
**OUTER HOUSE, COURT OF SESSION**

**[2024] CSOH 110**

**CA144/21**

OPINION OF LORD HARROWER

In the cause

IMRAN AHMAD

Pursuer

against

THE LORD ADVOCATE

Defender

**Pursuer: E Campbell; Pinsent Masons LLP**
**Defender: Moynihan, KC; Scottish Government Legal Directorate**

18 December 2024

**Introduction**

[1] In this case, the pursuer sought to recover £60 million in damages from the Lord Advocate. The cause of action was malicious prosecution. The Lord Advocate admitted liability at an early stage. Following a proof before answer restricted to quantum, I found that the pursuer had been dishonest in the presentation of his claim, and issued an opinion indicating the limited basis upon which I would be prepared to make an award of damages in his favour ([2024] CSOH 23; references in what follows to paragraph numbers are to that opinion unless the context indicates otherwise). I also put the matter out by order, inviting parties to calculate the effects of taxation and interest on the proposed

principal sum, while reserving any question of expenses. The opinion drew parties' attention to the options that the court might require to consider in order to address the pursuer's dishonesty (paragraphs 45 and 123). These included the possibility of an award of expenses being made against him, on an agent and client basis, and the instigation of proceedings for contempt of court.

[2] At the by order hearing, parties agreed that decree in the sum of just £368,061 plus interest would give effect to the proposed award. Obviously, that was only a small fraction of the sum sued for, but it was more than *de minimis*. Moreover, it transpired that the Lord Advocate had not tendered or made an offer to settle of any kind. These factors persuaded me, on 4 June 2024, to make an award of expenses in favour of the pursuer, restricted by 50% to take account of the egregious nature of the pursuer's improper and unreasonable conduct and its effect on the litigation (*Ahmad* v *Lord Advocate (No 2)* [2024] CSOH 54; 2024 SLT 747). In the same opinion, and having just penalised the pursuer by restricting the award of expenses in his favour, I concluded that it would be disproportionate to expose the pursuer to the risk of further punishment by instigating contempt proceedings against him. Finally, I reserved the expenses of the by order hearing that was required in order to discuss these various matters.

[3] On 1 October 2024, almost 4 months later, the pursuer enrolled a motion seeking to recover, on an unrestricted basis, the expenses of the by order hearing. He also asked the court to grant an additional fee, this being an action to which rule 42.14 of Schedule 2 of the Act of Sederunt (Rules of the Court of Session 1994) 1994 applies ("r 42.14"). The pursuer sought the additional fee under reference to all of the heads set out in r 42.14(3)(a) to (g). No explanation has been provided for why such a long period of time had been allowed to lapse before enrolling either motion. Nor has the pursuer explained why he did not seek

an additional fee at the same time as moving for the expenses of the action. That would have been the more usual, and certainly from the court's point of view the more efficient, way of proceeding. However, as the Lord Advocate accepted, there would appear to be nothing in r 42.14 to suggest that it is incompetent to move for an additional fee separately from the award of expenses.

**Preliminary observations**

[4] Regarding the expenses of the by order hearing, the Lord Advocate had been of the view that the 50% restriction was applicable to the expenses of process as a whole, and should therefore cover any award made in favour of the pursuer. However, in the interest of saving valuable court time, she decided not to oppose that part of the pursuer's motion seeking to recover his expenses on an unrestricted basis.

[5] That pragmatic stance taken in relation to the expenses of the by order hearing was consistent, the Lord Advocate submitted, with the "line in the sand" that had been drawn by the court when deciding not to instigate contempt proceedings against the pursuer. The court's decision in relation to contempt proceedings had been inextricably linked with the decision to restrict the award of expenses in the pursuer's favour. To allow an additional fee now would dilute the rationale behind these decisions. It would vitiate the penalty imposed upon the pursuer by reason of his dishonesty and egregious conduct, as well as undermine the court's reason for deciding not to instigate contempt proceedings. Moreover, in the event that the court were to allow an additional fee, now, under whatever heads, it could not fetter the discretion of the auditor to examine the whole matter afresh when the case was brought before him (*Gray* v *Babcock Power Ltd* [1990] SLT 693 at 696D). Ultimately, a large uplift could be applied, materially diluting the penalty that the court had considered should

be imposed on the pursuer. Senior counsel for the Lord Advocate did not go so far as to suggest that the pursuer was personally barred from applying for an additional fee on behalf of his solicitors. Rather, he submitted that the court should simply refuse the motion in the exercise of its discretion.

