Edinburgh Sheriff Court

Scottish Legal Aid Board
DX ED 555250
Edinburgh 30

Civil Section
27 Chambers Street
Edinburgh
EH1 1LB

30 May 2013

31 MAY 2013

DX 550312, Edinburgh 37

Our Ref: NR/JBS

Your Ref: JDH/CS

Dear Sir/Madam

George Gebbie v Scottish Legal Aid Board

Please find enclosed a copy of the Sheriff's Judgment in the above named case.

Yours faithfully

Neil Rawlings
Sheriff Clerk Depute
0131 225 2525 ext 472565

A910/11

GEORGE GEBBIE v SCOTTISH LEGAL AID BOARD

Edinburgh, 23rd May 2013

Act: Smith Q.C.

Alt: Duncan Q.C.

The Sheriff, having resumed consideration of the cause awards the expenses of the process in favour of the pursuers, except insofar as already determined, on an Agent and Client third party paying basis from 22 May 2012, and *quoad ultra* expenses on a party party basis; further allows an uplift in the solicitor's fee to the extent of 100% in terms of paragraph 5 of the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993/3080, and ordains said accounts of expenses to be lodged with the Auditor of Court to tax and to report.

NOTE

[1] On 1 November 2012, the Court having been advised that the cause had settled extra-judicially, on the defenders' motion discharged the diet of proof and continued the cause until 2 November for settlement and for a hearing on expenses.

[2] On 2 November 2012, settlement having been effected for the whole sum sought, the defenders conceded expenses of the cause on the party party scale. Senior Counsel for the pursuer moved

(i) for the whole expenses of process, except insofar as already determined on an agent/client third party paying basis

(ii) for certification that the cause was suitable for the employment of Senior Counsel and

(iii) for an uplift in the solicitors' fee to the extent of 100% in terms of paragraph 5 of the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993/3080.

Mr Heggarty, for the defenders opposed the pursuer's motion in respect of each of the foregoing instances.

On 2 November 2012, Senior Counsel for the pursuer made his submissions in respect of parts (i) and (ii) of his motion in full. He had provided the defenders, in advance of the hearing, with a typewritten copy of his "Skeleton Argument" which was extensive. At the hearing he made submissions on the basis of the extensive and detailed "Skeleton Argument". Towards the conclusion of Senior Counsel's submissions, Mr. Heggarty, for the defenders interjecting, stated that he would not be making any submissions that day on the basis of certain of Senior Counsel's submissions contained in the typewritten "Skeleton Argument" albeit he conceding he had received a copy of the said argument prior to the hearing. After some discussion he moved that the hearing be adjourned to allow him to instruct Senior Counsel. He confirmed that he continued to

oppose the pursuer's motion on all three bases. Exceptionally, his motion to allow the hearing to be adjourned for the purpose of instructing Senior Counsel was granted.

[3] On 8 November 2012, Mr. Duncan QC, appearing for the defenders withdrew opposition to head (ii) of the pursuer's motion relative to the employment of Senior Counsel but maintained opposition to the pursuer's motion in respect of the agent client third party paying basis and the uplift in the solicitors' fees. At the conclusion of submissions the Court certified the cause as suitable for the employment of Senior Counsel and *quoad ultra* made avizandum.

AGENT AND CLIENT EXPENSES

[4] The current legal position on agent and client expenses was adroitly summarised by Lord Hodge in ***McKie v Scottish Ministers*** **2006 SC 528** in the following terms (my emphasis):

> *"[3] The majority of the submissions which I heard addressed the issue of the scale on which the pursuer should be awarded expenses. Counsel referred me to* ***Plasticisers Ltd v William R Stewart & Sons (Hacklemakers) Ltd, British Railways Board v Ross and Cromarty County Council, Walker v McNeil, North East Ice & Cold Storage Co Ltd v Third and Baker Hughes Ltd v CGC Contracting International Ltd and Ewos Ltd v Mainland****. The law on this issue is well settled and may be summarised in the following five propositions. First, the court has* ***discretion*** *as to the scale of expenses which should be awarded. Secondly, in the normal case expenses are awarded on a party and party scale; that scale applies in the absence of any specification to the*

