OUTER HOUSE, COURT OF SESSION

[2024] CSOH 19

CA6/23

OPINION OF LORD BRAID

In the cause

LIVINGSTON FOOTBALL CLUB LIMITED

Pursuer

against

NEIL HOGARTH

Defender

Pursuer: Forsyth; Blackwater Law Limited
Defender: D Thomson KC; Shoosmiths LLP

27 February 2024

Introduction

[1] The pursuer's action against the defender was previously dismissed: [2023] CSOH 71. The defender has now enrolled a motion for the expenses of the action, insofar as not already dealt with, on an agent client, client paying basis from 17 August 2022, and for an additional charge. The pursuer agrees that it should be found liable in the expenses of the action, but opposes the other two elements of the motion.

[2] The pursuer has previously been found liable in the expenses of two minutes of amendment. It is common ground that those awards must be taxed on the party-party scale, no other basis of taxation having been sought at the time the awards were made.

Background

[3] A full description of the background is given in my previous opinion. In summary, the pursuer initially raised an action against the defender in Livingston Sheriff Court, seeking payment of the sum of £74,000 on the basis of an alleged misappropriation by him of that sum by writing, and cashing, a cheque in his own favour. The pursuer subsequently lodged a minute of amendment, seeking to increase the sum sued for to £148,000, on averments which remain difficult to follow, but that minute of amendment was ultimately refused while a new crave seeking payment of £609,771.02, founded upon averments of fraud and breach of fiduciary duty whilst supposedly acting as a shadow director of the pursuer, was introduced by amendment. Another crave for £50,000 was also added. The new case rendered the action of sufficient complexity, and value, that a remit to the Court of Session was sought, and granted; and the action subsequently found its way on to the commercial roll. After sundry procedure, in the course of which it was on more than one occasion pointed out to counsel for the pursuer that the pleadings were, at best, difficult to follow and required significant adjustment, the case was set down for debate. On the first day of the debate, senior counsel for the defender mounted a wholesale attack on the pursuer's pleadings, including the averments of fraud, shadow directorship and breach of fiduciary duty. At the conclusion of his submissions, counsel for the pursuer sought and was granted an adjournment overnight, and the following morning he intimated that the conclusion for £609,771.02 was no longer insisted in, and the fraud case was departed from. The debate continued in relation to its remaining elements, which I held to be irrelevant and lacking in specification, and the action was duly dismissed. At the end of my opinion, I

suggested that if a fresh action was raised, the issues which appeared to be in dispute were sufficiently straightforward to be litigated once more in the sheriff court.

The scale on which expenses should be awarded

[4] The law on the issue of which scale of expenses should be awarded was summarised by Lord Hodge in *McKie* v *Scottish Ministers* 2006 SC 528, para [3], where he set out five propositions. The third and fourth are relevant for present purposes: where one party has conducted the litigation incompetently or unreasonably, thereby causing the other party unnecessary expense, the court can impose, as a sanction against such conduct, an award of expenses on the solicitor client scale; and, in its consideration of reasonableness, the court can take all relevant circumstances into account.

Additional charge

[5] Rule 5.2 of the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019/75 (SSI), insofar as material, 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), specify 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;
...
(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."

Submissions for the defender

[6] Senior counsel for the defender submitted that the averments of fraud, adjusted into the minute of amendment on 17 August 2022, had fallen far short of what was required, and that expenses on an agent client basis should be awarded from that date, when the conduct of the cause became unreasonable. Under reference to Lord Hodge, again, in *Grant Estates Ltd* v *The Royal Bank of Scotland Plc and Others* [2012] CSOH 133 paras [86] to [89], and the authorities therein cited, he submitted that in alleging fraud, clear and specific averments were required on three matters: the act or representation founded upon; the occasion on which the act was committed or the representation made; and the circumstances relied on as yielding the inference that that act or representation was fraudulent. Fraud was neither to be lightly inferred, nor lightly averred (para [93], citing Lord Brodie in *Zurich CSG Ltd* v *Gray & Kellas* 2007 SLT 917 at paragraph 24). Allegations of fraud could have serious consequences. As had happened in *Grant Estates*, the pursuer's fraud case, hopelessly irrelevant and lacking in specification from the outset, was not insisted in. This was a paradigm example of unreasonable conduct. As for an additional charge, the factors in rule 5.2(6)(a), (e) and (f) were in play. The allegations were serious and potentially had far-reaching consequences for Mr Hogarth's reputation and character, such as to increase the difficulty for, and burden on, his solicitor. There was admittedly some degree of overlap

between the factors. The court should fix the percentage itself, failing which remit that issue to the auditor in terms of rule 5.2(5).

