EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 8
XA38/17

Lord Brodie
Lord Drummond Young
Lady Clark of Calton

OPINION OF THE COURT

delivered by LORD BRODIE

in the cause

by

MESSRS J & E SHEPHERD

Pursuers and Respondents

against

PAUL DAVID LETLEY

Defender and Appellant

Pursuers and Respondents: Upton; Thorntons Law LLP
Defender and Appellant: Logan; Campbell Smith LLP

2 February 2018

Introduction

[1] On 12 December 2017 the Court allowed an appeal against an interlocutor of Sheriff Principal Lewis pronounced on 18 July 2016 in proceedings commenced by way of summary application at the instance of Messrs J & E Shepherd, a firm of chartered surveyors, (the pursuers) against Paul David Letley (the defender). In their application the pursuers had

complained of breach by the defender of an interim interdict granted by the sheriff at Dundee on 10 June 2011.

[2] As appears from the Court's Opinion of 12 December 2017, the background history to this matter is that the defender had been a fixed-profit-sharing partner in the pursuers from 1988 until 1 June 2011. As part of their business the pursuers operated a residential property letting department which provided management services to a number of clients who were property owners. For many years the defender headed this department. However, he was also a major client of the pursuers in that he utilised their management services in respect of a substantial number of properties in which he had an interest, whether as a partner in limited liability partnerships or otherwise. In April and May 2011 the equity partners of the pursuers transferred the operation of their residential property letting department to a third party. They had not previously consulted the defender, who in consequence felt aggrieved. The defender took steps to transfer the management of properties in which he had an interest away from the third party. The pursuers reacted by expelling the defender from the partnership and on 10 June 2011, founding on a restrictive covenant, sought and obtained interim interdict against the defender in the following terms:

> "ad interim interdicts the defender during the period of one year from 1 June 2011 from canvassing or soliciting the custom of any person, firm or company with which he had dealings during the period of partnership of the firm [or who was in the period of twelve months prior to termination of the Subsidiary Agreement]."

The relevant court order was served on the defender on 13 June 2011. After a debate in the present proceedings, Sheriff Mundy, on 28 March 2012, held the words in square brackets, "or who was in the period of twelve months prior to termination of the Subsidiary Agreement", to be meaningless but capable of being severed from what preceded them without adversely affecting the validity of the court order of 10 June 2011. That decision was not challenged.

[3] In their application the pursuers averred a number of alleged instances of breach of interdict by the defender subsequent to 13 June 2011 but after proof they relied on just four. Of these the sheriff found only one to have been established and that by the sending of an email dated 26 June 2011 to one Dr Sally Keenan. The defender appealed the sheriff's finding to the sheriff principal. That appeal was initially refused as incompetent but after a further appeal to the Court of Session on the competency point, the substantive issue came before Sheriff Principal Lewis who upheld the sheriff's finding of breach. In terms of our interlocutor of 12 December 2017 we reversed the sheriff principal on the short point that the sheriff had not found it established that Dr Keenan was a person with whom the defender had "had dealings".

[4] Consequential upon our interlocutor of 12 December 2017 the defender has enrolled the following motions:

> "On behalf of the appellant [1] to find the appellant entitled to the expenses of the whole cause as taxed except as otherwise provided for; [2] to certify the Sheriff Court procedure as suitable for the employment of junior counsel; [3] in respect of the complexity and difficulty and importance for the client to find the solicitors entitled to and uplift of fees of 20%; and to decern."

These motions were marked as opposed. The reason for opposition was stated thus:

> "The defender seeks to recall all of the interlocutors with findings of expenses against him. This is not in the interests of justice. The defender has enjoyed mixed success throughout the case including a completely unnecessary appeal to an incompetent forum. The pursuers are entitled to expenses for much of the procedure and these interlocutors ought not to be recalled. The appeal advanced a position not put before the lower courts."

The motions came before the Court on the Single Bills on 12 January 2018. Mr Logan, advocate, appeared for the defender and Mr Upton, advocate, appeared for the pursuers. Both counsel had appeared for their respective clients from an early stage in the proceedings. Unsurprisingly, Mr Upton intimated that there was no opposition to motion [2]. Opposition was however maintained to motions [1] and [3].

