OUTER HOUSE, COURT OF SESSION

[2019] CSOH

PD217/19

NOTE BY LADY CARMICHAEL

In the cause

VIKKI DAVIDSON

Pursuer

against

GRAMPIAN HEALTH BOARD

Defender

Pursuer: Cleland; Drummond Miller

24 May 2019

[1] This action for damages for clinical negligence came before me on a motion before calling seeking authority in terms of rule 43.1A to raise the action as an ordinary action; in terms of rules 4.5 and 5.1(b) of the Act of Sederunt (Taxation of Judicial Expenses) Rules 2019 to certify certain specified individuals as skilled persons for the future conduct of the action; and also, in respect that they had already undertaken work necessary to allow the proceedings to be raised, retrospectively to certify those persons as skilled persons in respect of the work already done. The reference to rule 5.1(b) is more properly a reference to rule 5.1(1)(b). Although it was a motion before calling, it had been intimated to the National Health Service Central Legal Office. I was shown an email from a solicitor in that office

indicating that neither part of the motion was contentious. I was satisfied that the individuals were skilled and that it was reasonable and proportionate to have instructed them in the matter, and also that the action should proceed under Chapter 42A.

[2] Counsel indicated that the motion raised novel issues, as the rules in question had only recently come into force. He submitted that particular aspects of their drafting, to which I turn in more detail below, had excited some discussion amongst practitioners. He invited me to write a note regarding the matter, as he understood that there had not been judicial consideration of these rules before. The Act of Sederunt (Taxation of Judicial Expenses) Rules 2019 (SSI 2019/75) came into force on 29 April 2019. They apply to proceedings commenced on or after that date.

[3] Rules 4.5, 5.1 and 5.3 provide, so far as material:

> **Skilled persons**
>
> **4.5.**—(1) No charge incurred to a person who has been engaged for the purposes of the application of that person's skill is to be allowed as an outlay unless—
>
> (a) the person has been certified as a skilled person in accordance with rule 5.3 (certification of skilled persons); and
>
> (b) except where paragraph (4) applies, the charge relates to work done, or expenses incurred, after the date of certification.
>
> (2) Where a person has been so certified, the Auditor is to allow charges for work done or expenses reasonably incurred by that person which were reasonably required for a purpose in connection with the proceedings, or in contemplation of the proceedings.

(3) The charges to be allowed under paragraph (2) are such charges as the Auditor determines to be fair and reasonable.

(4) This paragraph applies where—

(a) the account relates to—

(i) proceedings subject to Chapter 43 of the Rules of the Court of Session 1994;

(ii) proceedings subject to Chapter 36 of the Ordinary Cause Rules 1993; or

(iii) a simple procedure case; or

(b) the sheriff has determined in accordance with rule 5.3(5) that the certification has effect for the purposes of work done, or expenses incurred, before the date of certification.

5.1.—(1) This Chapter applies for the purpose of applications to the court for—

…

(b) the certification of skilled witnesses;

…

(2) Applications to which this Chapter applies are to be made—

(a) in a simple procedure case by incidental orders application;

(b) otherwise by motion.

Certification of skilled persons

5.3.—(1) On the application of a party the court may certify a person as a skilled person for the purpose of rule 4.5 (skilled persons).

(2) The court may only grant such an application if satisfied that—

(a) the person is a skilled person; and

(b) it is, or was, reasonable and proportionate that the person should be employed.

(3) The refusal of an application under this rule does not preclude the making of a further application on a change of circumstances.

(4) Where the application is made in proceedings other than—

(a) proceedings subject to Chapter 43 of the Rules of the Court of Session 1994;

(b) proceedings subject to Chapter 36 of the Ordinary Cause Rules 1993; or

(c) a simple procedure case,

paragraph (5) applies.

(5) Where this paragraph applies, the court may only determine that the certification has effect for the purposes of work already done by the person where the court is satisfied that the party applying has shown cause for not having applied for certification before the work was done.

[4] Rule 5.3 empowers the court to grant applications to certify a person as a skilled person for the purpose of rule 4.5. In proceedings of the type specified in 4.5(4)(a), certification has retrospective effect. In other types of proceedings there must be a determination by the court that the certification is to have that effect. The court is empowered to make a determination of that sort by rule 5.3(5).

[5] Counsel raised a concern as to whether there was any effective provision for certification with retrospective effect in cases proceeding under Chapter 42A. Proceedings subject to Chapter 42A (and its sheriff court equivalent, Chapter 36A) are not mentioned in

the rules as proceedings in which certification has retrospective effect. The way in which the rules were drafted left it unclear as to whether the provision for determination by the court that certification should have retrospective effect was effective in relation to Chapter 42A proceedings.

