

SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

[2022] SC GLW 18

GLW-A1020-18

JUDGMENT OF SHERIFF ANDREW MACINNES CUBIE

in the cause

RONA MACGREGOR OR MACFARLANE

Pursuer

against

ELIZABETH MACGREGOR

Defender

GLASGOW, 10 June 2022

The Sheriff, having resumed consideration of the cause; allows a percentage increase in the fees recoverable from the defender to the extent of 70% having regard to the complexity of the cause and the number, difficulty or novelty of the questions raised; the importance of the cause or the subject-matter of it to the client; the amount or value of money or property involved in the cause; and the steps taken with a view to settling the cause, limiting the matters in dispute or limiting the scope of any hearing and finds the defender liable to the pursuer for the expenses occasioned by the motion.

NOTE:

[1] The pursuers seek an uplift of the fees recoverable from the defender. I heard from counsel on the 29 March 2022 supplementing the note of argument provided by each side.

Background

[2] The pursuer claimed in her action that the defender (her mother) had concealed the existence of legacies in her favour after the death of her father (the defender's husband), including succession to an ongoing business, and had used the concealed resources for herself; it was alleged that a particular financial bequest had not been paid and that the business had been sold. The litigation was hard fought, and included a debate, a substantial specification of documents and a hearing on a minute for transference following upon the acknowledged incapacity of the defender; that led to the pursuer's brother being sisted as the defender's representative. The matter settled with days to go before the proof diet.

Submissions

[3] The relevant legislation in relation to these proceedings, raised as they were in 2018 is the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993/3080 which provides at paragraph 5, (emphasis added to those factors relied upon by the pursuer).

“The court shall have the following discretionary powers in relation to the Table of Fees:–

- (a) In any case the court may direct that expenses shall be subject to modification.
- (b) The court may, on a motion made on or after the date of any interlocutor disposing of expenses, pronounce a further interlocutor regarding those 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 the following factors shall be taken into account:–

- (i) the complexity of the cause and the number, difficulty or novelty of the questions raised;
 - (ii) the skill, time and labour, and specialised knowledge required, of the solicitor;
 - (iii) the number and importance of any documents prepared or perused;
 - (iv) the place and circumstances of the cause or in which the work of the solicitor in preparation for, and conduct of, the cause has been carried out;
 - (v) the importance of the cause or the subject-matter of it to the client;
 - (vi) the amount or value of money or property involved in the cause;
 - (vii) the steps taken with a view to settling the cause, limiting the matters in dispute or limiting the scope of any hearing.
- (c) Where a party or his solicitor abandons, fails to attend or is not prepared to proceed with any diet of proof, debate, appeal or meeting ordered by the court, the court shall have power to decern against that party for payment of such expenses as it considers reasonable."

Submissions

[4] The pursuer described the action as abnormally complex, procedurally, legally and factually. This had given rise to a considerable amount of investigatory work. It was accepted that the employment of counsel mitigated some of the legal complexity, but the factual and procedural complexity was primarily borne by the solicitors.

[5] The case dealt with a serious and sustained betrayal of trust and, the pursuer contended, the denial of a career path. Although every case is important to the litigant, it was submitted that this case involved allegations of fraud in a family, with events unfolding over years and the fraud being maintained for a considerable period of time; there were developments during the period for example in relation to the tracing of funds since 1995.

[6] The value was significant in sheriff court terms; the crave was initially for £315,558, amended to £697,529.88; settlement was effected at £235,000.

[7] The defenders failed to limit the issues; every step of procedure was fought including the liability to account and the defender's loss of capacity. The defender's refusal to limit the issues protracted the proceedings.

[8] The pursuer sought 20% per head as a “general rule of thumb” leading to a 100% uplift.

Defender

[9] The defender opposed any increase, with the fall-back position that the full extent of the additional fee sought was not justified.

[10] The procedure in this action of count reckoning and payment was standard and long established. The debate was principally concerned with prescription, a commonly encountered issue. In any event, counsel dealt with all issues raised at debate; the expenses occasioned by the minute of sist/transference were dealt with discretely, so the novelty and complexity of that point are irrelevant. Again, counsel took responsibility.

[11] The passage of time does not render a matter complex; the case turned on the credibility of one witness on each side; in any event the delay was caused by the pursuer in failing to take steps to enforce the claim.

