OUTER HOUSE, COURT OF SESSION

[2021] CSOH 52

P74/21

NOTE BY LORD BRAID

In the petition

REVEREND DR WILLIAM J U PHILIP AND OTHERS

Petitioners

against

THE SCOTTISH MINISTERS AND OTHERS

Respondents

Petitioners: Scott QC, Lindsays
Respondents and First Interested Party: Muir QC, Irvine, Scottish Government Legal Directorate

19 May 2021

Introduction

[1] Following my opinion of 24 March 2021, the petitioners now seek an award of expenses against the respondents and first interested party (the Lord Advocate). They also seek certification of Dr Martin Parsons and Dr Ian Blenkharn as skilled persons and a 100% increase in the charges to be allowed on taxation. These latter orders are sought in terms of Act of Sederunt (Taxation of Judicial Expenses Rules) 2019 rule 5.3; and rule 5.2(6)(a), (b), (c), (d), (e) and (g).

[2] The respondents do not take issue with the motion for expenses nor with certification of Dr Parsons as a skilled person. They do, however, oppose certification of Dr Blenkharn,

and the 100% increase in charges (albeit they concede that some modest increase may be appropriate). I will deal with each issue in turn.

Certification

[3] Rule 5.3, in so far as relevant, provides (it is conceded that paragraph 5 applies):

> "**5.3 Certification of skilled persons**
>
> (1) On the application of a party the court may certify a person as a skilled person for the purpose of rule 4.5 (skilled persons).
> (2) The court may only grant such an application if satisfied that –
> (a) the person is a skilled person; and
> (b) it is, or was, reasonable and proportionate that the person should be employed.
> …
> (5) Where this paragraph applies, the court may only determine that the certification has effect for the purposes of work already done by the person where the court is satisfied that the party applying has shown cause for not having applied for certification before the work was done".

[4] The respondents do not dispute that Dr Blenkharn satisfies the first part of rule 5.3(2), in other words, that he is a skilled person; nor do they dispute that cause has been shown for not having applied for certification before the work was carried out, given that the report was instructed at a time when the proceedings were not in existence. The point in contention is whether it was reasonable and proportionate that he should be employed at all. The petitioners submit that this was an anxious matter for them and that it was reasonable of them to take steps to vouch that their position - that it was safe for places of worship to open - was a reasonable one for them to adopt. The instruction of an expert microbiologist, such as Dr Blenkharn, to express an opinion on the mitigation measures which the petitioners proposed and whether they were reasonable precautions from a public health perspective was thus a reasonable and proportionate step for them to take.

[5] The respondents' response is that it was neither reasonable nor proportionate to instruct Dr Blenkharn. The case was not about whether mitigation measures were helpful but whether the restrictions imposed by the regulations challenged in the judicial review were justified. It had not been necessary to instruct Dr Blenkharn. He addressed the very question which was for the court to resolve. His report had, in the event, not been relied upon by the court. Accordingly, certification should not be granted.

[6] It is important to focus on the test set by the rule, which is whether it was reasonable and proportionate that Dr Blenkharn should be employed. That question cannot be answered by asking whether, or to what extent, the court ultimately relied on the evidence given by him in his report or whether he may have exceeded his remit, although undoubtedly those factors may feed into an assessment of the reasonableness and proportionality of the instruction. Whether it was reasonable and proportionate to employ Dr Blenkharn must be justified objectively having regard to the circumstances at the time of instruction. (I was not referred to any authority on this point but it respectfully seems to me that the approach taken by the Sheriff Appeal Court in *Webster* v *MacLeod* 2018 SLT (Sh Ct) 429, in relation to the predecessor to rule 5.3, is correct.) Given that at the time of employment of Dr Blenkharn, an issue in the judicial review was likely to be whether the regulations under challenge imposed proportionate restrictions, and given the importance of the case to the petitioners, I consider that it was both reasonable and proportionate to obtain an expert view from a microbiologist on whether mitigation measures would adequately mitigate the risk posed by the new strain. In any event, it cannot be said that Dr Blenkharn's evidence was of no value, since I did have regard to his report: see my opinion at para [111].

