SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2018] SC EDIN 60

A453/16

NOTE BY SHERIFF PETER JOHN BRAID

in the cause

D

Pursuer

against

VICTIM SUPPORT SCOTLAND

Defender

Edinburgh, 26 October 2018

The sheriff, having resumed consideration of the cause, grants the pursuer's opposed motion, number 7/5 of process in part; allows the joint minute of parties to be received and form number 31 of process; interpones the authority of the court thereto and in terms thereof finds the defender liable to the pursuer in the expenses of the cause as taxed; allows an account thereof to be given in and remits same when lodged to the auditor to tax and report; certifies Dr Martin Livingston, Honorary Consultant Psychiatrist, Festival Business Centre, 150 Brand Street, Ibrox, G51 1DH as a skilled person who provided a report for the pursuer; refuses to certify Mr Fred Tyler, Senior Litigation Partner, Balfour & Manson LLP, 56-66 Frederick Street, Edinburgh, EH2 1LS as a skilled person; thereafter, grants the pursuer's opposed motion, number 7/5 of process, to the extent of allowing an additional fee by way of a 50% uplift of fees in terms of paragraph 5(b)(i), (ii), (iii) and (v) of schedule 1, General Regulations, Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment

and Further Provisions) 1993; *quoad ultra,* assoilzies the defender from the crave of the initial writ.

[1] This action previously called before me for a preliminary proof in May and October 2017. In my judgment dated 20 December 2017 (reported at 2018 SLT (Sh Ct) 91) I held that the defender owed the pursuer a duty of care. Further procedure followed and the action settled without the need for any further inquiry. The pursuer's motions 7/5 and 7/6 of process called before me on 4 October 2018. The former motion seeks the award of an additional fee of 200% in terms of general regulation 5(b) of the schedule to the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993/3080, and is opposed in its entirety by the defender. The latter motion is for authority to be interponed to the parties' joint minute which craves the court to find the defender liable to the pursuer in expenses and *quoad ultra* to assoilize the defender from the craves of the initial writ, and to certify two skilled witnesses (sic), namely Dr Martin Livingston, honorary consultant psychiatrist, and Mr Fred Tyler, senior litigation partner, Balfour & Manson. That motion is opposed only as regards to certification of Mr Tyler. It is convenient to deal with that motion first.

Certification

[2] The Act of Sederunt (Fees of Witnesses and Shorthand Writers in the Sheriff Court) 1992/1878, schedule 1, paragraph 1, provides:

"Skilled persons

(1) If at any time before the diet of taxation, the sheriff has granted a motion for the certification of a person as skilled, charges shall be allowed for any work done or expenses reasonably incurred by that person which were reasonably required for a purpose in connection with the cause or in contemplation of the cause.
(2) A motion under paragraph (1) may be granted only if the sheriff is satisfied that –

(a) the person was a skilled person, and
(b) it was reasonable to employ the person."

Pursuer's submissions

[3] Mr Pitts, solicitor for the pursuer, made reference to the Act of Sederunt. He submitted that for certification to be granted the court must be satisfied that the person was indeed skilled and that the instruction was reasonable. Reasonableness should be judged as at the time of instruction of the expert rather than with hindsight. He referred to *Macphail*, Sheriff Court Practice (3rd Edn), para 19.62. Mr Tyler was instructed because he was a solicitor and a first tier tribunal judge. He had determined a large number of applications under the criminal injuries compensation schemes and had experience and skills not ordinarily possessed by a solicitor or other individual. He was instructed prior to a claim being intimated to the defender and before an action was raised. His report was intimated to the defender. In instructing Mr Tyler, the pursuer's agents sought answers to the following questions: Was the pursuer eligible for a loss of earnings claim? Would he expect an advisor of the type employed by the defender to pick up on this? How common would such a claim be?

