OUTER HOUSE, COURT OF SESSION

[2017] CSOH 124

CA211/15

OPINION OF LORD TYRE

In the cause

ROBERT KIDD

Pursuer

against

(FIRST) PAULL & WILLIAMSONS LLP

(SECOND) BURNESS PAULL LLP

Defenders

Pursuer: A Smith QC, J Brown; Levy & McRae
Defenders: R W Dunlop QC, Paterson; BTO Solicitors LLP

26 September 2017

Introduction

[1] In this action the pursuer, a former client of the first defender and its predecessor firm Paull & Williamsons, seeks damages from the defenders for losses which he claims to have sustained as a consequence of the sale in September 2009 of part of his interest in a company called ITS Tubular Services (Holdings) Limited. The sum sued for is US$210 million. Further details of the factual background are set out in my opinion at [2017] CSOH 16. Proof before answer has been allowed and is set to commence on 9 January 2018.

[2] On 25 November 2016, I pronounced an interlocutor finding the defenders liable to the pursuer for (i) the expenses of a minute of amendment; (ii) the expenses of the discharge of a diet of proof; and (iii) one half of the expenses of the action to date except in so far as otherwise dealt with. Each of those awards was on an agent and client, client paying basis. I also found the pursuer entitled to an additional fee under various heads of Rule of Court 42.14(3). In accordance with usual practice, the pursuer's account of expenses was remitted, when lodged, to the Auditor of Court for taxation, and the interlocutor included a decerniture for payment of the expenses as taxed.

[3] No account of expenses has yet been lodged. The pursuer, however, enrolled a motion for payment within 14 days of £2,000,000 as an interim payment of expenses, with interest at the judicial rate from expiry of the 14-day period. The motion was opposed.

Arguments for the Parties

[4] On behalf of the pursuer it was submitted that the motion was competent and that the making of such an interim award did not require special reasons but was a matter for the discretion of the court. If special reasons were required, they consisted here of the conduct of the defenders that had led to an award of expenses on an agent and client, client paying basis, the size of the sum due, the complexity of the process of making up the pursuer's account, and the prejudice to him in having to continue to litigate without access to funds to which he had been found entitled. As regards the sum sought, it was very unlikely that a lower sum would be awarded after taxation.

[5] On behalf of the defenders it was not contended that the motion was incompetent, but it was submitted that an interim award should only be made in special circumstances, of which there were none here. In any event no award should be made at this time because if

the defenders were ultimately successful in their defence to the action, there would be a very large contra-award to set against the pursuer's award. It was further contended that the sum sought was excessive.

Review of Authorities

[6] I take as a starting point the following statement in Maclaren on *Expenses* (1912) at page 43:

> "It is within the discretion of the judge to give an *interim* award of expenses upon a point distinct and separate from the rest of the cause."

Examination of the cases cited in support of this proposition (*Waddel* v *Hope* (1843) 6D 160 and *Vaughan* v *Davidson* (1854) 16D 922) discloses that they were concerned only with the question whether it was competent for the court to make a finding of liability for the expenses of a particular step of process, or whether expenses could only be awarded at the end of the action. In modern practice, interim awards in this sense are routine. The cases cited do not address the question whether an order for interim *payment* prior to taxation can or should be made.

[7] The passage in Maclaren continues:

> "Where the *interim* award is modified, the award is final, and no further expenses in respect of the part modified can be obtained by the party receiving the *interim* award, should he be ultimately successful in the cause. If, however, the *interim* award is unqualified, it is simply regarded as a payment to account."

The authority cited for the latter proposition is *Cameron and Waterston* v *Muir & Sons* (1861) 23D 535, reported more fully at 33 Scot Jur 272. The pursuers in that case sought suspension of a charge, but this was refused because they had not offered caution, and a finding of expenses was made against them. The pursuers reclaimed and sought leave to amend their pleadings by offering caution. This was allowed conditionally upon payment of £8, 8s by

way of expenses occasioned by their previous failure to offer caution. Lord Ivory described the payment as "a payment to account". Lord President McNeill observed:

> "… When we merely appoint payment of a certain sum of expenses, without using the word 'modify', that leaves open for further examination, whether the full expenses of that litigation may not afterwards be given, under deduction of the payment made."

