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Case & Legislation Update on Expenses

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ASPIC

Section 108 of the Courts Reform (Scotland) Act 2014 deals with sanction for counsel in the sheriff court and Sheriff Appeal Court

(1) This section applies in civil proceedings in the sheriff court or the Sheriff Appeal Court where the court is deciding for he purposes of any relevant expenses rule whether to sanction the employment of counsel by a party for the purposes of the proceedings.

(2) The court MUST sanction the employment of counsel if the court considers, in all the circumstances of the case, that it is reasonable to do so

(3) In considering that matter, the court MUST have regard to
(a) whether the proceedings are such as to merit the employment of counsel, having particular regard to:
(i) the difficulty or complexity, or LIKELY difficulty or complexity, of the proceedings,
(ii) the importance OR value of any claim in the proceedings, and
(b) the desirability of ensuring that no party gains an unfair advantage by virtue of the employment of counsel.

(4) The court may have regard to such other matters as it considers appropriate.

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ASPIC Cases

Cumming v SSE [2017] SAC (Civ) 17

Pleural plaques.

Appeal against the grant of sanction. Appeal refused

Counsel had been instructed after defences had been lodged at the stage of adjustment of the pleadings. Counsel had consulted with the pursuer, drafted adjustments and a specification of documents. Subsequently, counsel advised the pursuer on the tender.

"*Section 108(3)(a)(ii) refers to the importance of any claim in the proceedings. This is a wider concept than importance of the proceedings to the pursuer or indeed for any other party to the proceedings. Nevertheless, the importance of the claim to the pursuer is a relevant matter for the sheriff to take account of. We do not consider that the criticism of the sheriff is well founded. The sheriff was entitled to have regard to this factor as meriting the involvement of counsel*"

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ASPIC Cases

Cumming (continued)

The Court confirmed that the test was one of objective reasonableness considered at the time of the motion, in all the circumstances of the case, having regard in particular to the matters specified in section 108(3) (see paragraphs 12 and 13 of the Court's opinion). If the court considers that the reasonableness test is met, then it has a positive duty to grant sanction.

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ASPIC Cases

David Brown v Aviva [2017] SAC (Civ) 34 LIV-SF34 -15

Appeal against refusal of sanction for counsel

"They chose to instruct Counsel because the defenders had advised them shortly before the proof that they had instructed counsel to conduct the proof on their behalf. Until that point as I understand it, the pursuer was content to be represented by a solicitor. I therefore do not find that the importance of the proceedings to the pursuer is sufficient to justify certifying the case as suitable for counsel."

"The trouble for the pursuer is however that the importance of the claim was not the reason why the pursuer or his agents chose to instruct counsel...I therefore do not find that the importance of the proceedings to the pursuer is sufficient to justify the case as suitable for counsel"

The sheriff was in error in determining that he was precluded from taking into account "importance" as a relevant factor, a matter I infer by the sheriff's use of the word "therefore," (meaning "as a result of").

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ASPIC Cases

Burns v Hamilton and Forbes and others [2017] SC EDIN 72

Pleural plaque case. Junior instructed . Unsuccessful pre-trial meeting then Senior instructed Objection to sanction for Senior

I bear in mind that the test is one of objective reasonableness viewed at the time of the motion, rather than whether it was subjectively reasonable for the pursuer to instruct senior counsel following the pre-trial meeting. It is also important to bear in mind that the test is reasonableness, not necessity. Accordingly, while it may well be true that many competent junior counsel could have conducted the proof, it does not follow that it is not reasonable to sanction the employment of senior counsel, any more than that it would not be reasonable to sanction junior counsel in a case which might be capable of being conducted by some solicitors.

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Court of Session Cases

Eileen Collie v Tesco Stores Ltd [2016] CSOH 149

Lord Kinclaven **Objections to Auditors Report sustained**

Pursuer omitted to include certain outlays (Counsels fees) in her final account

Argument whether *"it forms part of the Auditor's duty, under the remit to him, not only to tax off and reduce articles which appeared to be improperly charged, but also to increase and insert charges for articles which he considered as under stated, not filled up, or altogether omitted" (Reeve v Dykes (1829) 7 S 632)"*

Rule of Court (1994) 42.1(2)(a) provides that any party found entitled to expenses 'shall…lodge an account of expenses in process not later than four months after the final interlocutor in which a finding respect of expenses is made'.

The defenders argued and the auditor agreed that it would be incompetent for the auditor to allow any omitted item to be added after the expiry of the four month period.