The Procedural History

The Debate before Sheriff Mundy

[5] The initial procedure in this summary application is not documented in the Appeal Print. The first interlocutor which appears there is dated 16 January 2013. It assigned a procedural hearing for 22 January 2013. At that procedural hearing the sheriff allowed parties proof of their respective averments. These were not the first procedural steps in the application. Among the procedural steps not mentioned in the Appeal Print is a debate before Sheriff Mundy after which he allowed parties proof of their respective averments in terms of interlocutor dated 28 March 2012. As appears from Sheriff Mundy's accompanying judgment, which was made available to us, albeit absent from the Appeal Print, the defender had argued that much of what was averred by the pursuers should not be admitted to probation. In addition to responding to the defender's submissions the pursuer had argued for decree *de plano* in so far as their case was founded on the alleged solicitation of Dr Sally Keenan by the sending of an email dated 26 June 2011 (the sole allegation on which the pursuers were later to succeed at proof). Thus, in so far as Sheriff Mundy allowed parties proof on all their averments, neither party enjoyed unqualified success.

The First Appeal to the Sheriff Principal

[6] We understand the defender to have appealed Sheriff Mundy's interlocutor to the sheriff principal (Sheriff Principal Dunlop), although again that is not documented in the material with which we have been provided and little was said about it in submissions. In what was an *ex tempore* judgment, Sheriff Principal Dunlop refused that appeal.

The Proof before Sheriff Way

[7] A diet of proof was assigned for 23 and 24 April 2013. On 18 April 2013 the record was amended in terms of the defender's minute of amendment, number 25 of process, and the pursuers' answers, number 26. The defender was found liable to the pursuers in the expenses of the amendment procedure.

[8] Sheriff Way heard proof on 23 and 24 April 2013. A diet of continued proof was fixed for 13 and 14 August 2013. The case called on 13 August and evidence is recorded as having been led. The diet on 14 August was discharged. A further diet of continued proof was fixed for 13 and 26 November 2013 but discharged on 5 September. By interlocutor of 13 November 2013 the sheriff found no expenses due to or by either party "in respect of the discharge of diets of proof fixed for today and 26 November 2013".

[9] Further proof was led and concluded on 13 and 14 January 2014. On 14 January 2014 Sheriff Way made avizandum. As we have already noted, when it came to submissions, the pursuers had relied on four instances of what they alleged to be solicitation. The sheriff was not satisfied that three of these instances amounted to breach of interdict. That left one in respect of which he did find there to have been a breach of interdict, that being the sending of an email to Dr Sally Keenan on 26 June 2011. Having regard to that finding, in terms of interlocutor dated 16 June 2014, the sheriff fined the defender the sum of £500. He went on to deal with expenses in the same interlocutor as follows:

> "Finds the defender liable to the pursuers in the expenses as taxed of minute of amendment number 13 of process, restricted to the preparation and lodging of the minute; finds the defender liable by concession to the pursuers in respect of the expenses as taxed of minute of amendment number 25 of process; finds the defender liable to the pursuers in the expenses, as taxed, of the debate before Sheriff Mundy; finds the defender liable to the pursuers in the expenses of the action, as taxed, in so far as they have not already been dealt with, said expenses

> to be modified by 50% …certifies the cause as suitable for the employment of Junior Counsel."

The Second Appeal to the Sheriff Principal

[10] The defender appealed the sheriff's finding of breach of interdict to the sheriff principal. On the binding authority of *Forbes* v *Forbes* 1993 SC 271 Sheriff Principal Dunlop had previously held such an appeal to be incompetent in *Dundee Car Service Centre Ltd* v *Scanlan*, an unreported decision of 27 October 2006. He accordingly asked to be addressed on competency. Having been so addressed the sheriff principal dismissed the defender's appeal as incompetent in terms of interlocutor dated 27 November 2014. He found the defender liable in the expenses of the appeal. He certified the cause as suitable for the employment of junior counsel.

