

SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH  
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2024] SC EDIN 51

PIC-PN4628-23

JUDGMENT OF SHERIFF IAIN W NICOL

in the cause

JILLIAN LAWRIE

Pursuer

against

RAJA BROS FIFE LIMITED

Defender

**Pursuer: Hovey, Advocate; Thompsons Solicitors**

EDINBURGH, 14 November 2024

**Introduction**

[1] This action called as a procedural hearing on 11 November 2024 for the court to be addressed on the competency of the pursuer's motion for certification of a skilled person and sanction for junior counsel for drafting the Initial Writ. The competency point related to the timing of the motion.

**Background**

[2] The action, which related to a slipping accident in the defender's shop, was raised on 6 December 2023. It was undefended. The pursuer lodged a minute for decree for payment of the sum sued for (£10,000) plus taxed expenses on 18 January 2024 without seeking

certification of a skilled orthopaedic person or sanction for counsel. Decree was pronounced in the terms sought on 23 January 2023.

[3] The pursuer lodged their account of expenses timeously on 22 May 2024 which was remitted to the Auditor of the All-Scotland Sheriff Personal Injury Court. A diet of taxation was arranged and proceeded on 14 August 2024. The pursuer was represented by the Law Accountant who had prepared the account. The Auditor considered the account but, before issuing his report, he contacted the pursuer's agent to request copies of any interlocutors certifying the skilled person and sanctioning counsel. This alerted the pursuer's agent that no certification or sanction had been obtained due to "administrative oversight." The Auditor continued the diet of taxation *sine die* to allow the pursuer to rectify the position.

[4] The pursuer enrolled a motion for certification and sanction on 16 October 2024. The foregoing background was not set fully out. In particular, it was not clear whether the Auditor had issued his statement of the amount of expenses as taxed in terms of Ordinary Cause Rule 32.3A(1). The sheriff clerk had not received the taxed account and statement from the Auditor and no interlocutor had been issued decerning for payment of the taxed expenses but it seemed clear that the taxation had proceeded, at least to some extent.

[5] The court assigned a hearing to be addressed on whether it remained competent to grant certification and sanction, having regard to the stage the taxation procedure had reached.

[6] The requirement to obtain certification of a skilled person is provided for in terms of Rule 4.5 of the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019 S.S.I 2019/75 (the 2019 Rules) which is in the following terms:

**“Skilled persons**

- 4.5.—(1) No charge incurred to a person who has been engaged for the purposes of the application of that person’s skill is to be allowed as an outlay unless—
- (a) the person has been certified as a skilled person in accordance with rule 5.3 (certification of skilled persons); and
  - (b) except where paragraph (4) applies, the charge relates to work done, or expenses incurred, after the date of certification.
- (2) Where a person has been so certified, the Auditor is to allow charges for work done or expenses reasonably incurred by that person which were reasonably required for a purpose in connection with the proceedings, or in contemplation of the proceedings.
- (3) The charges to be allowed under paragraph (2) are such charges as the Auditor determines to be fair and reasonable.
- (4) This paragraph applies where—
- (a) the account relates to—
    - (i) proceedings subject to Chapter 43 of the Rules of the Court of Session 1994;
    - (ii) proceedings subject to Chapter 36 of the Ordinary Cause Rules 1993; or
    - (iii) a simple procedure case; or
  - (b) the sheriff has determined in accordance with rule 5.3(5) that the certification has effect for the purposes of work done, or expenses incurred, before the date of certification.”

[7] The test which the court has to apply is set out in Rule 5.3 which provides as follows:

**“Certification of skilled persons**

- 5.3.—(1) On the application of a party the court may certify a person as a skilled person for the purpose of rule 4.5 (skilled persons).
- (2) The court may only grant such an application if satisfied that—
- (a) the person is a skilled person; and
  - (b) it is, or was, reasonable and proportionate that the person should be employed.
- (3) The refusal of an application under this rule does not preclude the making of a further application on a change of circumstances.