[4] The report was required in order to satisfy after-the-event insurers dealing with funding of the pursuer's case and also in order to comply with the protocol on professional negligence claims. Two reports had been obtained. The first was the one which was ruled inadmissible at the preliminary proof (see my judgment, paragraph 32). The second report

had neither been intimated nor lodged as a production (although was placed before me as part of the pursuer's bundle for the hearing on the motion). That report formed the basis of quantification, or elements of it, and guided the pursuer's negotiating strategy in terms of settlement. Had the action not settled, evidence would have been led at the proof on quantum from Mr Tyler.

Defender's submissions

[5] Counsel for the defender opposed the motion on the basis both that Mr Tyler was not a skilled person within the meaning of the Act of Sederunt, and that it was not reasonable for the pursuer to have employed him. In relation to the first of those submissions, counsel argued that in considering whether a person was skilled, regard must be had to the context. The issue which had been before the court was whether a duty of care was owed by the defender to the pursuer. That was a question of law. In that context, Mr Tyler was not a skilled person in that, having regard to the test in *Kennedy* v *Cordia Services* [2016] UKSC 6 he did not have any relevant body of expertise which could assist the court. As regards reasonableness, it was not reasonable to employ him because even if he could be regarded as a skilled person, he was doing no more than either expressing an opinion on the law, or carrying out an arithmetical exercise, which the court could equally do for itself.

Discussion

[6] It was surprising that neither party referred me to the recent Sheriff Appeal Court case *Webster* v *Macleod* [2018] SAC (Civ) 16 which dealt with the approach which should be taken to the certification of skilled persons in terms of paragraph 1 of schedule 1 to the Act of Sederunt. In particular, reasonableness must be assessed as at the time of instruction. For

that matter, reference might have been made to a recent decision of Sheriff McGowan in *Hunter* v *East Lothian Council* [2018] SC Edin 19 which, although not binding on me, contains an interesting discussion of the same issues as are raised in the present motion, not least, the approach to be taken in deciding whether or not a person can be regarded as skilled; and the relevance of *Kennedy* v *Cordia Services* [2016] UKSC 6. I was referred to *Allison* v *Orr* 2004 SC 453, which is authority for the proposition that the question of reasonableness should not be judged with the benefit of hindsight; in other words it should be assessed as at the time of instruction. *Webster* v *Macleod* also reminds us that the test is an objective one and that the decision as to whether to certify a person as a skilled person is a matter of judgement rather than a matter of discretion.

[7] The first issue is whether or not, or in the context of this action, Mr Tyler can be regarded as a skilled person. This is a more complex question than appears at first sight. There is of course no doubt whatsoever that Mr Tyler, an experienced solicitor and first tier tribunal judge, has the necessary skill and experience such as to qualify him to act as a skilled person in certain types of action. Were this a professional negligence action against a firm of solicitors, there is no doubt whatsoever that he would be a skilled person. However, as counsel for the defender pointed out, this is not a professional negligence action, but an action against a charity, in which I previously ruled that, on the facts of this case, I was not persuaded that Mr Tyler had knowledge and experience such as to qualify him to give relevant factual evidence which would be of any assistance to the court; nor that he was qualified to give expert opinion evidence which would assist me in my task, because the opinion which he offered to give was on the very question of law which it was for the court to decide.

[8] Further, it seems to me that in deciding whether or not a person is skilled for the purpose of the Act of Sederunt, some regard must be had to context. One must bear in mind that the significance of being a skilled witness is ultimately to enable to be given either (i) opinion evidence, or (ii) relevant factual evidence which will assist the court in its task. I appreciate that there is no necessity for the person actually to be a witness, but in the context of an Act of Sederunt dealing with witnesses' fees, it is not unreasonable to impose a basic requirement that the person is at least capable of giving competent evidence should that be necessary, in order to be certified. That being so, it is logical that the skill should relate to the opinion or factual evidence to be given. For example, had the pursuer sought an opinion in the present case not from Mr Tyler, but from, say, an eminent brain surgeon, it would be difficult to hold that such a person was skilled in the context of the rule notwithstanding that he or she had undoubted skills in another field, since opinion or factual evidence from a brain surgeon about the normal practice of a worker in the charitable sector would plainly be inadmissible. Equally, had Mr Tyler been instructed for an opinion as to causation in a medical negligence case, it would be hard to describe him as skilled in that context. Accordingly I do not see the issue of whether a person is skilled or not as being purely a binary question, to be answered according to the qualifications or experience of the person in a vacuum, without reference to the circumstances, but rather as a contextual one, to be decided according to the relevance of the qualifications or experience to the issues in the particular case. That, no less than the question of reasonableness, is an evaluation to be carried out by the sheriff.