[6] I have decided not to refuse the pursuer's motion for an additional fee on this basis. As the Lord Justice Clerk explained in *Trunature Ltd* v *Scotnet (1974) Ltd* 2008 SLT 653, while the allowance of an additional fee confers on the solicitor the right to whatever sum the auditor may fix, it must be applied for by the successful party (*Ibid*, at paragraphs 16 and 17). When, therefore, such a fee is allowed, it forms part of the expenses of the action. As such, and this was conceded by counsel for the pursuer, it will be subject to whatever restriction the court has imposed on the award of expenses. If, therefore, and entirely hypothetically, the auditor were to allow an uplift of 50%, the effect of the restriction would be to reduce that uplift to 25%. Both parties are to be held to know that if either party should be awarded expenses, it will be open to him or her to move for an additional fee (*Trunature Ltd* v *Scotnet (1974) Ltd*, *op cit*, paragraph 14). In my view, the court cannot take away that right, except by clear words or necessary implication, and after raising the matter with parties. Nothing that I said in my decision not to instigate contempt proceedings against the pursuer had the effect of depriving his solicitors of any additional fee that might be shown to be truly justified. Nor was it intended to do so.

[7] It does not follow that the starting point for the assessment of the pursuer's application for an additional fee should be the full claim as formulated and presented by him, on the basis that any reservations the court might have regarding the merits of the application would be covered by whatever percentage restriction the court had already decided to impose. If this were counsel for the pursuer's submission, and it seemed to be

implicit in his submissions made under reference to several of the heads relied upon, then I reject it. Specifically, while the absence of a tender might have entitled the pursuer to recover his taxed expenses, subject only to a restriction of 50%, it does not follow that the same "top down" approach should apply to the question of whether to allow an additional fee. Rather, r 42.14(3) requires the court, or the auditor, as the case may be, to take into account the various matters specified in paragraphs (a) to (g). In other words, it requires the question of whether or not to allow an additional fee to be assessed, as it were, from the bottom up, taking each head into account. For example, r 42.14(3)(c) is a head that requires the court to take into account the number or importance of any documents prepared or perused. If, hypothetically, the vast bulk of the documentation prepared or perused by the solicitors related to a part of the claim that was refused, the court would be entitled, in the exercise of its discretion, to give no weight whatsoever to that particular head.

[8] In this case, the pursuer claimed to have suffered irreparable reputational damage in the global business community. This, he argued, led to his exclusion from participation in, and raising capital for, a new business venture, Proton Partners International Limited ("Proton"). However, he was entirely unsuccessful in recovering damages in respect of many of the major heads of loss claimed, such as his lost opportunity to take up the position of investor relations director with Proton on a salary of £100,000 plus bonuses and pension contributions. He recovered nothing for any lost profit on the sale of founder and growth shares that he claimed he would have realised as soon as Proton floated. His claim that he would have used money earned from the sale of Proton shares as seed capital to invest in further growth companies necessarily also failed. He failed to establish that he would have been permanently resident in Dubai for tax purposes. And he was only partially successful

in his recovery for solatium and for loss of business opportunity. Stripped back to its essentials, the pursuer's claim, insofar as justified, was for a relatively modest sum, by Court of Session standards, and in relation to relatively few heads of loss. It is against that background that I have approached the question of whether or not an additional fee is justified, taking each of the heads set out in r 43.14(3) into account.