Held: The auditor had the power but he was not "bound" to exercise the power.

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Court of Session cases

Glasgow Caledoninan University v Lihe Liu **[2016] CSIH 91**

Note of Objections by Defender Refused

"The nature of the jurisdiction of the court in respect of objections to a report flows from the nature of the function of the Auditor. In terms of RCS 42.4 (4) the court has the power to sustain or repel any objection in the note or remit to the Auditor for further consideration. However, the circumstances in which that power may be exercised are limited ……. It is not open to the court to substitute its views for those of the Auditor in respect of a particular item in the account simply because it disagrees with the conclusion that the Auditor has reached……. the grounds on which a decision of the Auditor can be challenged by way of note of objections are akin to those that apply in judicial review proceedings. It follows that the court can interfere if, but only if, for example, he has misdirected himself in law or has taken irrelevant circumstances into account or has failed to take into account relevant considerations or has misunderstood the factual material put before him. Where, as will very often be the case, his decision depends on the exercise of discretion, it will only be susceptible to being overturned where it is such that no reasonable decision-maker could come to that conclusion."

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Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018

Act was passed by Scottish Parliament on 1st May 2018

It has been reported that there will be a phased implementation beginning this summer

Part 1 introduces "Damages Based Agreements" (DBA's)

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Damages Based Agreements

- Definition
- Historical position
- Increased use of speculative funding arrangements

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Definition of DBA

- An agreement under which a lawyer's fee is calculated as percentage of their client's damages if the case is won, but no fee is payable if it is lost (though a lower fee may be payable in commercial cases) – see Policy Memorandum
- A form of "No win, no fee" arrangment
- Longstanding feature of US litigation and introduced in England and Wales in 2013

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Historical position

- DBAs are not currently enforceable by solicitors or advocates (*pactum de quota litis*)
- Claims management companies can fund an action in return to a percentage of the damages
- Solicitors can be members of a claims management company
- In US, DBAs are standard but (1) damages are much higher and (2) there are no recoverable expenses

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Recent trends in funding personal injury litigation

- Decline in legal aid and trade union backing
- Increase in speculative funding arrangements
- Who pays other side's costs?
- After the event insurance (ATE)
- Before the event insurance (BTE) – usually with a financial limit

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Speculative/Conditional fee arrangements for legal expenses

- Party/party expenses with uplift of at most 100% (the maximum allowed by Act of Sederunt (Fees of Solicitors in Speculative Actions) 1992)
- Agent/client expenses with no uplift. Judicially recoverable expenses only
- Agent/client expenses on hourly rate with uplift

- Still question of who pays in event of losing the claim

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Part 1 of the Expenses Act

- 1(1) In this part, a "success fee agreement" is an agreement between a person providing relevant legal services (the provider) and the recipient of those (the recipient) under which the recipient-
- (a)is to make a payment (the success fee) to the provider in respect of the services if the recipient obtains a financial benefit in connection with a matter in relation to which the services are provided but
- (b) is not to make any payment, or is to make a payment of a lower amount than the success fee, in respect of the services if no such benefit is obtained.

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Translation

You can now agree a no win no fee agreement with your client in return for a cut of his or her damages and the courts will enforce that agreement

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Restrictions

- Regulations may be made to limit the amounts recoverable (section 4)
- Family actions are excluded (section 5)
- Extra judicial expenses must be met from the success fee in PI claims (section 6(2)&(3))
- PPOs are excluded (section 6(6))
- Complicated provisions in relation to future losses

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Regulations

- Likely that they will cap the amount recoverable
- Existing limit is uplift of 100% of fees
- In addition, will probably be a cap on total by reference to the damages. Sheriff Principal Taylor recommended maximum of 2.5% over £500,000
- Compare the position in England and Wales, where future losses are excluded altogether

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Deductions from future losses

- Future losses over £1m cannot be included, unless

(1) the payment is made as a lump sum

and

(2) the court is satisfied that it is in the pursuer's best interests to make a lump sum award

- Or

  Where the award is agreed, an independent actuary has confirmed that it is in the pursuer's best interests to make a lump sum award

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How will this work in practice?

- Will parties have to lead evidence as to the form of the award?
- Who will bear the cost of that evidence?
- What interest do the defenders have in this question?
- How well placed is the court to regulate this type of issue?