[9] Applying that logic to the present motion, I am not satisfied that Mr Tyler is a skilled person within the meaning of the paragraph. In the first place, I have already ruled that I was not persuaded that he had relevant knowledge and experience such as to qualify him to

give relevant factual evidence which would assist the court. His true expertise lies in his knowledge of the law. However, a person who gives a legal opinion as to the law of Scotland (which would be inadmissible in evidence) cannot be regarded as a skilled person for the purposes of certification. Were it otherwise, then any person (including counsel, or another lawyer in the pursuer's solicitors firm) could potentially be regarded as a skilled person, and certified as such; which is counter-intuitive. In other words, Mr Tyler in the context of this action is in no better position than the hypothetical brain surgeon; and on that basis the pursuer's motion must fail. I reach this view with some diffidence, having regard, first, to Mr Tyler's undoubted expertise and knowledge of the law which I do not question for one moment, and, second, since it is contrary to the view expressed by Sheriff McGowan in *Hunter* v *East Lothian Council*, but nonetheless it is the view which I have reached. Accordingly, certification cannot be granted.

[10] However, lest I am wrong in the conclusion I have just reached, I will now turn to consider whether or not it was reasonable to employ Mr Tyler, on the assumption that he was a skilled person for the purposes of the rule. While in this instance I do agree with Sheriff McGowan that *Kennedy* v *Cordia* is not determinative but is merely one factor to take into account, it is clearly relevant to the question of reasonableness to have regard to whether the purpose for which a skilled person is instructed could result in his ever being in a position to give competent evidence to the court. In the present case, none of the questions asked of Mr Tyler would ever have resulted in his being able to give evidence in court (notwithstanding the pursuer's submission that he "would" have given evidence on *quantum*). Looking at the various questions which he was asked, eligibility for a loss of earnings claim was a matter which could have been determined by the court itself, having regard to the terms of the CICA scheme. Mr Tyler was not able to give opinion evidence as

to whether or not an advisor of the type employed by the defender should "pick up on this", for the reasons which I expressed in my judgment. As regards *quantum*, and the other matters upon which he advised in his supplementary report, I do not see anything there which would have been the subject of relevant evidence. The correctness of the tariff award, one of the matters on which he commented was neither here nor there in the context of the pursuer's claim. Loss of earnings was a relevant factor, but was largely an arithmetical exercise, as Mr Tyler himself pointed out. In summary, all Mr Tyler did was, either, express an opinion on the law, which, putting it bluntly, was for the pursuer's solicitors and, if appropriate, counsel to advise upon; or consider the documentary evidence, including the CICA scheme, and form a view which could equally easily have been formed by the pursuer's solicitors themselves and, ultimately, by the court itself. Mr Pitts further argued that the instruction of Mr Tyler was reasonable to satisfy insurers of the position and to meet the terms of the protocol. Dealing with the first of those arguments, it seems to me that that would be an extra-judicial expense in any event but, in addition, it seems to me that that is applying too broad a meaning to the words "for a purpose in connection with the cause or in contemplation of the cause". Even if that is not correct, the provision of material which could equally have been collated by the pursuer's solicitor (or provided in an opinion by counsel) results in the instruction not being reasonable, viewed objectively. The same can be said of the protocol. The provision of "evidence" which could never be admissible in a proof cannot be said to be reasonably required in contemplation of the cause.

[11] Finally, in *Allison* v *Orr*, I note that the First Division of the Inner House refused to certify a witness who could not, in the court's view, "apply his general expertise to assist the court in assessing a particular pursuer's promotion prospects in a particular employment". Essentially, that is the view which I have reached of Mr Tyler's "evidence".