**Head (a): complexity of the cause and the number, difficulty or novelty of the questions raised**

[9] Under this head, counsel for the pursuer made a variety of submissions that may be summarised as follows. The factual evidence had been complex, technical and detailed. The "concept" of an action for malicious prosecution was novel. The question of whether the pursuer had been carrying out regulated activity under section 19 of the Financial Services and Markets Act 2000 ("FSMA") was complex. The pursuer had obtained specialist advice from English counsel on that matter, which his solicitors were required to understand. Causation was "multi-factorial", involving a number of different hypotheses, questions of material contribution and loss of opportunity. Quantum was complex because the pursuer's career involved "unusual industries" and required expert evidence. It involved tax questions. The pursuer's solicitors were required to ensure that experts instructed by them were familiar with the obligations that would be incumbent on them as expert witnesses. Notes of objections to evidence were lodged by both parties, with the prospect of the evidence of the pursuer's expert, Mr Andrews, being refused. The court had already allowed the Financial Conduct Authority an additional fee in respect of their successful opposition to the Lord Advocate's motion to open up a sealed packet of confidential documents. The pursuer had opposed that motion on the same basis.

[10] In my view, this was, or should have been, a relatively straightforward action in damages. There is nothing remotely novel about an action for malicious prosecution. The only conceivable novelty related to the Lord Advocate's immunity from suit. However, that issue had been raised in another case (*Whitehouse* v *Lord Advocate* 2020 SC 133). The present action had been sisted, prior to defences even being lodged, pending the resolution of the immunity issue in the Inner House.

[11] So far as solatium was concerned, there was well-established case law providing clear guidance on quantum: *Thompson* v *Commissioner of Police of the Metropolis* [1998] QB 498; *Rees* v *Commissioner of Police of the Metropolis* [2019] EWHC 2339; *Grier* v *Chief Constable of the Police Service of Scotland* 2022 SLT 199, at paragraphs 176-178. Certainly, the court might be required to distinguish between injury caused by the prosecution from injury caused by other factors. But such a task was not novel, complex or difficult. It did not call for the application of anything more sophisticated than the "conventional broad axe with a blunt blade" (*Grier* v *Lord Advocate* 2023 SC 116, at paragraph 144).

[12] I also disagree that there had been anything complex, novel or difficult about the application of FSMA and the Financial Services and Markets Act 2000 (Regulated Activities Order) 2001 ("the RAO"). The case called for a straightforward application of the RAO as interpreted by established case law, notably, the Court of Appeal's decision in *Financial Conduct Authority* v *Avacade Ltd (in Liquidation)* [2021] EWCA 1206; [2021] Bus LR 1810. Applying that case law, I concluded that it was "obvious" that the activities to be carried out pursuant to the letter of engagement, which provided the foundation for the pursuer's claim, were regulated activities for the purposes of article 25(1) of the RAO (paragraph 88).

[13] So far as causation was concerned, I found that the bulk of the losses claimed by the pursuer was attributable, as a matter of fact, not to the Lord Advocate's decision to

prosecute him, but to the risk of prosecution caused by the pursuer's close association with Charles Green (paragraphs 76-77, 78-79, 102, 105, 112 and 119). Insofar as the pursuer recovered anything, it was largely conceded and relatively trivial (legal expenses), or arrived at by the application of similar broad axe and blunt blade considerations that had been used to assess solatium. For example, loss of commission was arrived at by choosing an appropriate rate and applying it to the first £100 million of funds raised, while deducting for fees and expenses. So far as loss of business opportunity was concerned, there might well have been complexities, novelties and difficulties associated with being what the pursuer's expert, Mr Andrews, had described as a "venture capitalist entrepreneur". However, that description had been an invention of Mr Andrews. It was based on assumptions about the pursuer's career that were rooted in the pursuer's false testimony (paragraph 115). In my view, there was nothing particularly unusual about the pursuer's employment. He had been a stockbroker, whose prospects in that field had become precarious as a result of difficulties with the regulatory authorities for which he had no one to blame but himself. Because of these difficulties, I decided that his loss of business opportunity should be measured by comparison with the salary of a company director, there having been at least some evidence that he might be able to secure such a position, principally through his associations with friends and relatives. Resorting once again to the judicial broad axe, I awarded the pursuer a lump sum corresponding to 2 years' net salary to compensate him for this head of loss. Calculations of this sort are entirely mundane features of damages awards. There was nothing particularly complex, novel or difficult about them or the tax implications arising therefrom.

