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

[2019] SC EDIN 49

PIC-PN940/16

JUDGMENT OF SHERIFF PETER JOHN BRAID

in the cause

PATRICK ANTHONY STEPHEN BURNS

Pursuer

against

LORD KEEN OF ELIE QC

Defender

Pursuer: Clark, Advocate; Bonnar Accident Law, Solicitors
Defender: Matheson, Morton Fraser, Solicitors

Edinburgh, 16 January 2019

[1] The pursuer's opposed motion, 7/18 of process, called before me on 7 January 2019. The motion as lodged sought correction of a so-called incidental error within the interlocutor of 10 July 2018 granting the pursuer's motion 7/16 of process. That interlocutor, among other things, granted sanction for the instruction of senior and junior counsel for specific elements of work undertaken. However, it has emerged that the pursuer's intention had been that sanction for *all* work done by senior and junior counsel throughout the case should be granted, but the significance of the wording of the interlocutor was not appreciated by the pursuer's agents until recently. Following lodging of the motion 7/18, the pursuer's position changed and counsel who appeared on his behalf at the hearing moved what had originally been merely an *esto* position (albeit one which was contained in the submissions section of the motion rather than in the motion itself: however no point was taken in relation

to that), namely, to grant sanction for the instruction of senior and junior counsel in so far as not previously granted. That motion was opposed by the solicitor for the defender.

[2] At this stage it is convenient to record the terms of the motion 7/16, in so far as material, which were as follows:

> "To certify the cause as suitable for the instruction of senior and junior counsel who consulted with the pursuer, prepared adjustments, the statement of valuation of claim, consulted with Dr Stone, Professor Hart and Gordon Cameron, prepared for and conducted the pre-trial meeting and consulted on the minute of tender".

[3] It might be observed that the motion is ambiguous. The words "who consulted with the pursuer" until the end might be read as simply descriptive of the work which had been undertaken without qualifying what was sought; or they might be read as defining the work undertaken for which sanction was sought. If a strict grammatical approach were adopted there may be significance in the absence of a comma after the word "counsel", and there is an interesting, if pedantic, discussion to be had as to whether the meaning of the motion would have been different had it sought sanction for "senior and junior counsel, who consulted etc". In the event the second interpretation was seemingly placed on the motion by the sheriff clerk's office, and the interlocutor of 10 July, again in so far as material, was in the following terms:

> "Grants sanction for the employment of senior and junior counsel in respect of:
>
> a. preparing adjustments;
> b. the statement of valuation of claim;
> c. consulting with Dr Stone, Professor Hart and Gordon Cameron;
> d. prepared for and conducted a pre-trial meeting;
> e. consulted a minute of tender" (all *sic*).

It will be noticed that this interlocutor made no mention of consulting with the pursuer (contrary to what had been sought), although that seems to have been overlooked by the pursuer's advisers until the hearing on the motion, perhaps because when they did get

round to reading the interlocutor, they were then preoccupied with the more fundamental problem that all other work done by counsel (of which I was told there was a considerable amount) had not been sanctioned. The particular omission which I have just identified appears to have been a straightforward error on the part of the court but no submissions were made in relation to that.

[4] A question which briefly arose before me was whether Sheriff McGowan, who granted the motion, had treated it as being a motion seeking blanket sanction but had decided to restrict it to the five items specified in the interlocutor. However, it should be noted that the motion was made of consent and was both lodged and granted on 10 July. Neither party before me suggested that Sheriff McGowan had indicated that he was not prepared to grant the motion without being addressed on it, and there is nothing about the wording of the interlocutor (such as use of the word "restrict") nor is there anything else in the process which suggests that Sheriff McGowan intended to grant less than what was moved for. Had it been otherwise, undoubtedly he would have wished to be addressed on the matter of sanction, which he did not. In those circumstances the motion before me proceeded on the footing that the court's intention had simply been to grant the motion as lodged.

[5] Although the defenders' position before me as to the meaning of the motion was initially unclear, Mr Matheson on their behalf was eventually constrained to accept that the correct interpretation of what had been requested was the one adopted by the court, namely that sanction was merely sought for the items specified and no more. (It might be observed, however, that since the motion was ambiguous, by not opposing it the defenders were running the risk, if it was a risk, that blanket sanction would be granted. Indeed, I was informed by counsel for the pursuer that prior to the motion being enrolled, it had been

agreed by senior counsel for the defenders that sanction for counsel would not be opposed. That statement was not challenged by the solicitor for the defenders. It should also be pointed out that the defenders did not seek to argue before me that sanction was inappropriate.)

[6] Accordingly, the short issue before me was whether or not it was competent for the court, at this stage, to grant sanction as regards all other work undertaken by senior and junior counsel beyond that specified in the previous interlocutor. Counsel for the pursuer submitted that it was competent. The position would be different if the matter had already been considered by the court and sanction had consciously been restricted. However, that was not the case. Sanction could be granted at any time up to taxation: *Macphail*, Sheriff Court Practice 3rd Edition, para 12.24; *Reid* v *Orkney* 1912 SC 627 at 633. That should now be done.

