OUTER HOUSE, COURT OF SESSION

[2019] CSOH 22

P968/18

OPINION OF LORD BRAILSFORD

In the petition

KAE ALEXANDRA TINTO or MURRAY

Petitioner

for interdict

Petitioner: McBrearty QC, Innes; SKO Family Law
Respondent: Duncan QC, Byrne; Turcan Connell

7 March 2019

[1] The petitioner sought to interdict Turcan Connell, a firm of solicitors ("TC"), from acting on behalf of the defender in divorce proceedings she had raised against her husband, Sir David Murray ("SDM"). That petition was ultimately successful and by interlocutor dated 11 December 2018 TC were interdicted from acting as the legal representatives and solicitors of SDM in the action of divorce against him at the instance of the petitioner. Thereafter the petitioner enrolled a motion seeking the expenses of the petition process, for those expenses to be awarded on the agent/client paying scale and for certification of a named person as a skilled witness. There was no opposition to the motion insofar as it related to an award of expenses. It was however submitted on behalf of TC that expenses should be on the party/party scale. The certification of the named person was also opposed.

[2] In order to put these motions and the considerations relevant to their determination in context it is necessary to briefly set out the relevant background to those motions.

[3] The petitioner and SDM were married in 2011. Prior to their marriage they entered into a pre-nuptial agreement regulating financial affairs in the event of the marriage terminating in divorce. TC are a Scottish firm of solicitors specialising in private client work. They were formed in 1997 and since that time had acted on behalf of SDM in connection with his private affairs. They acted for SDM in the negotiation and preparation of the pre-nuptial agreement. The petitioner was represented in the negotiation and preparation of the pre-nuptial agreement by a solicitor who was then employed by another firm of solicitors. In 2013 that solicitor joined TC initially as a senior associate and from April 2015 as a partner working in the firm's Glasgow office in the field of family law. Since joining TC the solicitor has not acted nor had any dealings with the petitioner. Since her marriage to SDM the petitioner had on a number of occasions instructed and obtained advice from another partner of TC, one primarily dealing with trust and tax matters for private clients. It was in this area that the petitioner sought the advice of that partner in TC. On 22 March 2018 the petitioner and SDM separated. The petitioner instigated divorce proceedings in this court against SDM by summons signeted on 22 May 2018 (bearing the court reference F40/18). The petitioner was represented in the divorce proceedings by a firm of solicitors specialising in family law. Defences were lodged on behalf of SDM on 19 June 2018. He was at that stage represented by TC. In the divorce proceedings the petitioner sought to set aside the pre-nuptial agreement and, further, made certain financial claims. That action proceeded uneventfully throughout the summer of 2018. By interlocutor of 12 July a proof date was fixed for 5 February 2019 and 7 subsequent days. At a scheduled by order case management hearing on 11 September the petitioner raised the issue of potential

disclosure of information confidential to her by TC. On 14 September the petitioner sought to introduce by way of Minute the contention that it was inappropriate for TC to continue to act in the divorce. The Minute, as a step in the divorce proceedings, was directed at SDM albeit that it was formally intimated to TC for any interest they may have. I declined to allow the Minute to be received on grounds of competency. Subsequently the present petition was presented on 18 September. After sundry procedure and, as already noted, on 11 December 2018 TC were interdicted from acting on behalf of SDM in the divorce proceedings. For completeness I should add that subsequent to that date, and indeed subsequent to the hearing of the motions with which I am currently concerned on 29 January 2019, a joint minute was entered into between the petitioner and SDM in terms of which it was agreed that those parties had reached agreement as to the financial consequences of the breakdown of their marriage and entered into a minute of agreement in that regard. A minute seeking decree of dismissal of action F40/18 was lodged with the court on 22 February 2019.

[4] In relation to the motions which I require to determine I deal firstly with the petitioner's submissions in support of her motion for expenses to be awarded on the agent/client, client paying scale.