[14] The pursuer's note of objections to the admissibility of expert evidence was prepared for discussion at a pre-proof by order. In my view, insofar as they contained anything of

substance, the objections went largely to weight rather than admissibility (paragraph 6). At the invitation of the pursuer's own counsel, I dealt with them at the conclusion of the proof. Although the objections were renewed after proof, in my view, they took little or no account of what, by that stage, had been said in evidence by the Lord Advocate's expert witness. Turning to the Lord Advocate's note, it had objected to the fact that Mr Andrews' report was based upon a less than candid account given by the pursuer of the circumstances in which he had left the stockbroking firm, Allenby Capital Ltd. I had taken the view that I was in no position, prior to the proof, to make any sort of assessment of what might ultimately turn out to be the pursuer's evidence on that matter. That was before the production, at first shortly before and then during the proof, of various Allenby-related documents disclosing the true circumstances in which the pursuer had left Allenby Capital Ltd (paragraphs 30-41). In my view, no additional fee is justified in respect of work done by the pursuer's solicitors in resisting the Lord Advocate's challenge to the admissibility of expert evidence, in circumstances where that challenge was based on what was ultimately revealed to be the pursuer's own fundamental dishonesty.

[15] Finally, the pursuer's reliance on the additional fee already allowed to the solicitors for the Financial Conduct Authority is misconceived. The primary heads upon which I allowed that additional fee were particular either to the solicitors for the Financial Conduct Authority (the specialist knowledge demonstrated by them) or to the Financial Conduct Authority itself as their client (importance of the subject matter of the cause). I would not have allowed an additional fee based on either of the other heads, considered on their own.

[16] I attach no weight to this head.

**Head (b): the skill, time and labour, and specialised knowledge required, of the solicitor**

[17] Under this head, counsel submitted that, according to the solicitors' estimate, they had spent 3,500 chargeable hours, or 500 full days, preparing for the proof. As I have already indicated, it seemed to be implicit in this submission that the pursuer wished the court to take into account all the work done by the solicitor in presenting and preparing the full £60 million alleged value of the pursuer's claim. In my view, for the reasons given, this would not be an appropriate exercise of the court's discretion, where so many heads of loss were either refused outright or severely restricted.

[18] The pursuer conceded that his submission under reference to this head overlapped with that already made under reference to paragraph (a) of r 42.14(3). I have given it no weight for similar reasons.

**Head (c): the number or importance of any documents prepared or perused**

[19] Counsel for the pursuer submitted that the joint bundle contained 255 documents and ran to 8377 pages, including 4 expert reports and 22 witness statements. In addition, there was a supplementary bundle. Again, I would note that it seemed to be implicit in this submission that the pursuer was relying on all the work done by the solicitor in presenting and preparing the full £60 million alleged value of his claim, notwithstanding that many of the heads of loss were either refused outright or heavily restricted. In addition, as the Lord Advocate pointed out, a great many documents were included "for good measure", such as witness statements from other proceedings, and the PwC report instructed by the pursuer (but paid for by the Lord Advocate) in connection with the mediation (*Ahmad* v *Lord Advocate (No 2), op cit*, paragraph 10). What was left would not be unusual for a commercial action.

[20] It is also instructive to look at what documents were actually relied upon at the proof. According to my notes, there were only about 240 references to pages from any bundle, whether the joint bundle, the supplementary joint bundle or the late inventories of Allenby-related productions. Many of these were duplicated references. Indeed, it is remarkable how few contemporary documents the pursuer was able to rely upon to vouch any aspect of his claim.

[21] Counsel for the pursuer submitted that the pursuer was required "to evidence his entire career, from 1995 to the malicious prosecution, and his attempts to earn following the malicious prosecution". While that may be the case, as the Lord Advocate pointed out, the pursuer's account was ultimately found to have been a false account, and the many documents and witness statements pertaining to that were provided within a distorted or untrue context. Had the pursuer provided a true account of his career, it would not have required reliance on anything like such a large number of documents.

[22] I attach no weight to this head.