The First Appeal to the Court of Session

[11] The defender appealed Sheriff Principal Dunlop's decision on competency to the Court of Session. Given the apparent conflict between *Forbes* v *Forbes* and *Maciver* v *Maciver* 1996 SLT 733, a full bench was convened to hear the appeal. On 22 October 2015 the pursuers were allowed to withdraw their answers and the appeal proceeded unopposed. An amicus curiae was appointed on 30 October 2015 in order to provide a contradictor. Following argument the full bench held that *Forbes* had been wrongly decided and overruled it. The defender's appeal to the Court of Session was allowed and his appeal against the decision of Sheriff Way remitted to the sheriff principal to proceed as accords. Expenses were dealt with by an interlocutor of 3 December 2015. Mr Upton advised that, although the pursuers had withdrawn their opposition to the appeal, *per incuriam* an award of the expenses of the appeal had originally been made in favour of

the defender. As a result the pursuers had had to apply to the Court in order that it might correct the original award. The interlocutor of 3 December 2015 was in the following terms:

> "The Lords, having heard counsel on the unopposed motion of the pursuers and respondents, allow the opposition to be received late; on the opposed motion of the defender and appellant, find the expenses of the appeal process, including those of today's hearing, and those of the process before the Sheriff Principal to date to be expenses in the cause."

The Third Appeal to the Sheriff Principal

[12] The remitted appeal by the defender against Sheriff Way's interlocutor of 18 July 2016 came before Sheriff Principal Lewis on 9 June 2016. As before us, Mr Logan appeared for the defender and Mr Upton appeared for the pursuers. The defender's note of appeal consisted of six paragraphs running over four pages but, in its essence, it presented two grounds of appeal: first, that there was "no finding that Dr Keenan was a client of the pursuers and thus fell within the terms of the interdict"; and second, that "In determining whether or not there was a breach of the interdict the Learned Sheriff ought to have considered the question of whether or not these parties were a client whose business could be solicited after the interdict came into effect …The Learned Sheriff has failed to make any of the relevant findings of fact to determine that there had been a breach of interdict".

[13] In her judgment on the merits of the appeal Sheriff Principal Lewis summarises the submissions of parties. The submission for the defender appears to have followed the terms of the note of appeal. In particular it was argued that there was no finding in fact that Dr Keenan was a "client" of the pursuers. However, there is nothing in the note of appeal or the sheriff principal's summary to suggest that the defender made a submission which depended on the absence of any finding that the defender had "had dealings" with

Dr Keenan. On the other hand the importance of that latter expression does not appear to have escaped Mr Upton. His argument, which he was later to repeat before us, was that, notwithstanding the absence of explicit findings by the sheriff, the admissions and positive averments by the defender on record demonstrated that: "Dr Keenan had always allowed and authorised the defender to make all decisions in relation to the management of the two properties. Thus the [defender] had had dealings with Dr Keenan while he was a partner of the [pursuers]". Accordingly, Dr Keenan was, in terms of the interdict, "a person …with which [the defender] had dealings during the period of partnership of the firm". The sheriff principal was also alive to the importance of "had dealings" but, as can be seen from paragraph 17 of her judgment, she accepted Mr Upton's analysis of the position. As she put it, "The combined effect of the admissions on record, the positive averments of the [defender] and the findings in fact all lead to an inevitable conclusion that the [defender] had had dealings with Dr Keenan prior to June 2011 and whilst a partner of the [pursuers]." She therefore rejected the first ground of appeal. She also rejected the second ground.

[14] By interlocutor dated 18 July 2016 Sheriff Principal Lewis refused the appeal and adhered to the sheriff's interlocutor of 16 June 2014. Having been requested to do so, she reserved the question of expenses for consideration at a further hearing. On 27 October 2016, having resumed consideration of the cause she found the defender liable to the pursuers in the expenses of the cause, being the expenses of (a) the appeal before Sheriff Principal Dunlop, (b) the appeal to the Inner House and (c) the appeal before her. She certified the cause as suitable for the employment of junior counsel. In so doing she rejected an argument by the defender that he should be awarded the expenses of his successful appeal to the Court of Session. She gave two reasons for that. First, it seemed to her that the defender had introduced an unnecessary step in process by appealing to the

sheriff principal rather than electing to go directly to the Court of Session as it would have been competent to do: *Macleay* v *Macdonald* 1928 SC 776. Second, although the defender had been successful before the Inner House, he had not been put to unnecessary expense by the pursuers who had withdrawn opposition to the appeal, leaving the path clear for the defender to argue the matter of competency.