*contrary. **But, thirdly, where one of the parties has conducted the litigation incompetently or unreasonably, and thereby caused the other party unnecessary expense, the court can impose, as a sanction against such conduct, an award of expenses on the solicitor and client scale.** Fourthly, in its consideration of the reasonableness of a party's conduct of an action, the court can take into account all relevant circumstances. Those circumstances include the **party's behaviour before the action commenced, the adequacy of a party's preparation for the action, the strengths or otherwise of a party's position on the substantive merits of the action, the use of a court action for an improper purpose, and the way in which a party has used court procedure, for example to progress or delay the resolution of the dispute.** Fifthly, where the court has awarded expenses at an earlier stage in the proceedings without reserving for later determination the scale of such expenses, any award of expenses on the solicitor and client scale may cover only those matters not already covered by the earlier awards.*

*[4] Where, as in this case, parties settle an action before a proof on its merits has been heard, it may be more difficult for the court to reach a firm view on a party's conduct in relation to the merits of the action than where the proof has been completed and the judge has made a final determination as in **British Railways Board v Ross and Cromarty County Council.** Nonetheless, in all of the other cases cited the proceedings terminated before any hearing of evidence was completed and the court reached its view on the material placed before it."*

[5] The pursuer's claim in the instant action was for a sum in excess of £11,000 in respect of interest on counsel's professional fees in respect of fee notes submitted by him to the defenders [SLAB] in about 1999/2000. Senior Counsel

for the pursuer contended that the whole expenses of this action should be awarded on an agent client third party paying basis, in the pursuer's favour [FIRST] on the grounds of the lengthy and protracted pre litigation history and [SECOND] on the basis of the general conduct on the part of the defenders and their representatives in the course of the instant litigation. He relied particularly on communications between the defenders and the pursuer's representatives, on contradictory averments in the pleadings, on confirmations given by their representatives in Court of a polar change in their legal position which was confirmed by their Chief Executive in a sworn affidavit which, they contended, contradicted their ongoing communications regarding tenders and offers and the defenders' eventual capitulation shortly before the diet of proof evidenced by their settlement of the whole sum claimed.

[6] [FIRST] the pre-litigation historical position is that the defenders paid the pursuer a small proportion of the substantive fees incurred and submitted by the pursuer to the defenders in 1999/2000 and denied that the outstanding balance was due. From early 2000, the pursuer repeatedly requested that the matter of the outstanding balance be sent to taxation. The defenders repeatedly refused to agree. After extensive and lengthy procedure the matter eventually went to the Privy Council and a hearing was ultimately fixed for 17 November 2011. Accordingly the matter of Counsel's fees took the better part of a decade to resolve against a climate of continued resistance by the defenders. Furthermore the Taxation Master found substantially in favour of the pursuer and following a

hearing on expenses, the pursuer was found, on 16 December 2011, to be entitled to his whole expenses, which, I was informed by counsel for the pursuer, were in the region of £20,000. None of the foregoing history was challenged by the defenders.

[7] [SECOND] So far as the conduct of the instant litigation is concerned, Senior Counsel for the pursuer contended that, following the commencement of this action in September 2012, the following facts taken together support his motion for expenses on the agent client scale:

(i) On **1 February 2012**, SLAB emailed the pursuer's clerk indicating that they were prepared to offer the sum of £10,325. On **2 February 2012** SLAB emailed an amended offer as above calculated to include VAT. The new offer was £12,370.38.

(ii) On **17 April 2012** a Minute of Amendment (Number 10 of Process) was lodged by the defenders averring in the pre-penultimate line that "remission of interest … brings out a sum due of £11,361.88". On **18 April 2012**, a tender was intimated in the sum of £12,900. No indication was provided as to how the sum was arrived at. The averments on record however suggested that £11,361.88 was the sum due, apart from the issue of section 5 remission. Thereafter correspondence was entered into asking for payment, *ad interim*, of the sum of £11,361.88. SLAB repeatedly refused to make that payment, and accordingly a motion for

summary decree was enrolled on behalf of the pursuer. The motion was due to call in Court on 22 May 2012.