[5] It was submitted that the law relating to the circumstances in which the court is entitled to make an award on this scale were correctly stated by Lord Hodge in *McKie* v *Scottish Ministers*[1] in particular at paragraph 3. After considering various authorities where that issue had been discussed Lord Hodge expressed the following views:

> "The law on this issue is well settled and may be summarised in the following five propositions. First, the court has discretion as to the scale of expenses which should be awarded. Secondly, in the normal case expenses are awarded on a party and party scale; that scale applies in the absence of any specification to the contrary. But,

[1] 2006 SC 528

> thirdly, where one of the parties has conducted the litigation incompetently or unreasonably, and thereby caused the other party unnecessary expense, the court can impose, as a sanction against such conduct, an award of expenses on the solicitor and client scale. Fourthly, in its consideration of the reasonableness of a party's conduct of an action, the court can take into account all relevant circumstances. Those circumstances include the party's behaviour before the action commenced, the adequacy of a party's preparation for the action, the strengths or otherwise of a party's position on the substantive merits of the action, the use of a court action for an improper purpose, and the way in which a party has used court procedure, for example to progress or delay the resolution of the dispute. Fifthly, where the court has awarded expenses at an earlier stage in the proceedings without reserving for later determination the scale of such expenses, any award of expenses on the solicitor and client scale may cover only those matters not already covered by the earlier awards."

Senior counsel for the petitioner relied principally on the third and fourth of Lord Hodge's propositions.

[6] The submission was that the starting point for consideration of the circumstances in the present petition was the dictum of Lord Millet in *Prince Jefri Bolkiah* v *KPMG* (a firm)[2], where his lordship stated:

> "… no solicitor should, without the consent of his former client, accept instructions unless, viewed objectively, his doing so will not increase the risk that information which is confidential to the former client may come into the possession of a party with an adverse interest."[3]

It was said that on the basis of that dictum the onus is upon a solicitor in accepting instructions to act against a former client to be satisfied that no such risk as identified by Lord Millet exists. It followed therefrom that TC ought to have been able to objectively justify from the outset its decision to accept instructions to act for SDM in the divorce action.

[7] A number of criticisms were advanced against TC which were said to show that their conduct both in the divorce action and in the petition process could not be regarded as reasonable and were therefore inconsistent with the third proposition enunciated by Lord Hodge in *McKie (supra)*. The first criticism was that TC did not rely upon a single,

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[2] [1999] 2 AC 222

[3] At page 237

coherent position from the outset of the petition procedure. The petitioner submitted that TC's position developed over time. In support of that proposition it was noted that affidavits purportedly in support of their position were first lodged and intimated by TC on 11 October 2018. Following that there was an exchange of Notes of Argument and subsequent to that exchange TC intimated further affidavits on the evening before the first court hearing on 2 November 2018. Following that hearing, and on the invitation of the court, further affidavits and productions were lodged by TC at 8.00am on 30 November 2018, the date of the continued hearing. This approach was said to be unreasonable for the reason that TC should only have accepted instructions against the petitioner's interest if it was able to rely upon an objectively coherent position from the outset. The proposition was that a firm of solicitors ought not to find itself justifying such a decision retrospectively and, moreover, using material which could not have been taken into account at the time of accepting instructions and which emerged only as a result of progressive disclosure before the court during the course of the petition process. It was also observed that aside from those issues of principle as a matter of practicality the production of material on an ongoing basis during the course of the petition process was productive of additional expense to the petitioner. I was also invited to have regard to the consideration that in a petition such as the one which I am considering the onus was on TC to demonstrate that there was no risk to the petitioner as a result of the decision to accept instructions against her interests. A firm of solicitors should be aware of the importance of properly dealing with confidential information.