The Second Appeal to the Court of Session

[15] The defender appealed Sheriff Principal Lewis's interlocutors to the Court of Session. It is with the merits of this appeal that our Opinion of 12 December 2017 is concerned. Initially the defender presented five grounds of appeal. However, on 16 August 2017 he was allowed to amend by deleting his original third, fourth and fifth grounds, introducing a new ground to be numbered "2" and renumbering the original second ground "3". As amended, the defender's grounds of appeal were as follows.

> "1. The Learned Sheriff is obliged to make findings in fact of the relevant facts in terms of s50 of the Sheriff Court (S) Act 1907. His findings in fact did not entitle him to conclude that the defender was in breach of the Court Order.
> 2. In making his findings in fact, the Learned Sheriff failed to have regard to the precise terms of the interdict, which operated by reference to persons with whom the appellant had had 'dealings' in the relevant period and not by reference to 'clients'.
> 3. The Learned Sheriff failed to give consideration to whether or not Sally Keenan was a person whose business could be solicited at the time that the interdict was obtained. The evidence clearly showed that with or without her consent the joint venture that she was a party to had already been transferred away from the pursuers/respondents prior to the relevant date."

As far as can be seen from the material before us, it was only with the amendment allowed on 16 August 2017 and the introduction of what was numbered ground of appeal 2 that the defender explicitly took the point that in order for there to be a finding of breach of interdict

based on the solicitation of Dr Keenan the sheriff had to find that she was a person with whom the defender had "had dealings".

[16] As appears from our Opinion of 12 December 2017, we considered that, in so far as relevant, ground 1 had to be taken as covering the same point made in ground 2. We upheld the appeal on that point: there was no finding that Dr Keenan had been a person with whom the defender had "had dealings" and the pleadings could not properly be read as an admission by the defender to that effect. We rejected ground 3.

Submissions

Defender

[17] In support of motion [1] Mr Logan argued that the defender had enjoyed very substantial success and that the rule was that expenses generally followed success. The defender had faced allegations of having breached the interim interdict on a number of occasions. By the end of the proof before Sheriff Way these had been narrowed to four. Only one instance was held by the sheriff to have been established. The defender had been vindicated as to the competency of his decision to appeal to the Sheriff Principal and, although unsuccessful before Sheriff Principal Lewis, an argument which she had rejected had been accepted by this court. Motion [2] was not opposed. As far as motion [3] was concerned, an uplift in fees was justified (notwithstanding certification of the proceedings in the sheriff court for the employment of counsel) given the number of novel propositions advanced by the pursuer in support of their averments of solicitation by the defender. The action was of particular importance to the defender; it was an anxious matter which had extended over six years. The action had been raised as part of a concerted effort to blacken his name. There had been something of a "public relations war". Initially the agents had

conducted the litigation without the benefit of counsel. There had been difficulties over documentation. Mr Logan conceded, however, that he had not taken the only point which succeeded before this court when he had been before the sheriff.

[18] In a very brief additional submission by way of response to what Mr Upton argued Mr Logan reminded the court that, on 28 March 2011 Sheriff Mundy, had found part of the interim interdict granted on 10 June 2011 to have been meaningless, albeit that the meaningless part could be excised without adversely affecting the validity of the court order.