**Head (d): the place and circumstances of the cause or in which the work of the solicitor in preparation for, and conduct of, the cause has been carried out**

[23] The pursuer resided in London during preparations for the proof. Witnesses resided in various locations around the world. Counsel for the pursuer conceded that the majority of witnesses provided statements via Microsoft Teams. Nevertheless he submitted that the pursuer's solicitors were required to travel to meet certain witnesses or for certain purposes. While I have no doubt that face-to-face meetings are preferable in order to explore the nuances of a case and the details of a witness's evidence, travel for such meetings would not be unusual for any action, let alone a commercial action. Moreover, I had found it

necessary to comment adversely on the formulaic nature of many of the witness statements lodged on behalf of the pursuer (paragraph 51). Not only was that an unhelpful presentation of evidence to the court, it did not demonstrate the sort of advantage in face-to-face meetings that would justify an additional fee.

[24] I attach no weight to this head.

**Head (e): the importance of the cause or the subject matter of it to the client**

[25] In February 2019 the pursuer had offered to settle his dispute with the Lord Advocate in return for nothing more than an apology. It wasn't until 12 August 2020 that the Scottish Government wrote to the pursuer admitting that the prosecution was malicious, and advising that damages would be paid and an apology issued. Liability was formally admitted on 1 October 2020, and an apology issued in June 2021. Although an apology was all that the pursuer had initially sought, I would accept that, without any offer of compensation, it might ultimately be regarded as inadequate. Of course, if £60 million, or anything remotely approaching that figure, truly represented the importance of the cause to the pursuer, then he was never going to receive satisfaction. Nevertheless, I accept that the pursuer had no alternative but to proceed to proof in order to receive the sort of vindication that only some degree of financial redress can bring.

[26] I would therefore give at least some weight to this head.

**Head (f): the amount or value of money or property involved in the cause**

[27] Counsel for the pursuer submitted that the £60 million sued for was supported by expert evidence. There was, he said, "clearly the potential for an award of many millions". The fact that he was awarded less than 1% of the sum claimed "did not impact the

responsibility upon the solicitors". I disagree. The sum sued for could only be regarded as being "supported" by expert evidence to the extent that the expert evidence was based on secure foundations. In this case, however, the expert's evidence was not based on secure foundations. It was based on assumptions that were not supported by the evidence. Indeed, they were undermined by the evidence. The pursuer's claim was grotesquely inflated. Even on the most optimistic assessment, it did not engage the responsibility of solicitors such as to justify an additional fee.

[28] I attach no weight to this head.

**Head (g): the steps taken with a view to settling the cause, limiting the matters in dispute or limiting the scope of any hearing**

[29] Counsel for the pursuer founded on the pursuer having been prepared to settle for an apology. However, that offer was made at a stage where the question of the Lord Advocate's immunity from suit had still to be decided in the Inner House. I accept that the pursuer did not rule out settling for an apology if the ruling went against the Lord Advocate. However, when ultimately the Inner House did decide that the Lord Advocate was not immune from suit, the pursuer, perhaps unsurprisingly, continued with the action in order to obtain financial redress. Indeed, he increased the sum sued for from £2 million to £60 million, a step that does not appear to have been designed to limit the matters in dispute or the scope of any proof.

[30] Counsel for the pursuer founded also on the absence of any offer by the Lord Advocate. This was a factor which I had already taken into account when making an award of expenses in favour of the pursuer. In my view, it did not increase the level of responsibility of the solicitors such as to justify the further step of awarding an additional fee.

[31] Finally, counsel for the pursuer founded on the fact that in August 2021, the then newly appointed Lord Advocate pulled out of the proposed mediation, having decided that the previously agreed confidentiality conditions were no longer acceptable. However, this argument is misconceived. Except in the rare situation where mediation, or some form of alternative dispute resolution, is a condition precedent to litigation (as in *Ohpen Operations UK Ltd* v *Invesco Fund Managers Ltd* [2019] EWHC 2246 (TCC)), either party can pull out of a mediation at any time. That is intrinsic to the mediation process. If parties were to lay themselves open to criticism for resiling from the mediation process they might be discouraged from ever participating in it in the first place. In any event, senior counsel pointed out, in my view fairly, that the Lord Advocate's change of direction should be considered against a background in which, had the mediation proceeded, it would have done so on the false premise of fact being laid out at that stage by the pursuer.

[32] In all the circumstances, I attach no weight to this head.