(iii) On **18 May 2012**, the Friday evening prior to the hearing, the averment relating to the £11,361.88 was deleted. On **22 May 2012**, Mr. Cownie, solicitor for the Board, appeared on behalf of the Board, and categorically stated in terms that the whole sum claimed by the pursuer in respect of interest should be remitted and that the defenders owed the pursuer nil in respect of his claim due to the pursuer's, or those acting on his behalf, failure to communicate with the defenders between at least 2002 and 2005. At that stage, the pursuer produced a schedule identifying a chronology replete with detailed and continuing correspondence between various Faculty representatives and officers and the defenders throughout the whole period. Mr. Cownie insisted that SLAB's position was that there was no sum whatsoever due to the pursuer by way of interest. This was minuted in the Minute of Proceedings for 22 May 2012. It was the position of senior counsel for the pursuer that if the pursuer obtained any sum beyond nothing there would be issues on expenses. The motion was continued until 28 May 2012 to allow the defenders' legal representative the opportunity to consider the chronology of correspondence produced by the pursuer and the defenders' legal position.

(iv) On **28 May 2012**, Mr. Cownie being unavailable, Mr. Heggerty a senior solicitor for the Board appeared for the defenders. He failed to clarify the

defenders' position. Given the contradictory nature of the defenders' position as regards their averments (in Minute of Amendment Nos. 10 and 11 of Process) in their actings and in the position stated by their representative in Court on 22 May, the Court ordained the Chief Executive of the Board to lodge an Affidavit, clarifying the defenders' position.

(v) On **11 June 2012**, the Affidavit of the Chief Executive (Number 13 of Process) was produced confirming that the defenders' position was accurately reflected in their Minute of Amendment of 18 May 2012 [Number 11 of Process] and that no sum was due to the pursuer by way of interest. Furthermore the said Minute of Amendment contained the averment that there was no communication from the pursuer or his representatives between 28 January 2002 and 26 January 2007. The Chief Executive did not, in his affidavit, dissociate himself from this factually incorrect statement. [That this statement was factually incorrect is now admitted by Mr. Duncan Q.C. on behalf of the defenders].

(vi) On **12 June 2012**, Miss Crawford QC appeared for the defenders, and the pursuer's motion in respect of expenses on an agent client basis and for certification of the hearings as suitable for the employment of senior counsel was granted, unopposed by the defenders (the pursuer's motion

for summary decree having been withdrawn). The Court allowed a two day diet of proof to be afterwards fixed.

(vii) On **17 July 2012**, at a further continued Rule 18 hearing the pursuer moved that a timetable towards proof should be set. This motion was opposed by Mr. Heggarty on the basis that negotiations towards settlement were ongoing. Despite this he confirmed that the position of SLAB, as clarified in the Affidavit of the Chief Executive remained that nothing was due, (although it seems the tender was left in place). Without section 5 remission, it remained the defenders' position that while the sum would have been £16,882.69; due to remission of the entire sum, nil was due. Senior Counsel for the pursuer intimated that he was, on his client's behalf, prepared to concede the former calculation to narrow the issues at proof.

(viii) On **14 September 2012**, SLAB increased the tender to £15,600. No explanation was provided for the calculation despite requests by pursuers as to how the figure was reached.

(ix) On **2 October 2012**, counsel for the pursuer emailed counsel for the defenders and asked how the figure in the tender had been arrived at and on **10 October 2012**, a further tender was lodged in the sum of £16,968. It was stated in correspondence that this was the full sum sued for, but it

did not include judicial interest. Correspondence was entered into, and it was stated on the pursuer's behalf that the sum was £18,444 as at 11 October. Within a few days this increased by about £20 (further daily interest), which was agreed to be the settlement amount. It would therefore appear that the position of SLAB reflected by their tenders was variously that £10,300; £12,900; £15,600; £16,968; £18,444 was due but their position as stated categorically to the Court by their representatives and in terms of their Chief Executive's affidavit, was that nil was due to the pursuer.

[8] Against that background Senior Counsel for the pursuer submitted that, while there are many circumstances where a party may wish to increase tenders as the case goes on, normally this will be as a result of further information being obtained, usually when a party was previously unaware of it. In this case however there was no information produced to SLAB of which they were unaware; and there was full disclosure of the pursuer's position from an early stage to the court and to SLAB. It was their plea that interest should be remitted primarily because of failure on the part of the pursuer and his representatives to communicate with the defenders over a lengthy period. He submitted that it is of some relevance that senior counsel appearing for the defenders now accepts [on 8 November 2012] that that averment and contention was factually incorrect as evidenced by the chronology produced.