The decision is thus concerned with the particular situation of the court allowing an action to proceed only on condition of payment of a sum by way of expenses incurred by the other party. At the very least it confirms the competency of an order for *interim* payment of a specified sum as opposed to a more general finding of entitlement to expenses as taxed (in absence of agreement).

[8] Maclaren then deals with the question whether, as a general rule, payment of an interim award was (as for example in *Cameron and Waterston*) a condition precedent of being allowed to proceed after a party had lost a material point. In *Byres' Trs* v *Gemmell* (1896) 4 SLT 21, the Lord Ordinary (Kincairney) reviewed the case law and observed:

> "… From the opinions expressed in the later cases, it appears that no inflexible rule on the point exists, but that it is a matter within the discretion of the Court, to be determined with reference to the circumstances in each case. There is no strong reason in the ordinary case for the enforcement of such a condition. The successful party gets his decree, and he can extract and enforce it in the ordinary way, and there is no reason why the Court should go out of its way in order to give him exceptional assistance."

Once again, therefore, the point was not whether an order for actual payment could or should be made. It is, however, of some interest to note Lord Kincairney's description of obtaining a decree for extraction and enforcement as "the ordinary way".

[9] Interim awards of expenses are also discussed by Maclaren at pages 302-3 in the particular context of consistorial cases. Maclaren states:

> "If [a wife defender] has no separate estate she is entitled to an *interim* award for the purpose of defending the charge against her."

In *Jaffray* v *Jaffray* 1909 SC 577, a husband sought decree of divorce on the ground of his wife's adultery. The Lord Ordinary assoilzied the wife and found her entitled to expenses. The husband reclaimed, and the wife sought payment of the amount of her account of expenses or, alternatively, an order remitting the account for taxation and for payment of the taxed amount. The court considered that she was entitled to sufficient funds to enable her to maintain her defence, Lord President Dunedin observing (page 579):

> "If a husband seeks to divorce his wife, and the wife is without means, she is entitled to have paid to her such funds as shall from day to day be sufficient to allow her to make good her defence. As to the amount to which she is from time to time entitled, that can only be arrived at by a rough estimate. Of that principle I think there can be no question. But if, during the progress of the case, the wife manages to carry on her case by means of her own funds or of funds which she has succeeded in borrowing for the purpose, the necessity for interim payments is over, and her ultimate right to expenses will be left to be determined at the end of the day according to the ordinary rules …"

It is apparent from this passage that the wife's entitlement to be paid an interim sum did not depend upon any prior finding of expenses in her favour, but rather derived from the legal disabilities and financial disadvantages which applied at that time to married women. Similarly, in *Anderson* v *Anderson* (1896) 4 SLT 36, also cited by Maclaren, a wife defender moved for an award of interim expenses to enable her to lodge defences. It was held that it was premature to move for expenses until defences had been lodged and proof allowed. Once again, therefore, the wife's entitlement to an interim payment did not depend upon there having been a finding of expenses in her favour. I conclude that the consistorial cases discussed in Maclaren are of no assistance in deciding the question before me, although I note Lord President Dunedin's reference in the passage quoted above to determination of a right to expenses "according to the ordinary rules".

[10] In *Martin & Co (UK) Ltd, Petrs* [2013] CSOH 25, the petitioners in an application for recovery of documents under section 1 of the Administration of Justice (Scotland) Act 1972 were awarded the expenses of process to date on an agent and client, client paying basis. They moved for an interim payment of expenses in the sum of £50,000. At the hearing of the motion there was no appearance for the respondent. The petitioners stated that an award of expenses in other commercial court proceedings had not been met and that a diet of taxation was being sought. The respondent was heritable proprietor of a number of properties and the petitioners wished to have a means of doing diligence to protect, pending taxation, their interest in recovering the expenses awarded, which were estimated to amount to £75,000. Lord Drummond Young granted the motion. Under reference to Maclaren (*loc cit*), *Cameron and Waterston* v *Muir & Sons* and *Jaffray* v *Jaffray*, he held that an order for interim payment of part of a party's expenses was competent. He cited the following passage from the decision of Jacob J in the English High Court in *Mars UK Ltd* v *Teknowledge Ltd* [1999] 2 Costs LR 44 (at para 8):