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Part 2

- Qualified One Way Cost Shifting (QOCS)
- In personal injury claims, expenses no longer follow success for defenders
- Subject to the important qualification that the pursuer "conducts the proceedings in an appropriate manner"
- What does this mean?

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Conducting proceedings in appropriate manner

Section 8(4) provides 3 grounds for holding the pursuer loses his protection:

(1)He acts fraudulently or makes a “fraudulent representation in connection with the proceedings”

(2)He behaves in a manner which is “manifestly unreasonable in connection with the proceedings”

(3)He conducts the proceedings in a manner that amounts to an abuse of process

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Position in England: Civil Procedure Rules

- Part 44 deals with QOCS
- CPR 44.16 provides that
- "Orders for costs made against the claimant may be be enforced to the full extent of such orders with the permission of the court where the claimant is found on the balance of probabilities to be fundamentally dishonest"

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English cases

- Large body of case law in the County Courts
- E.g. *Rayner v Raymond Brown Group* (3/8/16) Oxford County Court
- Fundamental dishonesty in this context meant a substantial and material dishonesty going to the heart of the claim, either in liability or quantum or both, rather than peripheral exaggerations or embroidery
- See "Blind men and elephants?" PILJ 2017 154, 22-24

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False travel insurance claims

- E.g. *Lavelle & McIntyre v Thomas Cook Tour Operators* 2017 WL 04317292
- Finding that the claimants did not suffer from food poisoning on holiday
- No room for doubt, unlike in a low impact RTA
- Claimants ordered to pay £3,744 to the defenders' solicitors and £2,000 to counsel

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Position in England and Wales

- Section 57 of the Criminal Justice and Courts Act 2015 goes further and allows the court to dismiss an otherwise valid action on the ground that it is "satisfied on the balance of probabilities that the claimant was fundamentally dishonest" in relation to his claim unless that would give rise to "substantial injustice " to the claimant

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London Organising Committee of the Olympic Games v Sinfield [2018] EWHC 51 (QB)

- The claimant suffered a broken arm and wrist
- Liability was admitted
- The claimant sought £14,000 for gardening expenses incurred as a result of the injuries
- This was about 28% of the total value of the claim
- That part of the claim turned out to be fraudulent
- The whole claim was dismissed under s57, applying test for dishonesty in *Ivey v Genting Casinos*

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Ivey v Genting Casinos (UK) Ltd [2017] 3 WLR 1212

- First step is to ascertain, subjectively, the actual state of the individual's knowledge or belief as to the facts.
- The reasonableness of that belief was a matter of evidence going to whether they had held the belief, but it was not an additional requirement that the belief had to be reasonable; the question was whether it was genuinely held.
- When the state of mind was established, the question whether the conduct was honest or dishonest was to be determined by applying the objective standards of ordinary decent people.
- There was no requirement that the defendant must appreciate that the conduct was dishonest by those standards

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Grubb v Finlay (No. 2)

- 15/9/17 (not reported but available on Compass Chambers website)
- Pursuer's motion for expenses refused
- Expenses awarded to DEFENDER subject to reduction of one third
- Pursuer succeeded in claim; was awarded damages; no tender; proof would have been much shorter if P had been candid
- Case was reclaimed by both sides!

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[2018] CSIH 29

- Both reclaiming motions were refused
- “The pursuer did not make a fundamentally dishonest claim. He made a good, if exaggerated, claim.” See paras 34-36.
- “The Lord Ordinary's view was that, if the pursuer had been candid and forthright throughout, the proof (were there to have been one at all) would have been a short one. In all these circumstances, the court is unable to hold that there are any grounds upon which the Lord Ordinary's discretionary decision on expenses could be successfully impugned.” See paras 37-40.

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Other limits on QOCS

- Section 10
- Pursuer must disclose indentity of funder; details of assistance provided and funder's financial interest
- Section 10(3) allows for award against third party funder and any intermediary
- Does this include the solicitor acting for the pursuer?! No – see Justice Committee stage 1 debate
- Does not include crowd funders

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Awards against legal representatives

- Section 11
- Court may make award against a legal representative where "the court considers that there has been "a serious breach of that representative's duties to the court"

See Paterson *Duties to the court* in *Law, Practice and Conduct for Solicitors* (2007)

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Conflicts of interest

Unavoidable but need to be treated with extreme caution. Some common examples:

- Weak claim with high value; low offer with full expenses
- Global offers
- Good offers but with limited expenses
- Debatable whether pursuer should take a large award as a lump sum or as a PPO

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