Pursuers

[19] It was Mr Upton's submission in response to motion [1] that the defender had achieved, at very best, divided success and that that should be reflected in the award of expenses. Counsel began by reminding the Court of the principal steps in the litigation. These were the seven hearings with their associated preparation work: the debate before Sheriff Mundy; the first appeal to the sheriff principal (Dunlop); the proof before Sheriff Way; the second appeal to the sheriff principal (Dunlop); the first appeal to the Court of Session which was heard by a full bench; the third appeal to the sheriff principal (Lewis); and the second appeal to the Court of Session. Mr Upton then considered these steps in reverse order, beginning with the second appeal to the Court of Session. The defender had originally presented five grounds of appeal. None of 3, 4 or 5 was argued. They were deleted by amendment on 16 August 2017, with one additional ground being introduced. Of the three grounds which were argued, one was rejected and two were seen as raising the same point. As for the third appeal to the sheriff principal, two points had been argued of which only one had found favour with this court, the other being rejected. The second

appeal to the sheriff principal and the consequent first appeal to the Court of Session could be considered together. They constituted an unnecessary step in procedure for the reasons which had been accepted by Sheriff Principal Lewis at the hearing before her on the question of expenses. Sheriff Principal Dunlop had made known in the case of *Dundee Car Service Centre Ltd* v *Scanlan*, decided on 27 October 2006 and available on the Scottish Courts and Tribunals Service website, his (entirely correct) Opinion that he was bound by the Inner House decision in *Forbes* to hold an appeal such as that of the defender incompetent. The clearly competent alternative would have been to appeal Sheriff Way's decision directly to the Court of Session: *Macleay* v *Macdonald*. So doing would have obviated one appeal to the Court of Session and two appeals to the sheriff principal. The defender should not have his expenses for this entirely unnecessary procedure. The court was in no way constrained in how it should deal with expenses by the terms of its interlocutor of 3 December 2015 finding "the expenses of the appeal process, including those of today's hearing, and those of the process before the Sheriff Principal to date to be expenses in the cause". To find particular expenses to be "expenses in the cause" was merely to indicate that this element was available to be dealt with in such way as might be thought appropriate by the court making a determination at a future date as to which party should bear the expenses of the cause. The court as constituted on 3 December 2015 could not know how the litigation would be conducted in future or with what outcome. At the proof before Sheriff Way the pursuers had focussed on just four instances. The sheriff found that one of these instances did indeed amount to a breach of interdict on the part of the defender. While this court has found that the sheriff failed to make sufficient findings in fact to justify that conclusion, the point that succeeded was not taken by the defender before Sheriff Way. It should have been. In that Sheriff Mundy allowed a proof before answer, the defender had been unsuccessful at the

debate as he had been unsuccessful in reversing Sheriff Mundy at the first appeal to the sheriff principal, but a further point could be made. The debate took place before the instruction of counsel but it would appear from paragraph 28 of Sheriff Mundy's judgment that the agent then acting for the defender conceded the relevancy of the averments relating to the sending of the email of 26 June 2011 notwithstanding that the averments failed to confirm that Dr Keenan was a person with whom the defender had had dealings. The effect of the court's decision of 12 December 2017 was that an averment to the effect that the defender had had dealings with Dr Keenan was crucial to the relevancy of the pursuers' pleadings and yet the defender had made no such submission to Sheriff Mundy. Had he done so matters might have proceeded differently.

[20] Mr Upton had no opposition to motion [2]. He opposed motion [3]. This was not a case for an uplift. This was a case about expenses.

Decision

[21] We deal first with motions [2] and [3]. Motion [2], to certify the sheriff court procedure as suitable for the employment of junior counsel, was unopposed. Both the sheriff and the sheriff principal had so certified the procedure. We accordingly so certify the procedure. Motion [3], in respect of the complexity and difficulty and importance for the client to find the solicitors entitled to an uplift of fees of 20%, was opposed. Mr Upton took little time in doing so, more or less contenting himself with the observation that this was a case about expenses. While he did not specifically say so, the implication was that this was simply a case about expenses. If that is indeed what he meant, we consider that he was both right and wrong. With the passage of time and the accruing of more and more expense, we can see that the importance of what substance there ever was in the pursuers' complaint will