Submissions for the pursuer

[7] Counsel for the pursuer submitted that the action had not been wholly departed from and insofar as the action averred misappropriation of funds, it had been insisted in all the way to debate, albeit unsuccessfully. Viewed as a whole, the action had been neither unreasonable nor incompetent; the minute of amendment had not related solely to the fraud and breach of duty case, but also to the other elements of the case. Simply because a case was hopeless did not mean that it should attract an award of agent client expenses. The defender might yet be shown to have acted dishonestly by writing to himself, and encashing, a cheque; and he might yet be found liable in a six figure sum to the pursuer in future proceedings. The pursuer's conduct had to be viewed in that light. As for the motion for an additional charge, to the extent that the action had been complex, the complexity had been for counsel rather than the solicitors to deal with. Neither the importance to the defender nor the value of the action was sufficiently out of the ordinary to attract an additional charge. If awarding an additional charge, its level should be left to the auditor to determine.

Decision

Which scale

[8] It was the introduction, by amendment, of averments of fraud and breach of fiduciary duty that directly led to this action being remitted to the Court of Session. The consequences for the defender of being found guilty of fraud, even in a civil context,

could have been significant. He had no option but to instruct his solicitors to investigate and defend the action against him, and to instruct counsel. For their part, the defender's solicitors had to understand the case that was being advanced, and to investigate it in order that answers to the minute of amendment could be instructed. The action called in the commercial court on several occasions, before a debate was fixed. At the debate, the pursuer's counsel, having heard the submissions made by senior counsel for the defender, could not, or at any rate did not, muster a single argument in support of the fraud/breach of duty case, which he departed from. Those averments themselves were as opaque and diffuse as those which were insisted in, but which led to the rump of the action being dismissed. They fell far short of being clear and specific in relation to the three matters specified by Lord Hodge in *Grant Estates.* It ought not to have been necessary for counsel for the pursuer to have heard the submissions of counsel for the defender before reaching the view that the case of fraud and breach of fiduciary duty could not be maintained. As senior counsel for the defender put it, the pursuer had marched the defender all the way to the top of the hill, to no end. Whether or not it is a paradigm example of unreasonable conduct, I am satisfied that the pursuer's conduct, in introducing a case which was hopelessly flawed from the outset and remained that way, which directly resulted in a remit to the Court of Session, was unreasonable, and caused the defender unnecessary expense for which he would not be adequately compensated by an award of party-party expenses. Put another way, it is entirely appropriate that the pursuer be sanctioned in expenses. No case, let alone a fraud case, should be litigated in the commercial court on the basis of averments which fall far short of the well-known standard and which have not been properly thought through. The pursuer is not saved from that consequence by the fact that a relatively small part of the case (in monetary terms) was deemed by counsel to

be sufficiently strong to argue at debate, not least having regard to the fact that even those pleadings did not disclose a case fit for proof. Finally, and for completeness, it is nothing to the point whether the pursuer might have a valid claim against the defender. It is the reasonableness, or otherwise, of the conduct of the present litigation, not some future one, on different pleadings, which is in question. I will therefore find the defender entitled to the expenses, insofar as not already awarded, on an agent client, client paying basis, from 17 August 2022, the date when the fraud/breach of duty case was introduced by adjustment into the pursuer's existing minute of amendment.

