were referred to *McNair's Executrix* v *Wrights Insulation Co. Limited* 2003 SLT 1311 as authority for the proposition that a premium paid by a successful litigant for an after the event ("ATE") insurance was not a legitimate expense of the process. In *McGraddie* v *McGraddie (No. 2)* [2015] UKSC 1 the Supreme Court concluded

that an ATE premium was not a sum incurred for conducting the cause. The court applied the same logic to a premium paid by a successful party for before the event ("BTE") insurance. We observe that the accounts in those cases were taxed on a party/party basis.

[33] Senior counsel for the defender urged us to accept that a success fee is an expense of process. He submitted that the expenses of process to which the process rule is directed includes all expenses which a client will incur to have his case defended or pursued, and if the client enters into a success fee arrangement to achieve that then it is, for the client, an expense of process.

[34] That submission does not bear close scrutiny. It finds support only from the extract from Hastings, above, which sits sharply in contrast to the authorities, all of which emphasise, to varying degrees, the need for control and a means of ensuring that the costs of litigation are kept within proper limits. The extract from Hastings requires to be placed in context – it comes from a book written by an Auditor in 1989, before success fees were commonplace, before Lord Carloway's comments in *McNair* (albeit that case did not involve a solicitor/client, client paying account), before the Supreme Court's decision in *McGraddie,* and before the Taylor; *Review of Expenses and Funding of Civil Litigation in Scotland* (2013) (in which the authors all expressed the view that a success fee is not recoverable from an unsuccessful opponent i.e. there is no 'full indemnity').

[35] Even if we were persuaded that the process rule does not apply to solicitor/client, client paying accounts, Hastings introduces a limit on the indemnity it appears to suggests exists, namely that those expenses which are unreasonable or unnecessary for the party to obtain justice will not be recoverable. We find it difficult to reconcile the proposition that a success fee (the terms of which have not been disclosed to the opposing party in a litigation

and which may amount to a bad bargain on the part of the client) will always be reasonable and necessary and thus recoverable.

[36] If it were correct that the payer steps into the shoes of the client in this particular instance and is bound by the terms of the speculative fee agreement, that argument is of no assistance in the present case. The Letter of Engagement makes specific provision that if the client wins, the client must pay the solicitor's outlays, solicitor/client fees and the success fee. It also however explains what the client may recover in the event of a win from the other party, namely "part or all of our outlays and solicitor/client's fees and advocate's or solicitor-advocate's fees if any from your opponent". There is no mention of an ability to recover the success fee from the other side.

[37] In summary:-

- An award of expenses on a solicitor/client, client paying basis does not provide an absolute indemnity to the payee.
- The expenses recoverable are limited to those which are reasonable.
- A success fee is not an expense of process.
- If we are wrong about that, the Letter of Engagement in the present case contains a tacit acceptance that a success fee is not recoverable from the other party.

[38] There is a subsidiary issue in this appeal which arises only in the event that the defender does not succeed in relation to the principal matter.

[39] In the event we are wrong about the indemnity, we consider that the sheriff was correct in his assessment of the cap. It is true that the defender did not obtain an award of damages or achieve a settlement. She was nonetheless successful in that she obtained decree of absolvitor after an unnecessarily lengthy battle. The effect of that was to reduce her potential liability to the pursuer to nil. The sheriff decided that the value of the reduction

was £7,277.52, being the amount of the reduction in her liability, and that a cap of 25% was applicable to that sum by virtue of the Letter of Engagement. The sheriff was therefore correct to identify that the sum payable would have been limited to £1819.38.

[40] For the foregoing reasons we refuse the appeal and adhere to the sheriff's interlocutor.

Expenses of the appeal

[41] Parties agreed that expenses should follow success. Consequently, the appeal having failed, the respondent is entitled to the expenses occasioned by it.

We were invited on behalf of the defender to sanction the employment of Senior Counsel. The pursuer was content that sanction be limited to that of junior counsel.

The issue of sanction for the employment of counsel in the Sheriff Appeal Court in governed by section 108 of the Courts Reform (Scotland) Act 2014. In considering whether or not it was reasonable for the defender to employ senior counsel, the court must first have regard to the difficulty or complexity of the proceedings. As we have noted, the issues argued before us are not free from difficulty, but we are not persuaded that they are so complex as to justify the appointment of senior counsel. We are satisfied that, in all the circumstances of the case, it was reasonable for both parties to employ junior counsel. Accordingly, we sanction the employment of junior counsel for the purposes of the appeal hearing.