[8] The submission was developed to extend criticism of TC's acting to the period prior to the presenting of the present petition on 18 September 2018 but during the tenure of the divorce proceedings. In that regard it was submitted that during the course of court

hearings on the petition and answers TC placed considerable significance and reliance on the fact that the petitioner's file had been "locked down" so that access to it was restricted. It was said that the need for access to the file to be restricted ought to have been clear to TC prior to the raising of the present petition, that situation should have been apparent upon the raising of divorce proceedings by the petitioner in May 2018. In any event, it ought to have been obvious by at latest 18 June 2018 when solicitors acting for the petitioner wrote to the respondent asking them to confirm that the petitioner's file could not be accessed by anyone acting for SDM in the divorce proceedings, or who could be a witness in those proceedings. Having regard to these factors it was submitted to be obvious that the need for "lock down" and restriction of access to the relevant file was plain prior to the petition being raised on 18 September 2018. Notwithstanding that consideration TC did not lock down the file until 21 September 2018, 3 days after the service of the petition. The petitioner only became aware of that fact during the course of the court hearing on 30 November 2018. The submission was that those factors indicated that TC's conduct of the litigation was, in this regard, unreasonable.

[9] A further factor was relied upon by the petitioners as indicative of unreasonable conduct of the litigation by TC. This was the consideration that an assistant in TC accessed the petitioner's electronic file after the divorce action had been commenced and that no adequate explanation for so doing was advanced. The explanation proffered was, essentially, a desire to update the assistant's knowledge of the petitioner's affairs for the purpose of considering her potential involvement in TC's client social activities. This was said not to constitute a reasonable approach by a solicitor charged with treating client information confidentially.

[10] The second motion, that is certification of a person as a skilled witness, was dealt with relatively briefly by senior counsel. The witness concerned was a solicitor who had been asked to report as to what advice she would have given on the question of whether the respondent should accept instructions on behalf of SDM. It was said that her views were sought on this matter on the basis of her background as a deputy secretary of the Law Society of Scotland and, moreover, as an author on the subject of professional ethics and practice. It was submitted that the purpose of her obtaining a report from this person was not to usurp the function of the court by presenting the witnesses views as the only possible basis upon which the petition could be determined, but was simply to allow the petitioner to demonstrate that there were at least different possible views as to what the proper approach was for TC to take in deciding whether to accept instructions from SDM.

[11] In response to these submissions senior counsel for TC accepted that the legal principles applicable when the court considers the issue of the appropriate scale of expenses are those set forth by Lord Hodge in *McKie (supra)*.

[12] Beyond that the submission was that as determined by the court the respondent lost the petition on the merits. In doing so the court formed the view and held that judgments made by TC prior to deciding to act for SDM in the litigation against the petitioner were, in error, but that was no basis for awarding anything other than the usual or normal measure of expenses, that is on a party-party basis.

[13] In relation to the specific criticisms made of TC's conduct, which primarily concern the manner and time at which evidence was produced for use at substantive hearings where the merits of the petition would be determined, it was submitted that regard should be had to what was regarded as the "… somewhat unusual … sub-optimal .. conditions as regard to the context of this petition." These factors were, as I follow the submission, the cause of

difficulties for what was described as the "neutral team" dealing with the petition on behalf of TC. By this characterisation I understood that, quite properly, the partner of TC who had been dealing with SDM's interests in the divorce proceedings and counsel who had been instructed by that partner for that purpose had no involvement in the current petition procedure. Another partner assumed responsibility for conduct of the petition procedure and instructed a separate and new team of counsel to represent TC in court. Neither that partner nor the counsel instructed had, obviously, any involvement in any of the matters prior to the raising of the petition on 18 September 2018. They thereafter had to familiarise themselves with the whole factual background, form a view on the issues and the merits of the application and collect supporting evidence in their presentation of TC's case. Furthermore because of the nature of the criticisms in the petition procedure it was not open to that team to have open discussions when collating evidence, they had to be "… very careful about what they discussed with anyone else."