- (4) Where the application is made in proceedings other than —
  - (a) proceedings subject to Chapter 43 of the Rules of the Court of Session 1994;
  - (b) proceedings subject to Chapter 36 of the Ordinary Cause Rules 1993; or
  - (c) a simple procedure case,
 paragraph (5) applies.
- (5) Where this paragraph applies, the court may only determine that the certification has effect for the purposes of work already done by the person where the court is satisfied that the party applying has shown cause for not having applied for certification before the work was done.”

[8] As the action was raised under Chapter 36 of the Ordinary Cause Rules there was no requirement to obtain prospective certification. I was satisfied that the orthopaedic surgeon was a skilled person and that it was reasonable and proportionate to employ her.

[9] The requirement to obtain sanction for counsel is provided for in terms of Rule 4.3 of the 2019 Rules, the salient parts of which are in the following terms:

**“Fees of counsel in the Sheriff Court or Sheriff Appeal Court**

- 4.3.—**(1) This rule applies to the taxation of accounts of expenses relating to proceedings in the sheriff court or Sheriff Appeal Court.
- (2) No fees are to be allowed for the work of counsel unless the proceedings, or particular work involved in the conduct of the proceedings, have been sanctioned as suitable for the employment of counsel in accordance with rule 5.4 (sanction for the employment of counsel in the sheriff court and Sheriff Appeal Court).
  - (3) Where particular work has been sanctioned as suitable for the employment of counsel the Auditor is to allow the reasonable fees of counsel for —
    - (a) doing that work, and
    - (b) subject to paragraph (6), consultations reasonably required in relation to that work.
  - (4) Where the proceedings have been sanctioned as suitable for the employment of counsel—
    - (a) it is for the Auditor to determine the work in relation to which it was reasonable for counsel to be instructed;
    - (b) subject to sub-paragraph (c), the Auditor is to allow the reasonable fees of counsel for carrying out that work;

- (c) subject to paragraph (3), no fees are to be allowed for work carried out before the date on which sanction was granted unless the proceedings are—
  - (i) proceedings subject to Chapter 36 of the Ordinary Cause Rules 1993;
  - (ii) a simple procedure case; or
  - (iii) proceedings in the Sheriff Appeal Court.”

[10] Ancillary provisions under Rule 5.4 provide:

**“Sanction for the employment of counsel in the sheriff court and Sheriff Appeal Court**

- 5.4.**—(1) This rule applies to proceedings in the sheriff court and Sheriff Appeal Court.
- (2) On the application of a party the court may, subject to paragraphs (4) to (6), sanction—
    - (a) the proceedings;
    - (b) any part of the proceedings;
    - (c) particular work involved in the conduct of the proceedings; or
    - (d) any combination of (a), (b) and (c),
 as suitable for the employment of counsel by that party.
  - (3) Where proceedings or work are sanctioned as suitable for the employment of senior counsel, or as suitable for the employment of more than one counsel, the interlocutor must record that.
  - (4) Paragraphs (5) and (6) apply where the application is made in proceedings other than—
    - (a) proceedings subject to Chapter 36 of the Ordinary Cause Rules 1993;
    - (b) a simple procedure case; or
    - (c) proceedings in the Sheriff Appeal Court.
  - (5) An interlocutor sanctioning proceedings, or a part of proceedings, as suitable for the employment of counsel has no effect as regards work carried out by counsel before the date of the interlocutor.
  - (6) The court may only sanction particular work already carried out as suitable for the employment of counsel when satisfied that the party applying has shown cause for not having applied for sanction before the work was carried out.
  - (7) The refusal of an application under this rule does not preclude the making of a further application on a change of circumstances.”

[11] Again, there was no requirement to obtain prospective sanction given that the case proceeded under Chapter 36.

[12] The test which the court has to apply in relation to sanction for counsel is set out in section 108 of the Courts Reform (Scotland) Act 2014. I was satisfied that it was reasonable

for the pursuer to have instructed counsel for particular work, namely, to draft the Initial Writ due to the complexities of the case in terms of the potential issues on liability, causation and quantum.

