OUTER HOUSE, COURT OF SESSION

[2022] CSOH 53

A20/19

OPINION OF LORD MENZIES

In the cause

DR MARGARET JANIS KIRKWOOD

Pursuer

against

THELEM ASSURANCES

Defenders

Pursuer: Smith QC; Blacklocks Solicitors
Defenders: Middleton QC; Brodies LLP

10 August 2022

Introduction

[1] On 9 December 2015 the pursuer sustained injuries when she was knocked down by a French motorist whilst she was on holiday in France. She raised an action in the Court of Session seeking damages from the motorist's insurers. She instructed English solicitors Irwin Mitchell of Birmingham to conduct the litigation, using Blacklocks in Edinburgh to attend to procedural matters. The action settled on 4 March 2020; the defenders paid damages to the pursuer and in terms of the court's interlocutor dated 27 October 2020 they were found liable to pay the pursuer's expenses of process as taxed, on a party and party basis.

[2] Blacklocks lodged an account with the Auditor in the sum of £260,629.11. This comprised their own fees of £8671.57 plus VAT of £1734.29 and outlays of £250,223.35. Of these outlays, £250,177.35 related to Irwin Mitchell's English account which had been prepared on the English equivalent of the Scottish "agent and client" basis.

[3] The defenders lodged a preliminary point of objection to Blacklocks' account, asking the Auditor to determine that the outlays in respect of Irwin Mitchells' account be disallowed and taxed off, on the basis that it was not reasonable for the proper conduct of the litigation for the pursuer to have instructed Irwin Mitchell. A diet of taxation was heard by the Auditor in relation to the preliminary objection, and on 2 July 2021 the Auditor determined that, in terms of rule of court 42.10, it was not reasonable for conducting the cause in a proper manner to instruct foreign solicitors. Following a further diet of taxation, the Auditor issued his report on 22 March 2022 taxing Blacklocks' account in the total sum of £136,783.20, made up of Blacklocks' abated fees, VAT and a number of outlays from the Irwin Mitchell account such as counsels' fees.

[4] The pursuer lodged a note of objections to the Auditor's report and the Auditor lodged a minute and note dated 20 April 2022 setting out his reasons for his determination. At the hearing before me on that note of objections, both the pursuer and the defenders were represented by senior counsel, each of whom adopted their written notes of argument and supplemented these with oral submissions.

Submissions for the pursuer

[5] Senior counsel for the pursuer submitted that the Auditor erred in law in refusing to allow any charges for the work carried out by Irwin Mitchell in Birmingham, and that these charges should be allowed in full. It was manifestly unfair and illogical to strike out the

whole of the work carried out by English solicitors. The Auditor was wrong to determine that the first question which he had to ask was whether it was reasonable at all to instruct English solicitors. He answered that question in the negative (without considering whether the amount involved was reasonable) and did not then go on to consider whether the charges were reasonable. The Auditor bears to draw on his experience that English solicitors charge more than Scottish solicitors, and for that reason it is unreasonable to instruct them. He proceeded on the assumption that the English solicitors' fees must be unreasonably high. This amounts to a statement of principle that the Auditor would never allow any fees from English solicitors. However, this approach was wrong in law; English solicitors may charge more than Scottish solicitors in some cases, but may charge less in others. If the Auditor does not even look at the account, he cannot say in this case that there was higher charging. To reach a conclusion on principle that English solicitors fees will never be allowed as they are inevitably excessive is manifestly unreasonable. Any statement of policy such as this is an unreasonable exercise of the Auditor's discretion.

[6] The Auditor had misinterpreted or misunderstood the authorities. He appears to have concluded that he was bound to apply a two stage test-(1) to ask if the English solicitor was properly employed in the Scottish litigation, and (2) if not, to refuse to allow the English solicitors charges. That is a misreading of the decision of a court of seven judges in *Wimpey Construction (UK) Limited* v *Martin Black and Co (Wire Ropes) Limited* 1988 SC 264, and also *Scottish Lion Insurance Co Limited Petitioner* 2006 SLT 606. The court in *Wimpey* was not considering the same point that is in issue in the present case; the Auditor fell into error in reading into the *Wimpey* decision something that was not decided. There is nothing in the decision in *Wimpey* which supports the conclusion that the Auditor required to ask first whether the English solicitor was properly employed in the Scottish litigation. The

Auditor's decision effectively deprives this pursuer of the ability to follow the *Wimpey* route. The Auditor has conflated the principle of instructing English solicitors with assessing individual charges; he appears to have ignored the possibility that the English solicitors' account might be reasonable.

[7] Similarly, the point in issue in *Scottish Lion Insurance Co Limited petitioner* was quite different from the present issue. That case was concerned with whether an additional fee could be awarded in respect of work carried out by an English solicitor. The Auditor has not properly applied the reasoning in paras [8] to [11] of that case, which was not about any requirement to have a two stage test such as the Auditor concluded was necessary in the present case.