[12] Accordingly, I also hold that it was not reasonable to employ Mr Tyler and, as such, the pursuer's motion 7/6 is refused to the extent that it seeks his certification. Otherwise, I have granted that motion.

Additional fee

[13] Regulation 5 of the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment of Further Provisions) 1993, schedule 1, insofar as material, is in the following terms:

> "The court shall have the following discretionary powers in relation to the table of fees:
> (a) …
> (b) The court may, on a motion made on or after the date of any interlocutor disposing of expenses, pronounce a further interlocutor regarding those expenses allowing a percentage increase in the fees authorised by the table of fees to cover the responsibility undertaken by the solicitor in the conduct of the cause. In fixing the amount of the percentage increase the following factors shall be taken into account:
> (i) the complexity of the cause and the number, difficulty or novelty of the questions raised;
> (ii) the skill, time and labour, and specialised knowledge required, of the solicitor;
> (iii) the number and importance of any documents prepared or perused;
> (iv) 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;
> (v) the importance of the cause or the subject matter of it to the client;
> (vi) the amount or value of money or property involved in the cause;
> (vii) the steps taken with a view to settling the cause, limiting the matters in dispute or omitting the scope of any hearing".

Pursuer's submissions

[14] Mr Pitts referred to the terms of the Act of Sederunt. He said that the additional fee was sought having regard to factors (i), (ii), (iii), (v) and (vi). He attached particular significance to factors (v) and (vi) – importance and value. He reminded me that the sum sued for was £100,000, the action having settled for £40,000. While it was true that every

case was important to every pursuer, this case was of particular importance to this pursuer because of its nature. He had found giving evidence at the trial of his mother, and at the subsequent preliminary proof in this action, traumatic. He had required a considerable amount of reassurance and handholding. It was significant that the object of the reparation action was to provide the pursuer with the appropriate level of compensation under the Criminal Injuries Compensation Scheme 2008 which he should have received in the first place, for the patrimonial loss sustained by him as a result of physical and sexual abuse at the hands of his mother. As regards the remaining factors, the case was novel, there being no prior reported cases in Scotland involving a breach of delictual duty where the defender was a charity. The pursuer, to succeed, had to demonstrate by averment (and in evidence) that the law should be extended so as to imply a duty of care. The pursuer's solicitor had to consider and examine the wider objects and means of the charity to establish the context in which it was providing advice. That required a considerable amount of research. The solicitor had a background in the voluntary sector and was able to identify factors which were relevant to the establishment of a duty, which counsel may have missed. He had to trace and precognosce those witnesses, who were former employees and volunteers of the defender, which took a significant amount of time. When valuing the claim in preparation for a proof on *quantum*, he had to step into the shoes of the decision maker at the CICA at the time the application would have been determined or into the shoes of the first tier tribunal at the time an appeal would have been decided. Some knowledge of case law involving appeals to the first tier tribunal was required. As regards skill, time and labour and specialized knowledge (factor (ii)), some of the same factors applied as under factor (i). The solicitor's specialist knowledge in CICA cases was a key part of preparing the case. As regards factor (iii), there was a voluminous quantity of papers to consider. The defender's

case file required careful consideration as did the records from the CICA. There was also a huge volume of medical records which required to be considered in light of the defender's contentions of medical causation. The pursuer's HMRC records were in an unusual format, which also required careful consideration.

Defender's submissions

[15] Counsel for the defender opposed the motion in relation to every head. He drew my attention to the wording of regulation 5(b) which makes clear that any additional fee is to cover the responsibility undertaken by the solicitor in the conduct of the cause. There was nothing unusual or exceptional about this case which justified an additional fee to cover any extra responsibility undertaken. It was relevant that both junior and senior counsel had been involved from an early stage. Looking at each of the heads in turn, while there was perhaps some novelty, the case could not be regarded as very novel. Not a large number of questions had been raised. The evidence which was led at the preliminary proof was relatively short in compass. While difficult questions of law had arisen, those were a matter for counsel. The case was of moderate complexity only. Nothing had been said to indicate that the solicitor had undertaken a particularly onerous burden. The pursuer's solicitor had been unable to demonstrate that anything had been done differently from the normal case. The actual work done could be charged for in any event. If more work had been done than in an average case, more could be charged in accordance with the table of fees. What the pursuer had to demonstrate was that the solicitors should be paid more for that work than the table of fees allowed. As regards specialist knowledge, the pursuer's solicitor's background in the voluntary sector was irrelevant. What was required was specialist knowledge of the law. As regards number and importance of documents perused, they