[9] SLAB, he submitted, is a publicly funded organisation. It has a duty to do what it can to save money to the taxpayer, but it is also under a duty to pay what it is due to pay. This exercise in Mr. Gebbie's case, on account of SLAB's failure to have the matter remitted to taxation at the outset as he suggested, resulted in not only the late payment; but the costs of taxation in London (approximately £20,000); the interest they have agreed to pay (approximately £19,000) and the expenses of this process as well as their own costs and expenses. It was contended by Mr. Smith QC that the total cost to the taxpayer here is of the order of £100,000. This contention was not contradicted by Mr. Duncan QC for the defenders. Furthermore no issue was taken with the narrative account represented by Senior Counsel for the pursuer.

[10] Mr. Duncan QC, appearing for the defenders conceded that the averment in the pleadings relative to non communication on the part of the pursuer was factually incorrect. However, he maintained that the awards of expenses previously made on an agent client basis were sufficient to penalise the defenders for their lack of clarity. He contended that otherwise expenses should be awarded against the defenders on the usual basis. Mr. Duncan Q.C., while accepting that the averment [in Minute of Amendment Number 11 of Process] and insofar as it was adopted by the defenders' Chief Executive in his affidavit, was factually incorrect, refuted that this was indicative of recklessness or dissemination on the part of the defenders' representatives or their Chief Executive. Equally he

refuted that there had been any attempt to mislead the Court on the defenders' part.

[11] While the pre-litigation history relative to the pursuer's professional fees, narrated by Senior Counsel is unfortunate and regrettable, in that it took the better part of a decade to resolve, in part at least due to the defenders' continued resistance to the matter going to taxation, there was no information to conclude that there was never a defence to the instant litigation. The action was raised, no doubt for good reason, prior to the Taxation Master's decision being available and the procedural history is relatively unremarkable until the lodging by the defenders of their Minute of Amendment Number 10 of Process, containing the averment that the sum of £11,361.88 was due. Accordingly I concluded that an award against the defenders on an agent and client basis in respect of the whole action was not appropriate or justified in all the circumstances. Accordingly, expenses on a party party paying basis is appropriate up until the Court hearing on 22 May 2012.

[12] That said, however, given the conduct from at least and including the hearing on 22 May 2012 through to its final resolution with contradictory averments, underpinned as it was by correspondence, numerous and various offers exhibited a degree of carelessness deserving of disapprobation particularly against the background of the long drawn out pre-litigation history, and for all the reasons referred to by Senior Counsel for the pursuer. So far as the defenders' Chief Executive is concerned while it is regrettable that his affidavit

refers to issues that were subsequently admitted to be factually incorrect, there was not sufficient information before the Court to attribute to him or to the defenders any malice or any deliberate attempt to mislead the Court as was suggested by the pursuer. In all the circumstances I concluded that an award of expenses from 22 May 2012 through to resolution of the cause, insofar as not already dealt with, on an agent and client paying basis was justified and appropriate.

[13] The pursuer moved for an uplift in solicitor's fees of 100% in terms of paragraphs 5b(i) (iii) (v) (vi) and (vii) of the Act of Sederunt referred to above. He submitted that this cause had wider implications in terms of importance and value as a number of other cases will follow on from the fact of settlement of this case, failing which, litigation. This was not challenged by the defenders. It was a matter of concession that the issue of remission of interest was novel. It was submitted that the matter, particularly given its lengthy history was of high importance to the client and further that it was of high importance to the Bar in general. This submission was not controverted. The volume and nature of the documentation extending as it did over a period in excess of a decade which required consideration is evidenced from the memory disc prepared and I accepted that it would have required a great deal of professional time to be devoted to it. Again this contention was not controverted. Lastly it was submitted that great efforts had been made by the pursuer in attempting to settle the case, to narrow the matters in dispute and to limit the scope of the hearing

in particular to avoid the need for witnesses being called. While the defenders remained opposed to the pursuer's motion in this respect, none of the submissions made were challenged. I accepted that the arguments made by Mr. Smith Q.C. were accurate and justified in all the circumstances and granted his motion for an uplift in the solicitor's fees to the extent of 100%.