SHERIFFDOM OF TAYSIDE, CENTRAL AND FIFE AT FORFAR

[2017] SC FOR 82

FFR-SG207-17

NOTE BY SUMMARY SHERIFF JILLIAN MARTIN~BROWN

In the cause

NATALIE GOWANS

Claimant

Against

ELIZABETH MILLER

Defender

Forfar, November 2017

NOTE

Introduction

[1] This case came before me on the claimant's opposed incidental application for expenses. The dispute concerned whether the cap in article 3 of the Sheriff Court Simple Procedure (Limits on Award of Expenses) Order 2016/338 applied to the fees element only (ie exclusive of VAT and outlays) or to the whole expenses (i.e. inclusive of fees, VAT and outlays).

Procedural History

[2] The claimant raised the action for payment on 14 June 2017. The respondent disputed the claim and a case management discussion was scheduled for 6 October 2017. The parties settled the case at £2,184.50 prior to the case management discussion and the

claimant lodged an incidental application in relation to expenses, which was opposed. The case management discussion was discharged and the parties requested for the matter to be dealt with by way of written submissions.

[3] Having considered the written submissions for both parties, I issued an order on 23 October 2017 awarding expenses of £218.45 inclusive of VAT and outlays. I have been asked to provide a note outlining my reasoning on the basis that the same issue has arisen and continues to arise in other cases.

Submissions for Claimant

[4] The claimant submitted that reasonable outlays, specifically warranting dues and VAT in this case, were recoverable. VAT and outlays were recoverable separately from 'expenses' in terms of the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993. But for the introduction of restrictions on expenses by way of the Act of Sederunt (Fees of Solicitors and Shorthand Writers in the Court of Session, Sheriff Appeal Court and Sheriff Court Amendment) 2016 and Sheriff Court Simple Procedure (Limits on Award of Expenses) Order 2016, there were no other amendments to the 1993 regulations, which meant that VAT and outlays remained recoverable.

[5] If VAT and outlays were not recoverable, the principles of civil justice would not be achieved, because the courts would not be accessible to all and sensitive to the needs of those who use it. Individuals should be given the opportunity to instruct legal representation and if a solicitor is instructed, VAT and outlays should be recoverable. Without the opportunity to instruct an expert and recover the expert's fee as an outlay,

claimants may not be in a position to support their claims and there would be no equality of arms between claimants and respondents.

[6] In summary, both legislation and public policy supported the position that VAT and outlays should be recoverable as well as the expenses of the action.

Submissions for Respondent

[7] The respondent submitted that article 3 of the 2016 Order provided that where the value of the claim was greater than £200 but less than or equal to £1,500, the expenses awarded by the sheriff may not exceed £150. Where the value of the claim was greater than £1,500 but less than or equal to £3,000, the expenses awarded by the sheriff may not exceed 10% of the value of the claim. Exceptions were provided in article 4 but none were applicable in this case.

[8] Article 3 of the 2016 Order was similar to article 4 of the Small Claims (Scotland) Order 1988 as amended, which had restricted expenses to £150 for cases where the value of the claim was £1,500 or less and to 10% of the value of the claim for cases over £1,500. A relatively recent example was found in *McNaught* v *Milligan* 2015 G.W.D 17-27, where £150 was awarded for expenses in a case worth £325.

[9] Although "expenses" was not defined in the 2016 Order, it had a well-established and understood meaning to include all elements that ordinarily make up a judicial account, i.e. fees, VAT and outlays.

[10] The claimant's contrary position was an attempt to limit the effects of the cap. Public policy was the basis for the restriction on expenses by encouraging parties to deal with low value claims without recourse to solicitors. The lack of taxation or similar procedure confirmed the intention behind the fixed sum award. Section 81 of the Courts Reform

(Scotland) Act 2014 allowed for capped expenses to be departed from where there was a difficult question of law or a question of fact of exceptional complexity.

[11] In summary, it was common practice under the Small Claims procedure that expenses included VAT and outlays and that position had not changed with the introduction of Simple Procedure.

Decision

[12] Rule 1.2 of the Simple Procedure Rules sets out the principles of Simple Procedure. They include that cases are to be resolved as quickly as possible, with the least expense to the parties and the courts; and that parties should only have to come to court when it is necessary to do so to progress or resolve their dispute.

[13] Against that background, article 3 of the Sheriff Court Simple Procedure (Limits on Award of Expenses) Order 2016/338 has restricted expenses in a simple and predictable manner for the majority of cases. While exceptions apply in certain circumstances, such as unreasonable behaviour by a party or difficult issues of fact or law, in most cases a fixed sum can be easily determined at the conclusion of a case without the need to return to court.

[14] I am of the view that the term 'expenses' in the 2016 Order includes all the elements of a judicial account. That interpretation is in keeping with the principles of quick resolution at least expense and only coming to court when necessary. To interpret the cap as restricting the fee element of a judicial account only and allowing VAT and outlays to be recovered separately would remove predictability for parties when considering the potential costs of litigating low value claims.

[15] I therefore awarded the claimant expenses of £218.45, ie 10% of the value of the claim, inclusive of VAT and outlays.