could not be regarded as exceptional. Finally as regards importance and value, value could be dismissed. The case was of no exceptional value. The sum sued for, and the sum for which the action settled, were of no particular significance. The value was not such as to justify an additional fee. As regards importance, the question was not whether it was important to the pursuer but whether it was of such importance as to justify an additional fee. No additional fee should be allowed. However, in the event that I concluded that an additional fee was justified, the amount sought was excessive. A more appropriate figure would be 10%. In support of his submissions counsel referred to an unreported decision of Sheriff Principal Sir Stephen Young: *Mackenzie* v *Grant* Inverness Sheriff Court, 25 July 2007.

Discussion

[16] As counsel for the defender submitted, regulation 5(b) makes clear that any additional fee is to cover the responsibility undertaken by the solicitor, assessed by reference to the seven factors of paragraph (b). That said, where one or more of the factors applies, the responsibility undertaken by the solicitor is likely to be greater than where none apply. In the present case, it seems to me that the starting point is to consider the nature of the claim, which arose from sexual abuse suffered by the pursuer and the defender's alleged failure to recover as much compensation as the pursuer was entitled to from CICA. He first became aware that he may have a potential claim against the defender for negligently having advised him when he discovered that his brother had received a significantly higher sum. He was clearly distressed during parts of his evidence at the preliminary proof, which did require him to recount how he first came into contact with the defender, following his giving evidence at his mother's trial. In those circumstances, I consider that the importance of the claim to him was such that his solicitors did undertake added responsibility. To put it

colloquially, the "handholding" which was required was out of the ordinary and more than would be required in the run of the mill case. Had such reassurance not been given, the pursuer may well not have been able to proceed with the action, or to give evidence. In addition, the case did raise a novel question in as much as a duty of care had not previously been held to exist in such circumstances. While it may be that most of the responsibility ultimately fell upon counsel, there was nonetheless some added responsibility on the solicitor, if only to recognise that there may be a claim even before the stage of instructing counsel was reached. While the instruction of counsel is a relevant factor, it cannot be determinative, otherwise a solicitor could never be granted an additional fee in a Court of Session action. The quantification of the claim also required some specialised knowledge of the CICA scheme which as I have previously observed is moderately complicated. Finally, in relation to documents, I consider that they were sufficiently bulky and unusual in nature (thinking particularly of the CICA file), again, to add to the responsibility upon the solicitor to peruse and understand them properly. It will be noted that I have attached no weight to the value of the claim, which, in isolation, was not of such size as to justify an additional fee.

[17] Accordingly, I conclude that the factors relied upon by the pursuer, other than value, all did add to the responsibility on his solicitors, which ought properly to be reflected by an additional fee.

[18] As regards quantification, I have again had regard to factors (i) (novelty only), (ii) (but excluding Mr Pitts' background in the voluntary sector which I do not consider relevant in this context), (iii) and (v). Those factors are not so great as to justify an additional fee of the magnitude in the motion, which might have been more appropriate had the solicitors conducted the case themselves without instructing counsel. Equally, I consider that the figure suggested by counsel for the defender of 10% does not adequately reflect the

additional responsibility having regard to the said factors. That was the amount allowed in *Mackenzie* v *Grant*. However, in that case the only applicable factor was importance of the cause and every case must in any event turn upon in its own facts. In all the circumstances of the present case, I consider that a fair additional fee, striking a fair balance between the responsibility upon the solicitors and the input of counsel, is 50%.

[19] I have therefore also granted motion 7/5 of process, to the extent of allowing an additional fee of 50%.