> "There is no guidance given in the Rules other than that the court may order a payment on account. There is no guidance in the Practice Direction. So I approach the matter as a question of principle. Where a party has won and has got an order for costs the only reason that he does not get the money straightaway is because of the need for a detailed assessment. Nobody knows how much it should be. If the detailed assessment were carried out instantly he would get the order instantly. So the successful party is entitled to the money. In principle he ought to get it as soon as possible. It does not seem to me to be a good reason for keeping him out of some of his costs that you need time to work out the total amount. A payment of some lesser amount which he will almost certainly collect is a closer approximation to justice. So I hold that where a party is successful the court should on a rough and ready basis also normally order an amount to be paid on account, the amount being a lesser sum than the likely full amount."

Lord Drummond Young observed (para 6):

> "What is said there appears to me to be equally applicable in Scotland, except that here there is no normal practice of making such orders. In general, in Scotland it will be necessary to show special reasons for making an *interim* award."

He considered that protection of the petitioners' right to expenses rendered such an award appropriate, as there was evidence of reluctance to make payment and possible lack of liquidity on the part of the respondent. Since the award of expenses had been made on an agent and client, client paying basis, an order for interim payment of just under two-thirds of the sum which a law accountant considered was unlikely to be reduced by the Auditor of Court was appropriate.

[11] Lord Drummond Young's approach, ie that an order for interim payment may be made if special reasons are present, was followed by Lord Woolman in *Tods Murray WS* v *Arakin Ltd* [2013] CSOH 134. This too was a case in which expenses had been awarded on an agent and client, client paying basis. Lord Woolman held that special reasons existed, in respect that the defender's previous conduct indicated that he would resist payment for as long as possible, and there was at least a question over his ability to satisfy the award. Having been provided with a statement by a law accountant that a sum of over £1,000,000 had been incurred on fees and outlays by the pursuers and their insurers, Lord Woolman adopted a conservative approach and ordered an interim payment of £150,000.

Decision

[12] I have already noted that it was not in dispute that it was competent for the court to order an interim payment of part of a party's expenses before an account has been lodged and, if necessary, taxed by the Auditor of Court. There is equally, in my view, no difficulty with regard to the competency of ordering payment of a specified sum by way of interim payment. The cases of *Cameron & Waterston* v *Muir & Sons* and *Jaffray* v *Jaffray* provide examples of cases in which the court has, in particular circumstances of no current

relevance, made orders for payment of specified sums by way of expenses. I see no reason why the practice should not be regarded as competent more broadly. The question that arises in the present case is whether, and if so in what circumstances, an order for interim payment should be made where expenses have been awarded but where the account has not yet been lodged and taxed.

[13] In *Martin & Co (UK) Ltd*, Lord Drummond Young identified a need to show "special reasons" for making an interim award. I do not, for my part, read this observation as meaning that an order will only be made in exceptional circumstances. It does no more than acknowledge that the rules of court provide a mechanism whereby an award of expenses may be made, quantified by the Auditor of Court in case of dispute, extracted and in due course enforced. This is the "ordinary way" to which reference was made in *Byres' Trs* v *Gemmell* and *Jaffray* v *Jaffray*: the procedure normally regarded by the rules of court as appropriate for recovery of expenses. But, as with other aspects of expenses, it is in my opinion within the discretion of the court to depart from the "ordinary way", provided the court is satisfied that there is sufficient reason for so doing.

