

## Scottish FOIL Expenses Sector Focus Team

### Minutes of meeting of 20 APRIL 2023, 2pm to 3pm, on Microsoft Teams Updated to 30 MAY 2023 with details of reported case law and any other relevant subsequent developments

**In attendance:** David McLeod, Keoghs, Fiona Dorman, Weightmans, Fiona McEwan, Clyde & Co, Mark Jamieson, Clyde & Co, Stephen Bryceland, BTO, Tim Lennox, Kennedys, Val Pitt, Horwich Farrelly

**Apologies:** Caroline Coyle, DWF, Kate Donachie, Brodies

#### **1. QOCS stories and reports**

- 1.1. As at both 20 April and 30 May, both 2023, there remain only two reported cases on Scottish QOCS, both covered in the minutes of our 12 January 2023 meeting. These are *Lennox* (on “manifestly unreasonable” and “abuse of process”, neither of which were established in this case) and *Gilchrist* (on “a fraudulent representation”, which was not established in this case).
- 1.2. In unreported cases, “local” sheriff courts appear more amenable than ASPIC in making awards of expenses against pursuers in personal injury litigation but these courts do not seem keen on writing on QOCS, with some saying that they are best leaving ASPIC to develop the written jurisprudence on it!
- 1.3. The “high bar” set in *Lennox* on manifest unreasonableness (which was in the context of a pursuer losing on the merits at proof) seems to have “spilled over” at ASPIC into other contexts and sometimes in ways that could reasonably be considered unjustified. For example, after a pursuer’s agent withdrew from acting and the pursuer cooperated no further with the court, with the case being dismissed at peremptory diet, a subsequent motion for an award of expenses against the pursuer was refused. Yet, in another case, where the pursuer did appear at a peremptory diet following agents’ withdrawal, an award of costs was made against the pursuer. This award came about because, at the peremptory diet, the pursuer confirmed to the sheriff that he was “abandoning at common law” (after a specific question from the bench on whether that may be noted as the pursuer’s position). This opened the door to an application for an award of expenses against the pursuer on the abandonment ground rather than the manifestly unreasonable ground. But - surely - it is more disrespectful to simply ignore the case and the court entirely after agents’ withdrawal than to cooperate with the court and confirm abandonment? Can we make something of an argument that non-cooperation post-withdrawal may be considered “tantamount to abandonment” and seek awards of expenses against pursuers on that basis, trying to ground that base as a coming within the abandonment qualification to the costs shift, while also continuing to run arguments on manifestly unreasonable conduct / behaviour in those circumstances?
- 1.4. We should keep a close look-out for what happens on costs following pursuers’ agents’ withdrawals and share information on that at future meetings of this sector focus team.
- 1.5. By requirement of s.23 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, Scottish Ministers must, as soon as practicable after 5 June 2023, review the operation of, *inter alia*, QOCS and Damages Based Agreement (DBA) success fees and lay before the Scottish Parliament a report on that review. This report must, in particular, contain information about the effect of QOCS on access to justice and the administration of the Scottish courts.

## **2. Tenders and pursuers' offers experiences**

2.1. The main question for the civil Sheriff Appeal Court in *Gray and Deeney or Sweaton v John Cape t/a Briggate Investments, SAC (civil)*, 10 May 2023, link [here](#) was whether the deadline for moving for extra money with reference to a pursuer's offer was the pre-taxation decree for expenses or the post-taxation decree decerning for payment of expenses. The answer is the latter - "We find that 'no later than the grant of decree for expenses as taxed' in OCR 27A.8(4) means no later than the decree decerning for payment of expenses as taxed."

## **3. Additional fee experiences**

3.1. Nothing in particular discussed on this at this meeting and no reported case law on additional fees in the period covered by these minutes.

## **4. Sanction for counsel / certification of persons as skilled witnesses (experts) experiences**

4.1. The bar for meeting the "objective reasonableness" test for sanction for counsel at sheriff court level appears to be a bit higher now than in the years immediately following s.108 of the Courts Reform (Scotland) Act 2014 coming into force on 22 September 2015.

4.2. Employers' liability cases with no future loss (or no significant future loss) now appear often to be refused sanction for counsel but a lot will, of course, turn on any complexities in any particular case. In general terms, sheriff courts appear to be looking for a coherent explanation on some level of complexity, or difficulty, to justify sanction for counsel.

4.3. A low bar having been set initially for sanction for counsel at sheriff court level, with that bar then seeming to rise, we wonder whether the converse may ultimately be seen on QOCS (i.e. will the high bar initially set on, for example, the application of "manifestly unreasonable", subsequently come down a bit?).

## **5. Issues on scale of expenses / percentage downwards modification of costs**

5.1 Nothing in particular discussed on this at this meeting and no reported case law on additional fees in the period covered by these minutes.

## **6. Any other relevant experiences or developing knowledge on expenses / costs**

6.1. Stephen Bryceland reported two decisions made by the auditor of the Court of Session in a recent taxation in a very complicated case -

6.1.1. The pursuer's agents were seeking 250-word based charges for perusing care management report(s). The auditor taxed those charges off in their entirety because a care manager was not considered a skilled person who was preparing a report for the purposes of the litigation (rather, the care management report was being prepared for the purposes of managing the pursuer's care).

6.1.2. The pursuer's agents were seeking charges for the reading-in time of a replacement junior counsel who was parachuted into the case late on after the originally booked junior counsel became unavailable for reasons that were nobody's fault. This reading-in time was also taxed off by the auditor in its entirety.

6.2. In *Petition of School and Nursery Milk Alliance Ltd for judicial review of the funding rates set in the Milk and Healthy Snack Scheme (Scotland) Regulations 2021 (as amended) and the guidance issued by the Scottish Ministers in relation to the Scottish Milk and Healthy Snack Scheme*, Lord Braid, Outer House, Court of Session, 19 May 2023, link [here](#), Lord Braid considered the recoverability of charges from English solicitors and English counsel in connection with Scottish litigation. Lord Braid -

6.2.1. found that the auditor had not erred in taxing off English counsel's charges - these were not charges reasonably incurred for conducting the litigation in a proper manner.

6.2.2. found that the auditor had erred in taxing off the entirety of English solicitors' charges. In determining the reasonableness of the English solicitors' charges, the auditor should have done a comparison exercise with what Scottish solicitors would have recovered if they had done the work that the English solicitors did.

**7. The law reform agenda insofar as impacting on issues of expenses / costs**

7.1. The minutes of the SCJC meeting on 20 February 2023 record that drafting instructions have been issued to the Lord President's Private Office on an increase in the value of one unit from £16.40 (the value from 29 April 2019 and continuing) to £18. There is no publicly available update on this as at 30 May 2023.

7.2. The minutes of the 21 March 2023 meeting of the costs and funding committee of SCJC show that this committee is continuing to work towards drafting court rules on "funders expenses orders" under s.10 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. There is no publicly available update on this as at 30 May 2023.

**8. Next meeting**

8.1 Our remaining two meetings of 2023 will take place on -

- Thursday 20 July 2023, 2pm-3pm on Microsoft Teams
- Thursday 19 October 2023, 2pm-3pm on Microsoft Teams