[8] What the Auditor required to do was to consider the reasonableness of the charges made, and consider whether these charges should have been made at all, or whether they were overstated. The pursuer was entitled to choose who should be her solicitor; the Auditor can then tax off or abate items if he considers the charges to be too high. He erred in creating a principle against allowing charges by English solicitors. Senior counsel referred to my decision in *McCallion* v *McCallion* [2022] CSOH 36 and to *Stuart* v *Reid* [2015] CSOH 175.

Submissions for the defenders

[9] Senior counsel for the defenders observed that the action was commenced in 2018, before the coming into force of the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019, and accordingly the relevant rule was the old rule of court 42.10(1), which provided that "only such expenses as are reasonable for conducting the cause in a proper manner shall be allowed".

[10] The defenders do not suggest that in no circumstances can charges by an English agent be recovered in a Scottish process: such a submission would be wrong, and fly in the face of the decisions in *Wimpey* and *Scottish Lion*. However, the Auditor in the present case has not established a principle against a recovery of English agents' fees per se - what the Auditor has decided is that in the particular circumstances of this case none of Irwin Mitchells' fees have been reasonably incurred in terms of RC 42.10(1). The pursuer suggests that the Auditor has not looked at the items in Irwin Mitchells' account, but this is incorrect-it is clear from paragraphs 3, 4 and 5 of his note that he has looked at the account (see in particular the last four lines of paragraph 3 of the Auditor's note).

[11] Senior counsel accepted that neither *Wimpey* nor *Scottish Lion* were entirely in point, but they did give useful guidance. In *Wimpey* at page 287 it is clear that the court accepted that where an English solicitor is properly employed in a Scottish litigation he is entitled to be remunerated for his work according to an English scale of remuneration. However, the first of the principles set out by Lord Drummond Young in *Scottish Lion* (at para [8]), which senior counsel described as "the gateway test", is whether an English solicitor is properly employed in a Scottish litigation. The Auditor in the present case has decided that the English solicitor was not properly employed in the present Scottish litigation, and that none of his charges are reasonable. The Auditor has a wide discretion in matters such as this, and he was entitled to reach this conclusion. He did not require to give lengthy reasons; the reasons which he gave were adequate. He did not require to look at the individual charges, because the English solicitor was not properly employed in the Scottish litigation. The pursuer never asked the Auditor to go through the charges one by one - the pursuer's position was "all or nothing". It was never the pursuer's position that the Auditor should assess individual items.

[12] Applying the guidance set out in *Wimpey* and *Scottish Lion*, the Auditor was correct to address his mind first to the question of whether Irwin Mitchell was properly employed in this Scottish litigation. If the answer to that question is in the negative, the matter ends there and he is not required to move on to stages two to four of Lord Drummond Young's guidance at paragraph 8 of *Scottish Lion.*

[13] The Auditor applied the correct test; in the exercise of his wide discretion he only allowed such expenses as "were reasonable for conducting the cause in a proper manner". The pursuer's note of objections and note of arguments proceed on a misunderstanding of the Auditor's approach. Irwin Mitchells' fees have not been disallowed carte blanche on the basis of some generally applied principle vis a vis English or other foreign agents fees-they were disallowed because the Auditor, in the proper exercise of his discretion, determined that in this case, their engagement (and the fees flowing therefrom) were not reasonable for the proper conduct of the case.

[14] Senior counsel drew attention to the fact that Irwin Mitchell themselves have a Glasgow office. The website for that office indicates inter alia that they specialise in personal injury claims, and that they have the UK's largest and most successful team of lawyers specialising in making accident claims abroad, including road traffic accidents and serious injuries.

[15] On the matter of fairness, senior counsel observed that to allow Irwin Mitchells' fees would be unfair on the defenders. The defenders have only been found liable to pay the pursuer's expenses on a "party and party" basis, but Irwin Mitchells' fees were calculated on the English equivalent of the "agent and client" basis, so to allow the charges would be to go beyond the clear intent of the court's interlocutor.

[16] Senior counsel for the defenders relied not only on the authorities referred to above, but also the decision of the First Division in *Shanley* v *Stewart* 2019 SLT 1090 (particularly per the Lord President at paragraph 25), and *CJC Media (Scotland) Limited* v *Sinclair* [2020] CSOH 93 at paragraph 7.

Reply for the pursuer

[17] Senior counsel for the pursuer accepted that the pursuer never asked the Auditor to look at individual items in the pursuer's account of expenses and outlays; the pursuer wanted to know the Auditor's view on the preliminary issue.

[18] The court in *Wimpey* (particularly in the last paragraph of page 288) was concerned with specific items-it was not concerned with a general principle. However, the observations of the Auditor in the present case (particularly in the last four lines of paragraph 3 of his note) were generalised and would apply to any case involving charges by English solicitors. The Auditor was elevating the issue to a matter of principle. He should not have engaged in a qualitative judgement about instructing English solicitors rather than Scottish solicitors unless such instructions resulted in higher charges.

[19] Parties were agreed that the expenses of and associated with the note of objections and the present hearing should follow success.