[7] For completeness, I agree, for the reasons submitted, that cause has been shown for not having sought prospective sanction. Since I am satisfied that the test in rule 5.3(2) is met, I will certify Dr Blenkharn as a skilled person in terms of rule 5.3.

[8] I will also of course certify Dr Parsons as a skilled person, which is not opposed.

Additional charge

[9] Rule 5.2 provides:

> "**5.2 – Additional Charge**
>
> (1) An entitled party may apply to the court for an increase in the charges to be allowed at taxation in respect of work carried out by the entitled party's solicitor.
> (2) Where the application is made to the Court of Session the court may, instead of determining the application, remit the application to the Auditor to determine if an increase should be allowed, and the level of any increase.
> (3) The court or, as the case may be, the Auditor must grant the application when satisfied that an increase is justified to reflect the responsibility undertaken by the solicitor in the conduct of the proceedings.
> (4) On granting an application the court must, subject to paragraph (5), specified a percentage increase in the charges to be allowed at taxation.
> (5) The Court of Session may instead remit to the Auditor to determine the level of increase.
> (6) In considering whether to grant an application, and the level of any increase, the court or, as the case may be, the Auditor is to have regard to –
>
> (a) the complexity of the proceedings and the number, difficulty or novelty of the questions raised;
> (b) the skill, time and labour and specialised knowledge required of the solicitor;
> (c) the number and importance of any documents prepared or perused;
> (d) The place and circumstances of the proceedings or in which the work of the solicitor in preparation for, and conduct of, the proceedings have been carried out;
> (e) the importance of the proceedings or the subject matter of the proceedings to the client;
> (f) the amount or value of money or property involved in the proceedings;
> (g) the steps taken with a view to settling the proceedings, limiting the matters in dispute or limiting the scope of any hearing".

[10] The petitioners argue that all of the above heads, with the exception of (f), come into play, and, taken together, justify the increase sought of 100%. The respondents take a slightly more nuanced approach. They submit that while the petitioners may be entitled to an additional charge, and concede that the court should itself decide that issue rather than remit to the Auditor in terms of rule 5.2(2), an increase is justified only by head (e); and, moreover, that the court should not itself fix the amount of the additional charge but should remit that matter to the Auditor to determine, in terms of rule 5.2(5). The petitioners' response to that point is that no reason has been given for the court itself not specifying a percentage under paragraph (4).

[11] Since on either approach I must have regard to the factors in rule 5.2(6) in deciding what to do, I will begin by discussing those factors.

Complexity, number, difficulty or novelty of questions raised

[12] The petitioners found mainly upon the novelty of the church law argument (previously referred to as the constitutional issue). They submit that this argument raised issues not previously raised in Scotland and drew on international cases and cross-border cases. The complexity and novelty of the questions raised were illustrated by the number of authorities referred to, which far exceeded the usual allowance of ten cases.

[13] The respondents point out that the international and convention case law was discounted by the court; that the significance of the complexity and novelty of the questions raised was diluted by the instruction of experienced senior counsel; and that the convention claim involved the application of well-established authority to the facts of the case. The respondents also point out (and this applies to all of the heads) that, as paragraph (3) makes clear, any increase is intended to reflect the responsibility undertaken by the solicitor in the

conduct of the proceedings and that each head of the rule must be viewed through that prism.

[14] I consider that the petition did raise novel and difficult questions, not least in relation to the tension between the state's right to legislate on civil matters and the church's right to non-interference in spiritual matters. I also consider that it is reasonable to regard counsel and solicitor as working as part of a team and that it is no answer to a claim for recognition of head (a) merely to say that experienced senior counsel was instructed. In short, I am satisfied that the complexity of the proceedings and the difficulty and novelty of the questions raised did increase the responsibility undertaken by the solicitor such as to merit some level of increase.

