

SHERIFFDOM OF LoTHIAN AND BORDERS
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2020] SC EDIN 24

PN2750/17

JUDGMENT OF SHERIFF PETER JOHN BRAID

in the cause

ALAN SCOTT

Pursuer

against

PRESTWICK AIRCRAFT MAINTENANCE LIMITED

Defender

Pursuer: Murray, Digby Brown, Solicitors

Defender: Sheppard, Eversheds Sutherland International LLP, Solicitors

Edinburgh 30 March 2020

Introduction

[1] In his motion 7/6 of process, the pursuer moves the court to allow his account of expenses to be lodged in process late, under OCR 32.1A(1)(b), and for a diet of taxation to be assigned. The motion was opposed by the defender and duly called before me, by conference call, on 20 March 2020. Mr Murray “appeared” for the pursuer, and Mr Sheppard for the defender. This means of hearing the motion was rendered necessary by the current virus crisis, but worked well. Each party had lodged a bundle of authorities in advance of the motion.

Rule 32.1A

[2] OCR 32.1A is in the following terms:

- “(1) A party found entitled to expenses shall lodge an account of expenses in process –
- (a) not later than four months after the final judgment;
 - or
 - (b) at any time with permission of the sheriff, but subject to such conditions, if any, as the sheriff thinks fit to impose.”

Background

[3] Mr Murray explained the background to the necessity for the motion as follows. The final interlocutor was pronounced on 29 October 2019. The last date for the account in terms of rule 32.1A(1)(a) was 29 February 2020. His firm operates a computerised case management system, whereby when the final interlocutor was received, it ought to have been entered on to the system, which would then have automatically diarised the final date for the account, and generated reminders before that date to ensure it was not missed. The interlocutor was received in his office on 31 October 2019. However, due to pressure of work before he went on annual leave four days later, the interlocutor was not entered on the system. The error was not picked up on his return. No reminders were generated and there was nothing to alert him or his firm to the deadline of 29 February 2020. The error was detected on 9 March 2020, when he noted that there were outlays on the cash account which he had not expected to see. On conducting a file review he then realised that the account ought to have been lodged, but had not been. He immediately contacted his law accountants, who drew up an account by 10 March (the next day) which was intimated to the defender’s agents that day. The present motion was enrolled on 11 March. Mr Murray fully acknowledged that the mistake had been his, and had been willing to negotiate an agreed figure to the extent of accepting a modification of 20%. That generous (my word, not

Mr Murray's) concession had not proved acceptable to the defender's agents, who instead had opposed the motion.

[4] Mr Sheppard did not dispute the foregoing, adding to it only that when the pursuer's law accountants had intimated the account, they had done so by email, and had not drawn attention to the fact that it was late. Instead, their email had stated simply that the pursuer's agents were keen to get expenses agreed before the end of the month and "with that in mind" were prepared to accept a figure of £16,750 if matters could be agreed that week. The figure brought out in the account was £17,872.17.

Submissions for pursuer

[5] In moving the motion against the above background, Mr Murray submitted that the court should exercise its discretion to allow the account to be lodged under rule 32.1A(1)(b), subject to such sanction as was deemed appropriate, such as modification, or an order that the pursuer meet the costs of taxation. He drew my attention to the current Rule of the Court of Session (42.1(2)), which was in substantially the same terms; and contrasted that with the previous incarnation of that Rule, which allowed an account to be lodged outwith the 4 month period on special cause shown. The present rule (introduced in the sheriff court with effect from 29 April 2019) did not require cause to be shown, let alone special cause. He referred to *Finlayson v British Steel* 2003 SLT 903, which bore striking similarities to the present case and where an account had been allowed late, albeit in the present case the error had been rectified more quickly. Prejudice, or the absence thereof, was relevant to the exercise of the court's discretion. There had been no prejudice to the defender. The delay had been very short. The action itself had lasted 19 months, and at least some of that delay was attributable to the defender. By contrast, the pursuer would be prejudiced were the

account not to be received since he would be able to recover any expenses from the defender.

Submissions for defender

[6] In response, Mr Sheppard submitted that the account ought to have been lodged on 28 February (29 February being a Saturday) and the delay in intimating an account was 11 days. The policy behind the four month rule was that a paying party should be aware of his liability in expenses within a reasonable period. Reference was made to the Report of Sheriff Principal Taylor on his Review of Expenses and Funding of Civil Litigation in Scotland. Mr Sheppard also referred to Finlayson's *Guardian v Scottish Rig Repairers* 2005 SLT 329, in which a different approach had been taken from Finlayson, *supra*, and the issue of prejudice had been discussed more fully. The defender in the present case had been prejudiced, by not knowing what their liability was within a reasonable period. As stated in Finlayson's *Guardian*, prejudice to the pursuer could not alone be a sufficient reason to allow an account to be lodged, since that was present in every case. In any event, the pursuer ought to have a right of recourse against his solicitors for their failure. If I did exercise my discretion in favour of the pursuer, I should impose two conditions, namely, that the expenses of the motion should be awarded to the defender on an agent client, client paying basis; and the pursuer should require to pay the expenses of the taxation. Although the pursuer had conceded some modification of the account, that was of doubtful competency, and Mr Sheppard did not seek modification.