Discussion and decision

[20] It is appropriate first to consider the respective roles of the Auditor and the court. In *Stuart* v *Reid* Lord Woolman set out (at paragraphs 24/25) six propositions on this matter. I indicated in *McCallion* v *McCallion* (at para [24]) that I was in complete agreement with these propositions. This remains my position. This is consistent with the views expressed by

Lord Tyre in *CJC Media (Scotland) Limited* v *Sinclair*. It is also consistent with the views of the First Division in *Shanley* v *Stewart*; in that case the opinion of the court, which was delivered by the Lord President (Carloway) included the following passages:

> "[25] In carrying out his task, the auditor is afforded a wide discretion. He sees a very large number of accounts over a considerable range of cases (*Jarvie* v *Greater Glasgow Primary Care NHS Trust,* Lord Carloway at para [39]). The court has no equivalent experience (*Glasgow Caledonian University* v *Liu,* Lord Brodie, delivering the opinion of the court, at para [7]). Accordingly, 'it is not the function of a Judge reviewing an exercise of a discretion to substitute his own view of the material under consideration. The decision of the Auditor stands in a not dissimilar positon to the verdict of a jury. If the Auditor had no material to go on, his exercise will fall, but if he had material, then, so long as the decision he reached on it was not unreasonable, it cannot readily be upset'. (*Wood* v *Miller,* LJC (Thomson) at page 98).
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> The available grounds of objection are analogous with those available in a judicial review (*Tods Murray WS* v *Arakin Limited (No 2*), Lord Mackay at 2002 SCLR page 764). The court can only interfere if, for example, the auditor 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'. (*Glasgow Caledonian University* v *Liu, supra*, para [6]).
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> [26] As the commercial judge recognised, once the auditor has taxed the account, the objection procedure is limited to permitting objections to specific items in the auditor's report; it is not for dealing with objections of a different nature …"

[21] It may be noted that in *McCallion* v *McCallion* I felt obliged to disturb the Auditor's decision. However, I made it clear (at para [24] of my opinion in that case) that I did so because I had reached the view that the Auditor's decision was unreasonable and flowed from a misunderstanding of the court's award. To the extent that the Auditor gave reasons in that case, it clearly appeared to me that he had mistaken or misunderstood the award of expenses, and had disallowed charges which clearly fell within that award.

[22] I do not consider that the present case falls within the same category as *McCallion*. Indeed, I can find no error in law in the Auditor's report. In the exercise of his wide

discretion, he took the view on the preliminary point of objection that the charges of English solicitors did not meet the test in rule of court 42.10(1), which was the relevant test for the purposes of this action. The rule provides that: "Only such expenses as are reasonable for conducting the cause in a proper manner shall be allowed."

[23] The Auditor applied his mind to this test and concluded that it was not met with regard to the charges of English solicitors. As the Auditor noted at paragraph 5 of his note, the pursuer had permanent residence in Scotland, the accident was in France, and a Scottish firm of solicitors was initially instructed. The action was raised, and remained, in the Court of Session. It is not immediately apparent that it was reasonable for conducting the cause in a proper manner that the pursuer should instruct English solicitors. Of course she was entitled to do so, but it does not follow that the expense of doing so should fall on the defenders.

[24] This is not to suggest that there is a general principle against the allowance of charges by English and other foreign agents. The defenders were clear that they were not submitting that the Auditor can never allow the recovery of items of expense incurred by English agents, where it was reasonable to incur that expense. They gave the example of an English agent instructed to precognosce a witness living in England, or where an English pursuer is injured in Scotland and English agents are better placed to recover English medical or earnings records. Another example might be where the proper law of a contract is English law, and advice is required as to the terms of English law on the point. It is possible to conceive of numerous situations in which the Auditor might, in the particular circumstances of a case, reach the view that it was reasonable to instruct English agents for conducting the cause in a proper manner.

[25] Senior counsel for the pursuer categorised the Auditor's decision as creating a general principle against the allowance of charges by English solicitors. If the Auditor had done this, his decision might be capable of challenge as an error of law or as unreasonable. However, I do not consider that he did so. His decision was confined to the circumstances of the present case – he was:

> "of the opinion that this was one of those occasions where the decision by the pursuer to instruct foreign agents would result in the party found liable to pay the expenses having to pay expenses at a greater level than they would have, had the matter been dealt with solely by Scottish agents".

[26] He was "not persuaded that there was anything gained in respect of the specialism of the English agents that was not readily available with a number of Scottish based agents". For these reasons, he was not satisfied that the instruction of English agents was reasonable for conducting the cause in a proper manner.

[27] As the defenders submitted, if the charges by English agents, which were set out as outlays in Blacklocks' account of expenses, were allowed, this would have the effect that while the defenders have only been found liable to pay the pursuer's expenses on a party and party basis, the pursuer would be able to recover from the defenders the charges of English solicitors effectively on an agent and client basis.

[28] In all these circumstances I do not consider that the Auditor's decision can be categorised as unreasonable. He had a wide discretion in this matter, and it cannot be said that he exercised this irrationally or unreasonably.

[29] I shall therefore refuse the pursuer's application for the objection to be sustained. In terms of rule of court 42.4(4) I shall repel the objections in the Note, and find the pursuer liable to the defenders in the expenses of the procedure on the Note.