[13] The 2019 Rules are silent as to when a motion for either certification or sanction requires to be made. They do not contain any specific deadline by which motions for certification or sanction require to be granted before it becomes incompetent to do so.

[14] *MacPhail Sheriff Court Practice* 4<sup>th</sup> Edition in section IV paragraph 19.71 provides: “A motion for certification can be made at any time prior to taxation.”

[15] The footnote relating to that proposition states:

“Taxation of Expenses Rules 2019 r.5.3(1). The rule contains no express time limit but when read along with r4.5(1) and (2), it is thought that it is implicit that the motion must be granted prior to taxation”

[16] So, what is meant by “prior to taxation”? There are a number of stages in having an account taxed and decree pronounced for the taxed expenses:

1. The entitled party prepares an account of expenses and lodges this for taxation.
2. The Auditor fixes a diet of taxation.
3. The party found liable in expenses shall intimate points of objections no later than 4.00pm on the fourth business day before the diet.
4. Parties proceed to taxation of the account.
5. Following the diet (or any continuation thereof), the Auditor prepares a statement of the amount of expenses as taxed and provides this to the sheriff clerk and parties.
6. A party may lodge a note of objections to an account as taxed within 14 days after the date of the statement. The court then fixes a hearing on the note of objections.

7. Decree for taxed expenses can be issued either on expiry of the period for objections where none are lodged or following determination of the objections by the court.

[17] It was submitted on behalf of the pursuer that the point taxation concludes is stage 5. It is only at this point that the Auditor prepares a statement of taxed expenses, which is then open to objection for determination by the court. In the present action, stage 4 had been completed but the action had not reached stage 5.

[18] I agree with that proposition. Taxation results in a statement of expenses as taxed being issued by the Auditor. If the statement has not been issued it cannot be said that there has been taxation of the pursuer's account. In my opinion, the correct interpretation of "prior to taxation" is "prior to the Auditor issuing his statement of the taxed account of expenses". Any motion for certification and / or sanction which is presented after that time would be incompetent.

[19] That view is supported by the fact that the Auditor himself was willing to continue the diet of taxation to allow the pursuer to enrol the appropriate motion. It is clear that the account has not been taxed as things stand.

[20] In addition, this issue was recently considered by Sheriff Dickson in this court on 30 September 2024 in *John Campbell v Boxmove Limited* (unreported). The pursuer had failed to move for certification of a skilled witness until after a diet of taxation had commenced. The motion was opposed by the defender on the grounds that it was too late. The defender contended that while Rules 5.3 and 5.4 of the 2019 Rules are silent on the issue of deadlines for motions, any such motion required to be made before a diet of taxation commenced. The taxation had commenced but had not concluded. The Auditor had continued the diet to allow the pursuer's motion to be decided before taxing the account. Sheriff Dickson granted

certification on the basis that whilst a motion for certification has to be made prior to taxation, the action had not reached that stage as the Auditor had not issued his statement.

[21] It might be suggested that the taxation process does not conclude until any procedure relating to objections is concluded. It is true to say that the paying party's liability does not crystallise until any objections are determined by the court and decree pronounced for the taxed expenses. However, I draw a distinction between the functions of the Auditor in relation to taxing the account and the court in determining whether (in simple terms) the Auditor's findings in the statement of taxed expenses are open to challenge. The latter cannot reasonably be viewed as part of the taxation of the account. It is not the court who taxes the account. That is the sole function of the Auditor.

### **Decision**

[22] A motion to certify a skilled person and/or sanction for the employment of counsel can competently be made at any time prior to the Auditor of Court issuing their statement of taxed expenses following the diet of taxation. That is the time when an account can be said to have been "taxed." I shall grant the pursuer's motion to a) certify Margaret McQueen, Consultant Orthopaedic Surgeon, as a skilled person and b) sanction the employment of junior counsel for particular work, namely, drafting the Initial Writ. Mr Hovey accepted that the expenses occasioned by the pursuer's motion and the continued diet of taxation should be on a no expenses basis. The defender had never entered the process but even if that were not the case, this additional procedure resulted from oversight on the part of the pursuer's agent for which the defender should not be liable.