**Conclusion**

[33] In summary, the only head which, in my opinion, justifies an additional fee and which may be relevant in determining the level of any uplift, is head (e). As has already been mentioned, the auditor is required to have regard to any of the heads in r 42.14(3), irrespective of the particular paragraphs on which the Lord Ordinary has relied when deciding that an additional fee is appropriate (r 42.14(4); *Gray* v *Babcock Power Ltd*, *op cit*, at 696D-E). Nevertheless, as the Inner House has recognised, in a case that has gone to proof and where the Lord Ordinary has had the advantage of hearing all the evidence and examining in detail the questions that the litigation has raised, the Lord Ordinary's views are likely to be of assistance to the auditor (*Gray* v *Babcock Power Ltd*, *op cit*, at 696E-F).

[34] In particular, it might not be immediately obvious to the reader of an opinion running to 73 pages and 23,491 words why the case was thought not to involve any particular complexity, or to raise any particularly large number of questions, or any questions of particular difficulty or novelty. The answer, as I have endeavoured in this opinion to explain, is that the case had acquired a superficial complexity and difficulty as a result of the grotesquely inflated sum sought to be recovered. As a result, the court was required to carry out a considerable amount of work in order to reveal the true character of the pursuer's claim which, stripped back to its essentials, was for a relatively modest sum, by Court of Session standards, and in relation to only a few heads of loss. I set to one side the relatively trivial sum sought to compensate for the legal expenses of the prosecution, in relation to which I agreed entirely with the submissions for the Lord Advocate. Properly understood, the claim's principal heads of loss were for solatium, loss of commission and loss of business opportunity, all of which fell to be assessed, not by the deployment of any particularly sophisticated legal analysis, but by the wielding of the judicial broad axe. When considering matters such as novelty, complexity and difficulty, it may be relevant to note that the court's decision cannot be found in any law report. Nor, so far as I can see, has it been cited in any court. In my view of the case, that is an entirely unremarkable state of affairs.

[35] Having decided that an additional fee should be allowed, the court does not have the power, which it has under the new rules relating to the additional charge, to fix the level of any uplift. However, parties were in agreement that the court might provide a recommendation to the auditor. This was on the basis that, the court having had the advantage of hearing all the evidence and examining in detail the questions that the litigation has raised, any such recommendation might well be of assistance to the auditor. It is also likely to promote consistency in decision-making. This is in itself desirable where the heads

upon which an additional fee may be allowed are almost identical to those relating to the additional charge. In a recent additional charge case, the Inner House adopted the rule of thumb under which an uplift of between 10% and 15% might be fixed in relation to each head (*Centenary 6 Ltd* v *TLT LLP* [2024] CSIH 29; 2024 SLT 1106). In my view, an uplift of at most 10% would be appropriate to reflect the importance of the cause or its subject matter to the pursuer. Out of respect for the auditor's exclusive jurisdiction in the matter, I should make it clear that the recommendation is intended to be just that, a recommendation, and nothing more. As previously discussed, the award of expenses, even with the uplift applied, will still be subject to the 50% restriction earlier imposed.

**Disposal**

[36] In all the circumstances, and having regard to the increased responsibility undertaken by the solicitor, I find the pursuer entitled to charge an additional fee, under reference to head (e). For the reasons given, that finding comes with the recommendation to the auditor that an uplift of no more than 10% be fixed under this head. Parties agreed that expenses should follow success, it being understood that the Lord Advocate's opposition was confined to that part of the pursuer's motion that applied for an additional fee. In addition to her general ground of opposition, based on the court having drawn a "line in the sand" when awarding the pursuer the expenses of process, the Lord Advocate advanced a number of specific grounds of opposition relating to all of the heads except head (e). As it happens, that is the only head under which I have allowed the pursuer's application for an additional fee. However, the Lord Advocate having been unsuccessful in her general ground of opposition, the result is that the pursuer has ultimately been successful in his application. I shall therefore find the Lord Advocate liable to the pursuer not just in the expenses of the by order hearing

on 27 March 2024, but also the opposed motion hearing on 19 November 2024. For the avoidance of doubt, the 50% restriction shall apply to neither of these awards of expenses.