have receded and the issue of who should pay for what we assume will have been costly proceedings will have loomed larger. It is because of the practical importance of who should pay that we have given the issue the consideration that we have. However, that is not to say that the case has been only about expenses. The defender had to face an allegation of having deliberately disobeyed an order of the court. That is a matter that he was entitled to take seriously, and consequently to deploy fully the arguments available to him both at first instance and at appeal. The General Regulations contained in Schedule 1 to the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993, SI 1993/3080, as amended, give power to the court to increase or modify such fees. In terms of Regulation 5(b) the court may, on a motion made on or after the date of any interlocutor disposing of expense, pronounce a further interlocutor regarding these expenses allowing a percentage increase in the fees authorised by the Table of Fees to cover the responsibility undertaken by the solicitor in the conduct of the cause. In fixing the amount of the percentage increase, a number of listed factors shall be taken into account. These include: (i) the complexity of the cause and the number, difficulty or novelty of the questions raised, and (v) the importance of the cause or the subject-matter of it to the client. It is by reference to Regulation 5(b) and factors (i) and (v) that the defender makes motion [3]. We do not consider this to have been a complex cause raising numerous, difficult or novel questions. The issues were essentially factual, at the most involving the question of mixed fact and law as to whether identified communications amounted to the solicitation by the defender of persons with whom he had had dealings during the period of partnership of the firm. It is also to be borne in mind that counsel was instructed from at least the stage of the proof and accordingly from that date it was his responsibility to address any legal difficulties which the cause might present. We accept that the cause can be said to have been of importance to

the defender but, to an extent that is always so and, again, responsibility was shared with counsel. If, as Mr Logan suggested, the defender's solicitors became involved in fighting a "public-relations war" on his behalf, we have not been persuaded that this should be reflected in court fees. We shall refuse motion [3].

[22] We turn to motion [1]. The principles by reference to which the court's discretion in the matter of the award of judicial expenses is exercised are familiar. They find expression in Maclaren *on Expenses*. The cost of litigation (as taxed on a party-party basis) is intended to fall on the party who has caused it. Maclaren explains what is meant by causing litigation at p21:

> "The general rule for applying this principle is that *costs follow the event*, the *ratio* being that the rights of parties are to be taken to have been all along such as the ultimate decree declares them to be, and that whosoever has resisted the vindication of those rights, whether by action or by defence, is *prima facie* to blame."

Thus, as a rule, because "costs follow the event", the successful party in a litigation will generally be found entitled to an award of his taxed judicial expenses against his opponent. Success is defined broadly and measured by outcome rather than a counting of particular arguments won and lost (Maclaren p22) but, as in this case Mr Upton invited the court to accept, there is scope for looking at different procedural steps or stages in the litigation with a view to discriminating among them when it comes to how expenses should be dealt with. Success may be held to have been qualified or divided with consequences for the expenses award (Maclaren pp32-34). Expenses may be modified or disallowed depending upon the court's view of the way in which a party has conducted the litigation (Maclaren pp25-28). There is an expectation that if a party is to recover his expenses from his opponent he must proceed with due economy and avoid incurring unnecessary costs. While, as appears from the General Regulations, and in particular Regulations 6, 8, 9 and 11 to 12B, these are

considerations which the Auditor will apply on taxation of an account where an award has been made, the principle that a party should only be found entitled to his expenses where he has acted reasonably applies equally at the stage of the court making an award.

[23] We intend to follow Mr Upton's suggestion and to give separate consideration to the various procedural steps identified in the course of his submission, but we should first explain our understanding of expenses "as otherwise provided for" where that expression appears in the defender's motion. We take these to be the expenses of incidental matters where awards have been made. We have only identified three instances: the award on 18 April 2013 in favour of the pursuers in respect of the defender's minute of amendment, number 25 of process; the confirmation of that award and the finding the defender liable to the pursuers in the expenses as taxed of minute of amendment number 13 of process in Sheriff Way's interlocutor of 16 May 2014; and the finding on 13 November 2013 of no expenses due to or by either party in respect of the discharge of diets of proof fixed for 13 and 26 November 2013. We assume that we are not invited to interfere with these disposals and we see no need to do so.