[12] No element of the procedure demonstrated any particular skill or knowledge by the solicitors given the involvement of counsel.

[13] This case, while accepted as important, was a litigation from choice; the pursuer was not forced to litigate to retain her home, to avoid bankruptcy or to maintain or end a personal relationship; the sum decerned for was significant but not exceptional, particularly given the element of interest added to the principal sum. The defender had made more than one offer to resolve matters albeit shortly before settlement was effected.

[14] The decision remains one for the discretion of the court; none of the considerations were met, or if met do not justify an additional fee. The case was a “run of the mill” action for count reckoning and payment. No additional fee was justified; but even if there was

justification, only a modest award was appropriate reflecting the personal importance to the pursuer.

Reasons for decision

[15] The factual matters in dispute were not resolved; settlement was effected by way of tender and acceptance the eve of the proof. There had been no previous settlement discussions until around July 2021. The tender was for £235,000.

[16] 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.

[17] The decision is discretionary (*Macphail* Sheriff Court Practice 4th edition paragraph 19.25; although dealing with the terms of the successor legislation, there is no reason to take a different approach). I take into account the following general factors in approaching decisions of this type.

[18] A factor can exist on its own and give rise to an uplift but complexity might arise from or give rise to numerous documents or more work; importance is likely to be reflected in the value; steps taken to limit may overlap with number of documents. So the particular grounds may overlap and the interaction of one or more factor can give rise to an uplift (*Macphail* 4th edition 19.27).

Complexity of the action

[19] An action for count reckoning and payment of itself does not necessarily give rise to complexity engaging rule 5(b)(i); although such action has two distinct parts, it is usually the accounting rather than the obligation to account which gives rise to controversy between parties. The procedure is clearly explained in *Macphail* (4th edition) paragraphs 21.02 - 21.11 and *Gray v Cape* 2022 SCLR 5. As a vehicle for resolving disputes, it is not of itself complex enough to engage 5(b)(i) although it may do. Other features of the action must engage complexity.

Importance

[20] Each case is important to the litigant (*J & E Shepherd v Letley (No 2)* [2018] CSIH 8 at para [21]). There must be some objective basis for elevating the importance into a category justifying an uplift; such importance is not restricted, as the defender appeared to argue, to issues of housing, status, or bankruptcy. Each case must turn on its own circumstances and can include the sustained nature of any ground of action, the period over which the facts relating to the action have endured, the nature of the relationship between the parties and consequences to the applicant, even if that falls short of homelessness bankruptcy or some change in status. Although importance is to be objectively determined by the court, the particular circumstances of the case and the parties can inform that decision.

Legal skill

[21] The employment of counsel has a bearing on the legal complexities and the skill, time labour and specialised knowledge of the solicitor; this was recognised in terms in

J & E Shepherd, where in delivering the opinion of the Inner House Lord Brodie said at (para [21]):

“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.”

Value of claim

[22] The amount of the claim made is not determinative of complexity; a straightforward case may give rise to significant financial consequences (quantum agreed at particular figure); equally an important case may have a limited or no financial crave (*J & E Shepherd*). It will depend upon the individual circumstances of each case. The steps taken with a view to settling the cause, limiting the matters in dispute or limiting the scope of any hearing.

[23] The wording of 5(b)(iv) is not restricted to steps taken but can include the absence of steps taken (for example, to agree matters) thus protracting matters. In *Boal v Newalls* 1994 SCLR 534 Lord Johnston sitting in the Outer House said of the equivalent provision:

“it is primarily designed to try and encourage both parties either to limit issues or preferably to reach settlement in cases and where there is a failure on the part of one party to respond to requests by the other to proceed along either of those two tracks, head (8) can come into play. I am satisfied, albeit it is obiter to this decision, that the pursuer's advisers did make genuine attempts at least to limit issues, if not to try and settle the case, and the failure of the defenders collectively to respond, either by making their position clear in relation to such questions as employment, contraction and indeed the time-bar question, increased, or at least reinforced, the responsibilities and consequent workload imposed on the pursuer's solicitors as the proof approached with all pleas standing and no concessions being made. This state of affairs, coupled with the fact that settlement negotiations were only opened within a week of the proof date, also entitles the pursuer to succeed under head (8).”