[14] Having regard to those considerations it was submitted that ultimately only one of the issues raised in the petition had any substance at all, the concern raised about the file maintained by the partner who had acted for the petitioner. The legal team acting on behalf of TC were granted access to that file only a matter of days before the substantive hearing. It was said that the content of that file when revealed drove further work which was carried out. The work was said to be done hurriedly in order to comply with court deadlines. In those circumstances TC did the best it could in difficult circumstances to meet the situation they faced. Ultimately it was accepted that the evidence produced was not good enough to resist the petition but that was said to be beside the point so far as the principles adumbrated by Lord Hodge in *McKie (supra)* were concerned. In all the circumstances those tests were not met and the motion should be refused.

[15] In relation to that part of the motion concerning certification of the skilled witness this was opposed on three grounds. Firstly the witness was said not to meet the requirements for being a skilled witness. Secondly it was submitted that her evidence was not relevant to the real issue in the case. Thirdly having regard to the previous two considerations it was not reasonable to instruct her.

[16] I deal firstly with the issue of the appropriate scale upon which expenses should be awarded. In relation to that issue I am firstly in agreement with the submissions for both senior counsel to the effect that the opinion of Lord Hodge in *McKie (supra)* is to be regarded as authoritative and accurately stating the current position in relation to the law applicable when a court is exercising its discretion as to the scale upon which expenses should be awarded, in particular the circumstances where an award of expenses on the agent/client scale will be justified. I am, further, satisfied that senior counsel for the petitioner was correct when he identified the third and fourth propositions set forth by Lord Hodge as relevant to the consideration of the current motion. So far as Lord Hodge's third proposition was concerned there was, correctly, no suggestion that the litigation had been conducted incompetently on behalf of the petitioner. The remaining issue was therefore whether or not the litigation had been conducted in a manner which could be properly categorised as "unreasonable". So far as Lord Hodge's fourth proposition was concerned it is plain that the issue of determination of whether conduct was unreasonable or not requires to have regard to all relevant circumstances and that those circumstances include, but are not confined to, behaviour before the action commenced, adequacy of a party's preparation for the action, the strengths or otherwise of a party's position on the substantive merits of the action, the use of a court action for an improper purpose and the way in which a party has used court procedure. So far as those factors are concerned there is no suggestion that there was an

improper purpose behind the conduct of the respondent's side in this petition. There has however been criticism of their decision making before the petition was presented and the adequacy of preparation in resisting the petition.

[17] It is, in my view, clear that in the context of the present procedure and, in particular, the motions which I am currently considering, the critical issue is whether the respondents conduct of the litigation can be characterised as unreasonable, which requires consideration of all relevant factual circumstances. I further accept that such consideration should start with acceptance of the proposition founded on Lord Millet's dictum in *Bolkiah (supra)* that a solicitor should not, without the consent of his former client, accept instructions unless, viewed objectively, by so doing he will not increase the risk that information which is confidential to the former client may come into the possession of a party with an adverse interest. A necessary inference of that is, in my opinion, that the solicitor proposing to accept instructions to act against a former client without that client's consent requires from the time that situation arose to actively consider whether there is a danger that information confidential to the former client might be disclosed to the person for whom the solicitor now acts. This will, again in my view, entail the solicitor requiring to consider what precautions are in place to prevent the disclosure of such information and whether such precautions are sufficient to ensure there will be no increase in the risk of disclosure of confidential information. The nature of the precautions taken are a matter for the solicitor involved but he or she would require to have in mind that in the event of their being challenged by the former client as to the nature and extent of precautions taken the solicitor would require to be able to demonstrate to the former client, or ultimately to a court, that the precautions taken were sufficient to reduce the risk of disclosure of confidential information to an acceptable level.