[7] The solicitor for the defenders submitted that it was not competent to grant further sanction at this stage. In support of that submission, he referred to *Laing* v *Scottish Arts Council* 2001 SC 493 at 501D-F. In that case a motion by the defenders for a *contra* award of expenses, following the acceptance of a tender, was held to be incompetent, where the Lord Ordinary had previously pronounced an interlocutor awarding expenses to the pursuer. All matters concerning expenses should be dealt with at the same time. That had been done, in the interlocutor of 10 July 2018. It was now too late for the pursuer to seek sanction for other work undertaken by counsel.

[8] It seems to me that the present case is not on all fours with *Laing*. In particular, on any view it is overstating the position to say that all matters concerning expenses must be dealt with at the same time as an interlocutor awarding expenses to one party or the other. There is perhaps a distinction to be drawn between liability for expenses of the cause, on the

one hand, and incidental matters such as certification of skilled persons and sanction of counsel, on the other. Certification of a skilled witness may be dealt with at any time prior to taxation, by virtue of Act of Sederunt (Fees of Witnesses and Shorthand Writers in the Sheriff Court) 1992, schedule 1 paragraph 1. While the position regarding sanction for counsel is not expressly dealt with by Act of Sederunt, nonetheless, on the basis of the authorities relied on by the pursuer, sanction for counsel may likewise be sought at any time prior to taxation. If that is correct, it is not incompetent to seek sanction even after an award of expenses has been made. It follows that, had sanction not been sought at all in the present case, it would have been open to the pursuer to make the present motion now. The question then becomes whether, sanction for some aspects of the case having been granted, that precludes the pursuer from seeking sanction for other aspects of the case. It is not immediately obvious why that should be so. If, for example, sanction had been granted at an earlier stage in the case for (say) the conduct of a debate it could not subsequently be argued that sanction could not thereafter be sought for other aspects of the case (including, perhaps, procedure which had occurred before the debate). Again, taking the analogy of skilled persons, it is not unknown for certification to be sought for, say, three witnesses and, subsequently for a fourth who has been overlooked.

[9] Accordingly, I consider that it is competent for the court to grant further sanction at this stage. Strictly speaking, I do not need to consider anything further, since the motion before me was argued by the defenders solely on the basis of competency. However, for completeness, I still require to have regard to the terms of section 108 of the Courts (Reform)(Scotland) Act 2014, which requires sanction to be granted if the court considers that it is reasonable to do so. Given the nature of the case, the fact that some sanction has already been granted and the prior agreement of senior counsel for the defenders, it might

be difficult now to conclude anything other than that sanction is reasonable, having regard to complexity, importance, value and equality of arms. However, in terms of section 108(4) the court may have regard to such matters as it considers appropriate. It seems to me that delay in seeking sanction, particularly where sanction for some aspects of the case, could be a relevant factor which the court may, in certain circumstances, be entitled to take into account. In other words, the matters founded on by the defenders, in my view, go to reasonableness rather than competency. So, if the motion 7/16 had made it clear beyond any doubt that all that the pursuer sought was sanction for the work specified therein then, having regard to the passage of time since then, I might have reached the view that it was too late to come back six months later to seek further sanction. However, I have not reached that view, because the motion was, as I have pointed out, ambiguous. On one view, the pursuer did seek blanket sanction which was what had originally been agreed by senior counsel for the defenders. In those circumstances, he should not be penalised by the infelicitous drafting of the motion and it is reasonable that sanction for the remainder of the work done by counsel should now be granted.

[10] Finally, agents are reminded of the need to take care, both when drafting motions and when checking interlocutors (which should be done upon receipt, not some six months later). Given the volume of e-motions passing through SAC, neither the sheriff clerk's office, nor indeed sheriffs, should be required to pore over the wording of motions with a fine-toothed comb to analyse the significance of commas, or the absence thereof. The court, and other party to the action, should be able to proceed on the basis that the motion section of Form G6A, that is section 6, clearly, concisely and unambiguously sets out precisely what it is that the court is being asked to do in anticipation that the wording will be replicated in the interlocutor to follow thereon, should the motion be granted (for example, to sist the action

for three months). Where appropriate, a brief reason for the motion can be stated in the motion itself, if that wording could reasonably be anticipated to appear in the interlocutor. So, for example, it is appropriate to move to sist an action for three months, to enable the pursuer to apply for legal aid. That is not to be confused with submissions in support of the motion, which should appear in section 7 of Form G6A, where required. Thus, in the example just given, that section might explain why legal aid had not been applied for sooner (for example, because the action was raised as a matter of urgency to beat the triennium). The present motion would probably not have been necessary had the pursuer's agents taken the requisite care to follow these brief, but simple, strictures. As it was, the motion 7/16 unnecessarily conflated the motion itself in section 6, with the submissions in justification for it, in section 7. Putting that another way, it is only natural that the court construed the wording of section 6 as defining what was sought, rather than being an augmentation of the submissions in section 7, which it now appears was what was intended. Ironically, motion 7/18 repeats this same basic error, since the second part of the motion contains what can only be described as a submission in support of it, and tucked away in the (lengthy) submissions we find the pursuer's *esto* position, which ought to have appeared in section 6. Agents are respectfully requested to take heed of these comments, since, regrettably, these criticisms are not unique to this case, which does however serve as a warning of the problems which may arise if care is not taken.