[24] As far as the debate before Sheriff Mundy is concerned we see the pursuers as having achieved substantial (albeit not unqualified) success and accordingly we shall find the defender liable to the pursuers in the expenses of the debate and, if necessary, in the expenses of the first appeal to the sheriff principal (we say "if necessary" because a remark by Mr Upton suggested that not only was an award made in favour of the defender but that the taxed account had been paid).

[25] As for the proof before Sheriff Way, on the approach taken by this court the defender should have been entirely successful. It may of course have been the case that he would have been entirely successful had he taken the "had dealings" point, which he did not.

However, it cannot be said that the defender's failure to take this point alters the fact that he was required to incur the expenses of proof in answering allegations which must now be regarded as ill-founded. We shall find the pursuers liable to the defender in the expenses of the proof.

[26] The circumstances of the second appeal to the sheriff principal and the consequential appeal to the Court of Session which was heard by a full bench are singular. From a purely legal perspective the defender can hardly be faulted. He appealed to the sheriff principal, a choice of appellate forum which is usually considered to be cheaper and faster than the alternative of appealing to the Court of Session. Although rebuffed by the sheriff principal, a bench of five judges held that the defender's choice had been a competent one and by so doing resolved a conflict among previous decisions of the Court. The defender had therefore been right about the law. It might be argued that he should not be penalised for that. There is, however, the practical perspective. There was no need for the defender to proceed as he did given the competent option of appealing Sheriff Way's decision directly to the Inner House. Had the defender adopted the option of a direct appeal he would have avoided the expense of not only the second appeal to the sheriff principal and the first appeal to the Court of Session, but also that of the third appeal to the sheriff principal. It may be that the defender was found to have been right about the law, but in choosing the route of an appeal to the sheriff principal, given the decisions in *Forbes*, as already applied by Sheriff Principal Dunlop in *Dundee Car Service Centre Ltd* v *Scanlan*, he must be taken as having been aware that he was involving himself in unnecessary steps in procedure with the consequences for expenses which that involved. A successful party may find that his entitlement to expenses is modified where he has chosen an inappropriate forum even where that forum is a competent one. We have accordingly been persuaded that the pursuers, who withdrew their opposition to the

first appeal to the Court of Session, should not have to meet the defender's expenses in the second appeal to the sheriff principal or the first appeal to the Court of Session. As far as these procedural steps are concerned we shall make an award of no expenses to or by either party. In so doing we have accepted Mr Upton's submissions that we are not constrained by the terms of the court's interlocutor of 3 December 2015, finding the expenses of the appeal process in the Court of Session and the process before the sheriff principal to be "expenses in the cause". We accept, again as Mr Upton argued, that that interlocutor did no more than allocate these particular expenses to the larger category of expenses in the cause which might then be determined upon by future decisions of the court in whatever way was then considered to be proper.

[27] Of the procedural steps that we have been asked to consider, that leaves the third appeal to the sheriff principal and the second appeal to the Court of Session. Subject to one consideration, we see the expenses of these steps to fall within the general rule that the successful party, here the defender, is entitled to his expenses from the unsuccessful party, here the pursuers. The consideration is the failure of the defender to take the "had dealings" point before the sheriff or indeed before Sheriff Principal Lewis. As Maclaren records at p26, under reference to the decision in *Menzies* v *Duff* (1851) 13 D 1044, expenses may be modified where the objection on which the case was won was not stated in the inferior court. The reason for that is that an appeal may not have been necessary if the ultimately winning argument had been deployed at first instance or at a lower appellate level. We do not see that as being the case here. While the defender may not have had the "had dealings" point at the forefront of his submissions to the sheriff principal, the pursuers considered that they had an answer to it which they put forward to the sheriff principal and which was accepted by her. At least by 16 August 2017 with the amendment of the grounds of appeal

the defender had given clear notice that he was focussed on "had dealings" and yet the pursuers, no doubt confident of the argument which had succeeded before Sheriff Principal Lewis, maintained their opposition to the second appeal to the Court of Session. The argument did not succeed before us and the defender's appeal was allowed. We see the consequence of this is that the general rule on expenses applies. We shall therefore find the pursuers liable to the defender in the expenses of the third appeal to the sheriff principal and the second appeal to the Court of Session.