Skill, time and labour and specialised knowledge required of the solicitor

[15] The petitioners submit that the solicitor involved in the case was highly experienced and a solicitor advocate (although he did not act in that capacity in this case). This allowed the case for the petitioners to proceed without the necessity to instruct junior counsel. The solicitor's skills and ability to fulfil the dual role should be recognised in expenses. The claim was based upon his skill as a solicitor, not as a solicitor advocate.

[16] The respondents submit that while the petitioners might have instructed junior counsel, they did not do so. Nothing had been advanced to justify the argument that this factor should be taken into account.

[17] There is some degree of overlap with paragraph (a). As acknowledged in my discussion of that paragraph, I consider that there is merit in the argument that solicitor and counsel should be regarded as a team. Under this head, also, I consider it relevant that the solicitor was acting for 27 petitioners, each presumably with their own demands. The

respondents' answers to that point is to query the need for 27 petitioners but I do not think it is for the respondents to take that point. The fact is that there were 27 petitioners which must have impacted on the time and labour required of the solicitor, and increased the responsibility undertaken by him. The issues raised did require skill and specialised knowledge and it is in relation to this head that I consider that the letter before action is relevant (rather than head (g), as discussed below). Accordingly I also have regard to this factor as one which justifies some level of increase.

Number and importance of any documents prepared or perused

[18] The petitioners point to the number of authorities which were ultimately lodged (35) and to the quantity of productions. The respondents say that the bulk of this work was done by others and in any event that the number of productions was nothing out of the ordinary for a Court of Session action.

[19] While the number of documents may have been unexceptional, those which were produced were undeniably important and undoubtedly had to be perused and assimilated. Accordingly I consider that this factor attracts some, although little, weight.

Place and circumstances of the proceedings etc

[20] The petitioners found upon the multi-party nature of the litigation, the truncated timetable conducted in the circumstances of a pandemic with no access to the usual supports of the solicitor's firm's facilities, complicated by the introduction of an additional party shortly before the hearing requiring additional liaison to manage the proceedings.

[21] The respondents, as already noted, query the necessity for 27 petitioners. They say that the truncated timetable was of the petitioners' own choosing. In so far as reference was

made to the pandemic, the respondents point out this can be said of almost all civil litigation within the past 12 months. Finally, nothing about the additional party's introduction into the proceedings was remarkable enough to justify an additional charge.

[22] Having already taken the fact that there were 27 petitioners into account in considering head (b), I do not consider that it should attract additional weight under this head. However there is merit in the submission of senior counsel for the petitioners that the issues were sufficiently urgent to demand a truncated timetable, which is a factor to take into account. The pandemic issue is an interesting one. As a matter of principle, I do not see why, in appropriate circumstances, solicitors whose work has been made more difficult by the circumstances under which they are constrained to work, whether caused by a pandemic or otherwise, should not on occasion be rewarded by an additional charge. On the other hand, we were, by the time of this petition, some 12 months into this pandemic and it is not unreasonable to proceed on the basis that solicitors and their firms have had time to adjust to the new way of working. I therefore attach no weight to any "pandemic factor" nor to the introduction of the additional party, which in no way added to the responsibility undertaken by the petitioners' solicitor. In summary, to the extent that the proceedings were urgent and did require to be conducted under a truncated timetable, but not otherwise, I attach some weight to this head.

Importance of the proceedings or the subject matter to the client

[23] The petitioners submitted that the importance for them was more in relation to the constitutional argument than the ECHR one. They faced a conflict in relation to a matter of central importance to their religion and belief. They were challenging the government in relation to a material aspect of Cabinet decision making.

[24] The respondents did not dispute that this head gave rise to a basis upon which the court might grant an increase. The respondents also pointed out that judicial review of governmental decisions invariably involved a challenge to ministerial decision making and did not of itself result in proceedings being important. The respondents further submitted that the percentage awarded ought to be significantly less than the amount sought, reflecting the limited extent to which the importance to the client was actually reflected in the responsibility undertaken by the solicitor.

[25] I accept that the case raised issues of considerable importance to the petitioners, such as to increase the responsibility undertaken by their solicitor in the conduct of the proceedings and that this factor attracts weight in deciding whether an additional charge is justified and, if so, the extent of the additional charge.