[14] In the present case, four features were relied upon by the pursuer as special reasons for granting the motion for interim payment. The first was the defenders' conduct which had justified the award of expenses on an agent and client, client paying basis. I reject that contention. The court has already expressed its disapproval of the defenders' conduct by making an award on that basis; there is no good reason to order interim payment as, in effect, a further instalment of punishment. The other three features relied upon were:

- the size of the sum likely to be found due: the greater the amount of money which the receiving party is kept out of for an extended period, the greater the injustice;

- the scale, complexity and cost of the process of preparation and taxation of the account: the solicitors' correspondence file ran to 50 volumes, with hundreds of thousands of pages of documents in electronic form. The taxation would be complicated and lengthy;
- the litigation was ongoing and cost continued to accrue: there was no good reason for the pursuer to have to fund that cost while being kept out of the sum owed to him by the defenders.

[15] In my opinion these three features together afford sufficient reason to grant the pursuer's motion for an interim payment. The present litigation is exceptional in respect of the amount of documents that have been recovered and perused. If taxation of the pursuer's account is required, this is likely to result in a very substantial award and/or a very lengthy process of taxation, depending on the extent to which the account is challenged. Having regard also to the pursuer's need to fund the continuing litigation, it is not in the interests of justice that he should be deprived for an indefinite period of the whole of the expenses to which he has been found entitled. I am not persuaded by the defenders' argument that the possibility of a substantial – and possibly equally large – contra-award were the pursuer's case ultimately to fail constitutes a good reason for refusing an interim award. The fact that a litigation is continuing does not preclude a party from having an account of expenses taxed in order to enable him to obtain an extract decree and enforce it, even though a future contra-award remains a possibility.

Amount of the Interim Payment

[16] The sum sought in the present case by way of an interim payment of expenses (£2,000,000) is very large indeed. Little detail of its composition was provided. In support of

it, the pursuer founded upon (i) a letter from Ms Frances Delaney, the law accountant instructed to prepare the pursuer's account; and (ii) a report by Mr Alexander Quinn, another experienced law accountant not otherwise involved in this litigation. Ms Delaney and Mr Quinn were both of the opinion (a) that the rates charged by the agents for work in respect of which expenses were awarded to the pursuer were reasonable; (b) that because expenses had been awarded on the agent and client, client paying basis, it was unlikely that there would be any significant taxing off of fees by the Auditor; (c) that an uplift of at least 150% was likely to be allowed in respect of the additional fee; and (d) that it was likely that the outlays, consisting principally of counsel's fees, would be taxed as recoverable in full. The total according to Ms Delaney's calculation (assuming that the figure of £479,307 at page 2 of her letter represents *one half* of the total solicitors' fees exclusive of VAT for the period in question) was £1,998,120. The total according to Mr Quinn's calculation was said to be £1,909,301 but according to my arithmetic was £1,684,451, although this figure does not appear to include fees charged by the pursuer's previous agents. These totals were regarded by the respective law accountants as underestimates of the sum likely to be awarded.

[17] I accept, on the basis of the views expressed by two experienced law accountants, that fees and outlays are much less likely to be taxed off an account of expenses awarded on an agent and client, client paying basis than on a party and party basis. I also accept that the arithmetic effect of the additional fee uplift will be very significant. The Auditor will nevertheless require to be satisfied both that any expense was reasonably incurred and that the rate charged is reasonable. One may anticipate that an account of this magnitude will be challenged and closely scrutinised. It is appropriate, especially in the absence of any detailed exposition of the fees and outlays incurred, for the court when exercising its discretion to adopt a conservative approach. In all of the circumstances I shall grant the

motion to the extent of ordering the defenders to make an interim payment to the pursuer of the sum of £1,000,000, with interest accruing thereon at the judicial rate after 14 days from the date of my interlocutor.

[18] The pursuer offered a formal undertaking to the court that in the event that the interim award turns out to exceed the taxed award, the excess will be repaid with interest at the judicial rate from the date of the interim payment until the date of repayment of the excess. As Lord Drummond Young observed in *Martin & Co (UK) Ltd* (para 7), such an obligation is almost certainly to be implied, but I shall record the undertaking in the minute of proceedings.