Expenses already awarded

[24] The fact that a discrete part of process gave rise to an award of expenses against a third party (the defender's attorney under a power of attorney in the minute to sist

procedure) does not render that part of the process irrelevant for assessing the complexity of the case. The defender argues that the discrete resolution of expenses arising means that no notice can be taken of the issues which might have a bearing on an uplift. I disagree; it is open to the court considering an uplift to take into account all aspects of the responsibility undertaken by the solicitor even if subject to a separate determination. In taking account of this feature, I do not overlook that fact that again counsel were involved in this unusual and discrete part of the procedure. It can be taken into account properly in assessing the uplift application. The Inner House seems to have given implicit support for this approach in *J & E Shepherd* where a number of factors were considered including procedure where there was a discrete awards of expense including a modification; these were not held to be irrelevant in a future consideration of any uplift, albeit the motion was unsuccessful as a consequence of the lack of complexity rather than the procedure followed (para [21]).

Application of factors to this case

[25] I remind myself that the increase, if any, is awarded to reflect the responsibility undertaken by the party's solicitor as evidenced by the heads identified in paragraph 5. The defender's written submission characterised the case as a "run-of-the-mill" action of count reckoning and payment. I disagree.

Complexity

[26] It was complex, procedurally, legally and factually. The procedure included a debate which canvassed the law in relation to issues of fraud, the liability of executors and trustees, and prescription, an opposed minute for transference and the allowance of a proof which gave rise to pre proof hearings. The factual situation involved the unravelling of the

circumstances which led to alleged appropriation of the funds and the business (a Chartered Accountant's business), the sale of the business which formed part of a legacy and the tracing of funds said to have accrued as a result of the sale. The case involved an effective allegation of fraud in respect of the actings of the defender in her capacity as executrix and trustee. The nature of the investigation was widespread in relation to both subject matter and timescales covered during the currency of the alleged misappropriation. I accept that the identification and to some extent untangling of the various steps taken after the death of the pursuer's father gave rise to complexity, indicated but not defined by the number of professional witnesses potentially to be called for the proof.

[27] The time frame of events, the nature of the family relationships between not just the parties but between the pursuer and the attorney for the defender, her brother who was substituted, the capacity of the defender, professional witnesses' qualification and the valuation of the claim all support the complexity head.

Legal skill

[28] In so far as the legal skill of the solicitors is concerned, I do not regard that discrete head as having been established given the involvement of counsel throughout the duration of the case, with whom primary responsibility lay; that involvement does help inform the decision in relation to other heads.

Importance

[29] The case can clearly be characterised as objectively important for the pursuer; she had on the face of it been deprived of an inheritance and, she asserted, even a career choice or path as a result of a fraud perpetrated by her mother and sustained over a number of

years. The nature of the dispute gave rise to inter-family difficulties some of which were spelled out in the material before the court. I recognise and accept that the case was one of fundamental importance to the pursuer and while it did not relate to preserving a current asset, the attempt to recoup funds and apparent opportunities denied to her from her father's estate, by her family, can be regarded as sufficiently important to engage the paragraph.

Value

[30] I consider that value of the claim, the sum settled for and the means and difficulty of calculation of the claim give rise to an entitlement under this head, supporting the view that there was responsibility undertaken which went beyond the norm.

Steps to limit proceedings

[31] I also accept the submission that the pursuer took steps to limit or agree matters which on the material available to me the defender did little or nothing to accommodate. The pursuer was entitled to characterise the defender's position throughout the proceeding as a steadfast refusal to admit and agree steps of procedure such as the liability to account, or the need to address the capacity issue. Following *Boal*, that factor is engaged.

Conclusion

[32] In the circumstances I consider that the pursuer has made out a basis for an uplift in relation to all of the paragraphs upon which the pursuer relies save for the legal skill head under 5(b)(ii).

Amount of uplift

[33] There is little guidance; I do not recognise the pursuer's quoted "rule of thumb" that each paragraph gave rise to a 20% increase. Even where the cause is determined to have engaged one or more of the factors, the court still retains a discretion in relation to the extent to which the additional fee is applied. It is not susceptible to some arithmetical formula. I consider that there was overlap between the factors and that the degree of responsibility will vary from case to case even when the paragraph is engaged. I factor in the involvement of counsel which takes a degree of responsibility from the agents.

[34] I consider that the appropriate uplift is 70% which I so award. The pursuer is also entitled to the expenses of the opposed motion.