Steps taken with a view to settling the proceedings, limiting the matters in dispute or limiting the scope of any hearing

[26] The petitioners rely here upon the lengthy letter before action which was to no avail. They submit that this exhibited a great degree of skill and that credit should be given for it.

[27] The respondents respond that the mere sending of a pre-action letter cannot justify an additional charge under this head. It could not be said that the letter, however skilful, was written with a view to settling the proceedings once under way, limiting the matters in dispute or limiting the scope of any hearing. As such, it does not fall within the ambit of this head.

[28] As I have stated above, I accept that the letter displays the skill and specialised knowledge of the solicitor, which I have already taken into account under head (b). Beyond

that I consider there is merit in the submissions of the respondents and I do not attach any additional weight to the pre-action letter under this head.

Decision

[29] In summary, I accept that to a greater or lesser extent, all of the factors relied upon by the petitioners, with the exception of head (g), justify an additional charge and are relevant in determining the level of any increase. Two questions then potentially arise: first, whether I should determine the level of the increase myself or, as urged to do by senior counsel for the respondents, remit that question to the Auditor to determine; and second, if I do determine it myself, what should the level of increase be?

[30] As senior counsel for the respondent acknowledged, if I were to make a remit to the Auditor, the Auditor would require to have regard to all the factors in paragraph (6) of new, and his discretion would not be constrained in any way by the view I had reached. For example, he might decide that only (e) applied and he would be free to reach his own view as to the weight to be attached to the various different factors.

[31] Paragraphs (4) and (5) of the rule, it seems to me, allow me absolute discretion as to whether to specify the percentage increase myself or remit to the Auditor. To that extent, I do not agree with the submission of senior counsel for the petitioners that the default position is that the court should specify the percentage increase itself, unless some cause has been shown as to why it would be better to remit to the Auditor. However, in any event the respondents have advanced a reason for remitting to the Auditor, namely that he would be better placed to determine the level of increase because he would have access to the files and could see precisely what work had and had not been done, and the question I have to determine is whether I should remit to the Auditor for that reason.

[32] I reject the respondents' approach. It seems to me that I am in a better position than the Auditor to form a view on the responsibility undertaken by the solicitor in the conduct of the proceedings, when I presided over the proceedings from start to finish and am equally able as the auditor to form a view on each of the heads in the rule, and the impact each had on the responsibility undertaken by the solicitor. It is unnecessary, in order to form a view, to have regard to the solicitor's file. Having formed a view that the factors in heads (a), (b), (c), (d) and (e) all, to a greater or lesser extent, merit an additional fee, and also having formed a view as to the comparative weight which each factor should attract, it seems to me that I should take the final step of myself determining what the level of increase should be.

[33] In carrying out that exercise, I consider that the approach is more refined than simply counting up the number of factors which apply, and attributing a certain percentage increase to each one, an approach which is sometimes advocated by solicitors, albeit not in this case. As I have indicated in discussing the individual factors, some of them attract little weight; others, more weight. It is possible to envisage a case where only one or two factors applied which, because of the impact on the responsibility undertaken by the solicitor, justified a higher percentage increase than one in which all the factors were present but to a lesser extent. One example of the former might be the case referred to, anecdotally, by senior counsel for the petitioners, which was conducted within a much shorter time frame and in which a 50% increase had been agreed. I derive no assistance from that example. Each case must in any event turn upon its own circumstances.

[34] In this case, I consider that the importance of the proceedings attracts most weight and that the other factors in combination attract probably the same amount of weight again. I do not consider that an increase of the highest magnitude is appropriate. The appropriate figure is somewhere between that contended for by the pursuers, and the somewhat

tentative counter suggestion on behalf of the defenders of 25-30%, which was based purely on head (e). In all the circumstances, having regard to the increased responsibility undertaken by the solicitor in relation to the heads identified above, I have determined that an appropriate percentage increase is one of 50% and I will so order.