[6] I raised with counsel whether it might be that, in this case, I was dealing with the application for certification at a point when the action was still subject to Chapter 43 procedure, if I had not yet determined the application to remove it from that procedure. The account, in relation to pre-certification work, would therefore be an account in proceedings which were subject to Chapter 43 at the time of certification. That is, however, perhaps not completely satisfactory where the certification is to have effect also prospectively, and I am determining that the action should be subject to Chapter 42A.

[7] I turn to the power of the court to determine that certification should have effect for the purposes of work done before certification. The route in the rules to certification with retrospective effect in cases which are not subject to Chapter 43 of the Rules of the Court of Session, Chapter 36 of the Ordinary Cause Rules 1993 or the simple procedure, lies in rule 5.3(5). That makes provision for the court to determine that certification is to have effect for the purposes of work already done where the court is satisfied that the party applying has shown cause for not having applied for certification before the work was done. Rule 1.3 provides:

> "the court" in relation to proceedings in the sheriff court means the sheriff.

Rule 1.2 provides that the rules, subject to some exceptions which are not material for these purposes, apply to taxation of accounts of expenses, and for related purposes, where:

> (a) the expenses were incurred in—
>
> > (i) proceedings in the Court of Session;

(ii) proceedings in the Sheriff Appeal Court; or

(iii) proceedings, other than a summary cause, in the sheriff court;

The expression "court" must therefore include the Court of Session. Further definition of "court" has been deemed necessary only in relation to proceedings in the sheriff court. Rule 5.3(5) empowers the court to grant certification with retrospective effect in proceedings other than those specified in Rule 5.3(4). Those provisions appear to be related, logically and structurally, to Rule 4.5(4)(a) and (b). Rule 4.5 empowers the auditor to allow charges for work predating certification in cases under the specified procedure, and in other cases where there has been a determination that certification is to have effect in relation to work already done. Rule 4.5(4)(b), however, unlike rule 5.3(5), refers to the sheriff, rather than the court. There is no obvious reason why that should be the case. One would expect the terms of these two rules to be consistent, and for the auditor to be empowered to give effect to a determination by the Court of Session, and not just the sheriff. The 2019 rules apply to proceedings in the Court of Session. Rules 4.5 and 5.3 refer specifically to Chapter 43 procedure, which is a Court of Session procedure.

[8] Counsel drew two matters to my attention. The first is the inconsistency I have already referred to. Rule 5.3(5) apparently empowers me to determine that certification should have effect retrospectively, but rule 4.5(4)(b) only empowers the auditor to allow an outlay in respect of pre-certification work where the determination under rule 5.3(5) has been made by a sheriff. That produces, on the face of matters, the absurd result that a determination by the Court of Session will have no practical effect when it comes to the Auditor's decision to allow an outlay. I would find it difficult to conclude that that had been the intended consequence. All I have to determine today, however, is whether I have power

to make the order sought, and I am satisfied that, if this action is not to be regarded as one under Chapter 43 procedure, rule 5.3(5) confers that power upon me.

[9] The other matter counsel brought to my attention was the absence in the rules of any reference (in rule 4.5(4)(a) or rule 5.3(4)(a)) to proceedings subject to Rule 42A. That raised particularly acute concern, given the use of the word "sheriff" in rule 4.5(4)(b). Chapter 42A proceedings are by definition actions which are of such complexity as to be unsuitable to proceed under Chapter 43. Most are clinical negligence actions transferred on an application under rule 43.1A. Pre-action investigation of whether there are grounds for bringing such an action inevitably involves the instruction of skilled persons. That it should be more straightforward to secure certification with retrospective effect in a Chapter 43 case than in a Chapter 42A case seems counterintuitive. A party will have to show cause for not having applied for certification before the work was done. That will not be hard to demonstrate, where, as here, certification is sought at the point the action is raised, but might be more difficult at a later stage. It seems to me undesirable, however, that a motion should require to be made a very early stage where, as here, no defender (who might wish to oppose the motion) has entered the process. Even where intimation has been made on a defender, the defender may not be in a position to take a particularly informed view as to whether certification ought to granted. The same issue arises in relation to Chapter 36A of the Ordinary Cause Rules.

[10] Requiring parties to enrol motions to be dealt with before applications under R43.1A have been dealt with, so as to fall within the scope of Chapter 43 procedure, is undesirable for similar reasons.

[11] For the avoidance of doubt I have certified the individuals specified in the motion as skilled persons in respect of work already done. That may be unnecessary if the correct

analysis is that I was granting certification in relation to proceedings subject to Chapter 43. If that analysis is wrong, I am satisfied that I have power to grant the application by making a determination under rule 5.3(5), and should exercise that power. The terms of rule 4.5(4)(b), however, may raise an issue as to the effect that the auditor can give to such a determination by the Court of Session.