[18] In the context of the present case the evidence shows that TC did take certain precautions from the time that they ceased to act for the petitioner and began to act in a litigation where she was the opposing party. Those precautions were essentially that a limited team of solicitors and support staff acted for SDM and that those persons did not have access to the files maintained by another partner in TC relative to the petitioner's affairs. TC further relied on what was described as the "culture of confidentiality" which was maintained to be engrained within the firm and whereby solicitors acting on behalf of a client did not discuss that client's affairs with anyone outwith the relevant team. TC did not however go a further stage and institute arrangements to "lock down" the physical and electronic file maintained of the petitioner's affairs until 3 days after the present petition was instituted, and that notwithstanding that the petitioner's solicitors had alerted them to the need to take this precaution shortly after the commencement of the divorce litigation and approximately 3 months before "lock down" was in fact instituted. There was evidence to support a proposition that "lock down" was a necessary precaution in the admitted fact that an associate in the firm, who was not part of the relevant divorce team and who had no occasion or need to access the petitioner's file, accessed the unlocked down file pertaining to the petitioner's affairs after the divorce proceedings had been instituted. Moreover during the course of submissions senior counsel for TC accepted that after the presentation of the petition the partner who had acted for the petitioner and who was responsible for instituting "lock down" of her file accepted "with the benefit of hindsight" that the file should have been locked down at an earlier date. The others factors which, in my view, might have relevance in determining whether or not TC's conduct of the litigation was unreasonable are the fact that the evidence founded upon by them developed in a significant way in the

period between the presentation of the petition and the final hearing on 30 November 2018, a period of approximately two and a half months.

[19] The definition of the word "unreasonable" in the context of a person's actions is "not guided by, or based upon, reason, good sense, or sound judgment; illogical."[4] The question I consider I have to answer is accordingly whether TC's defence of the petition, having regard to the factors desiderated in the preceding paragraph, can be said to lack a basis in reason, good sense or sound judgment. In the context of what was a contested litigation I consider that a high test to meet. TC plainly considered the question of potential disclosure of information confidential to the pursuer at the outset of the divorce proceedings. They formed the view that the precautions they had in place, namely the culture of confidentiality within the firm and the denial of access to the petitioner's file by the team charged with the conduct of the divorce litigation on behalf of SDM were sufficient to protect the interests of the petitioner. That judgment turned out to be erroneous but could not, again in my view, be said to have been taken without thought or illogically. It was a reasoned judgment based upon what was considered to be a sound analysis. That judgment was wrong but not, in my view, necessarily unreasonable. Similarly the failure to "lock down" the electronic file prior to 21 September 2018 proved to be a mistake. Moreover that erroneous decision was recognised as such by the partner responsible for instituting "lock down" during the course of the conduct of the present petition. Again however it would be hard to say that the decision was unreasonable. An error of judgment need not be something caused by a lack of thought or consideration of reasons. The position is, I think, even clearer in relation to the development of TC's evidence during the currency of the petition leading up to the final hearing on 30 November. In that regard, as was submitted by senior counsel for TC, a

[4] Oxford English Dictionary, Third Edition, December 2014

considerable amount of preparatory work required to be carried out in a relatively short time period. The knowledge base upon which evidence was prepared and presented evolved over the course of this period. When fresh information became available to the team conducting the defence of the petition on behalf of TC it was made available. I would not consider that this could constitute unreasonable behaviour on the part of TC.

[20] Having regard to all the foregoing matters I consider that TC's conduct in the period after they ceased to act for the petitioner and commenced acting for SDM against their former client cannot be characterised as unreasonable. With the considerable benefit of hindsight it can be said that a number of the judgments they took were erroneous. These decisions were however taken in good faith and mindful of the obligations TC owed to their former client, the petitioner. Errors in that category do not in my opinion justify a departure from the appropriateness of an award of expenses against TC being confined to the party/party scale. I will accordingly award expenses on that basis.

[21] The second motion, certification of the expert witness can be dealt with briefly. The person involved was, in my view, qualified by reason of her professional experience to give an expert opinion on the issue of a solicitor's duties towards a former client in respect of confidential information. At the time that opinion was sought by the respondents it was at least possible that such evidence might have been relevant in the issue between the petitioner and respondents. In these circumstances I would not regard it as unreasonable to instruct the preparation of the opinion. I will allow the charge for this witness.