[9] There is a complication in that the defender has already been found entitled to the expenses of the minute of amendment in question, and a subsequent minute of amendment, both on a party-party basis. Thus the auditor's task will not necessarily be straightforward. He will require to "carve out" the expenses of the two amendments from the general award. I did give consideration to simplifying his task by ordering that the agent client scale run only from a later date, as counsel for the pursuer invited me to do. However, that would run the risk that some expenses which ought to be taxed on the more favourable scale might be omitted, and logically it is correct that the agent client scale should run from the date when the pursuer's conduct of the litigation became unreasonable, 17 August 2022, when the fraud case was first introduced to the pleadings. That the auditor's task is difficult does not mean that he should not be asked to perform it. He has the necessary skill and experience to determine which costs, if any, incurred during the time-frame of the minute of amendment procedure is attributable to that procedure, and which are attributable to the action more generally.

Additional charge

[10] There is some degree of overlap between this, and the award of agent client expenses, inasmuch both rest to an extent on the same factual matrix (albeit, less overlap than there would have been had agent client expenses been awarded in relation to the expenses of the minutes of amendment). Nonetheless, different tests fall to be applied. One focusses on the conduct of the paying party; and the other on the additional responsibility undertaken by the entitled party's solicitor due to any one, or a combination, of a number of factors. In the present case, the factors relied upon are the complexity of the proceedings, importance to the defender and value. Dealing with each in turn:

Complexity of the proceedings and the number, difficulty or novelty of the questions raised

[11] One of the difficulties in deciding whether this factor is engaged is to try to separate the confusing nature of the pleadings from the underlying legal concepts being invoked. If the only factor relied upon had been that the pleadings were difficult to comprehend due to the manner in which they had been expressed, that would not of itself be sufficient to attract an additional charge. However, I have reached the view that the underlying circumstances and legal concepts invoked by the pursuer in its pleadings, albeit in an unspecific and confusing manner, were sufficiently complex to engage this factor, involving as they did allegations of fraud, shadow directorship and breach of fiduciary duty, which, if not novel, certainly raise questions of difficulty. I do not accept the argument that the issues raised were necessarily predominantly legal issues for counsel to deal with at debate. The defender's solicitors had to understand and investigate the case against the defender, in order that counsel could be properly and fully instructed, particularly in a commercial action (as this became), where much of the work is front-loaded.

Importance to the defender/value

[12] I deal with these factors together because they are inextricably interlinked in a way they perhaps might not be in every case. The sum of just over £600,000 is not outlandishly high in Court of Session terms. However, where, as here, it was sought from an individual on the ground of alleged fraud, I consider that, in combination, it did increase the level of responsibility undertaken by the defender's solicitors to such an extent as to engage the right to an additional charge, having regard to the consequences, financial and reputational, had the pursuer's claim been successful.

The level of increase

[13] Rules 5.2(4) and (5) of the Act of Sederunt, read together, give this court the option of either determining the level of percentage increase itself, or remitting that matter to the auditor. No guidance is given as to the factors to be taken into account, and the court has absolute discretion in deciding which course is appropriate. Had it only been importance/value which was engaged, I would probably have come to the view that I was as well-positioned as the auditor to determine the level, and fixed the percentage myself. I might also have come to that view had the case proceeded to proof and I had been able to see at first hand the degree to which the solicitors' labours had contributed to the case, and how they had in fact coped with the complexity (such as by helping to draft witness statements). As it is, however, I have no real feel for the extent to which factor (a), although engaged, resulted in the responsibility on the solicitors being increased. That can be determined, in this case, only by perusal of the solicitors' files. Such perusal will probably

also assist in determining the weight to be attached to the other factors. For these reasons, I will adopt the approach of remitting to the auditor to determine the level of increase.

Disposal

[14] In summary, I have found the pursuer liable in the expenses of the cause save insofar as already awarded by the interlocutors of 9 May 2023 and 19 September 2023, to be taxed on an agent client, client paying basis from 17 August 2022. I have also found the defender's solicitors entitled to an additional charge having regard to factors (a) (e) and (f) of rule 5.2(6) of the Act of Sederunt; and, in terms of rule 5.2(5), I have remitted to the auditor to determine the level of percentage increase. Since the defender has been entirely successful in his motion, I have also awarded the expense of the motion to him.