Discussion

[7] The decision whether or not to allow the account to be lodged after the expiry of the four month period from final judgment is a discretionary one. In exercising that discretion, the starting point is to have regard to the wording of the rule itself. It is set out above in paragraph [2]. As Mr Murray submitted, it does not impose an absolute requirement on the party entitled to payment of expenses to lodge an account within four months of final judgment, nor does it refer to the non-lodging of an account within that period as a failure to comply with the rules. In that respect, the wording is not identical to that of the version of Rule of Court 42(2) which was considered by the temporary judge in *Finlayson's Guardian*, *supra*, which did refer to such non-lodging as a failure. Accordingly, the dicta in that case must be read with this distinction in mind. The issue is not whether relief should be granted from a failure to comply with the rules (and thus the importance of the rules being complied with does not carry much, if any weight), but simply whether an account should be received after the four month period which is deemed to be a reasonable period within which the paying party should know of his liability. OCR 32.1A(2) provides simply that the party entitled to expenses can either lodge an account within the four month period as of right, or can lodge an account at any time with leave of the court, which may or may not be made subject to conditions. That said, the approach taken by Temporary Judge R F Macdonald QC (as he then was) does provide useful guidance, in particular, at paragraph [18] of his opinion, with which I respectfully agree. Stated shortly, the court must be able to conclude, in all the circumstances of the case, that it is appropriate for the account to be lodged. Neither special, nor indeed, any, cause must be shown, but there must be some factual basis for the court to be able to exercise its discretion (which is a wide one) in favour of the account being lodged. In exercising that discretion, the court must have regard to, and

balance, relevant factors, including but not confined to, that of relative prejudice. Other relevant factors may include: the length of the delay; why it occurred and, in the case of error, the steps taken to rectify that error once discovered. This must all be viewed in the context that Parliament has enacted, following the Taylor Review, that a paying party is entitled to know within a reasonable period what his liability (or at least, his maximum liability) is likely to be, that period being set at four months as a general rule (although, not an absolute one, given the right to lodge an account at any time with leave).

[8] Applying that approach here, and equating the pursuer with his agents, there would be prejudice suffered on that side of the scales were the motion to be refused, since the right to recover a sum in the region of £16,000 to £17,000 would be lost. Although the receiving party will always suffer prejudice if the right to recover is lost, the extent of that prejudice will clearly vary from case to case depending on the amount involved; and the amount here is not insignificant. By contrast, although the defender has remained in the dark as to its liability for more than four months, the delay – less than two weeks – is not long, particularly when viewed in the context of the length of the litigation, and the length of time for which the defender was unaware of its liability in damages to the pursuer. Moreover, the delay was not wilful, nor did it occur in the face of repeated (or indeed, any) reminders from the defender's agents but arose from an understandable human error which was promptly rectified as soon as it was noticed. The force of that is slightly lessened by the regrettable omission to proactively draw attention to the missed deadline, perhaps in the hope that the defender's agents had not noticed, perhaps not, but that was down to the pursuer's law accountants rather than to his solicitor.

[9] When all these factors are taken into account, I conclude that it is appropriate that the pursuer's account should be lodged (and, for the avoidance of doubt, I would have reached

the same view even if the defender's agent is correct in submitting that the pursuer himself would suffer no prejudice were the account not to be allowed late). Putting that another way, it would be unfair for the defender to receive a windfall benefit of some £16,000 when the delay was relatively short and no real prejudice (such as an inability to close their year end, or to make appropriate financial provision) has been shown by them, against a background where the pursuer's solicitors did have a system in place for lodging accounts timeously (unlike the solicitors in *Finlayson's Guardian*) but there was human error.

[10] That then raises the question of whether any conditions should be attached to the lodging of the account, and if so what they should be. Although the pursuer has offered a modification, I rule that out on a number of grounds, not least that it was conceded by counsel, and the court, in *Finlayson*, that modification would not be a competent order to make. It was argued in *Finlayson's Guardian* that the concession was wrongly made, since the case relied on was decided by reference to a rule which had since changed. Be that as it may, Temporary Judge Macdonald, in *Finlayson's Guardian*, expressed the obiter opinion that modification would be incompetent, since it would amount to altering a previous interlocutor. I respectfully agree. In any event, it is difficult to see how modification, whether competent or not, could be truly said to be a condition of an account being lodged, as opposed to a penalty for its not having been lodged, which is generally accepted to be incompetent, and which neither party suggested.

[11] That leaves me with the two suggestions made by Mr Sheppard, namely, payment of the expenses of the motion on an agent client basis and that the pursuer should pay the expenses of the taxation. The latter of course may not come to pass, but if it does, payment of those expenses by the pursuer could be justified as an appropriate sanction which does to

some extent mitigate any prejudice suffered by the defender by reason of the short delay (and no doubt will be taken into account in negotiating an overall figure).

[12] It also seems appropriate that the pursuer should pay the expenses of the motion, which were conceded. I have more difficulty in seeing why those should be on an agent client, client paying basis. No authority was proffered by Mr Sheppard as to why such an award should be made. Rather the suggestion appears to have been founded on the approach in *Finlayson's Guardian* where the temporary judge said that if he had allowed the account to be received, he would have imposed such a condition. However, generally such awards are made only where one of the parties has conducted the litigation (or part of it) incompetently or unreasonably, thereby causing the other party unnecessary expense (*McKie v Scottish Ministers* 2006 SC 528, per Lord Hodge at 530.) It cannot be said that the defender here has been caused unnecessary expense (beyond opposing this motion, in which opposition it has been unsuccessful). It is also more than a trifle harsh to categorise the pursuer's solicitor's conduct of this part of the litigation as incompetent, or unreasonable (in contrast, perhaps to the criticisms levelled at the solicitors in *Finlayson's Guardian*). Rather he made an honest error, which he responsibly took steps to rectify as soon as he noticed it, which is the very antithesis of unreasonableness.

[13] In summary, then, I have granted the motion and allowed the pursuer's account of expenses to be received, subject to the condition that the pursuer will meet the expenses of any taxation. I have awarded the expenses of the motion to the defender, on the usual basis. No other condition is appropriate.