
SCOTLAND / JUDGMENT

Stewart v. Speed [2006] ScotSC 26 (28 March 2006)

[2006] ScotSC 26

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Reference Number: A1517/05
SHERIFFDOM OF TAYSIDE, CENTRAL
AND
FIFE
AT KIRKCALDY

JUDGEMENT

OF SHERIFF WILLIAM HOLLIGAN in the cause DAVID STEWART , residing at 98 Bighty Avenue , Glenrothes, Fife KY7 5AF PURSUER against ARCHIBALD SPEED , residing at 47 Haddington Crescent , Glenrothes, Fife KY6 1LU DEFENDER ACT: Miss McKenzie; ALT: Miss Henderson. KIRKCALDY 28 March 2006. The Sheriff, having resumed consideration of the cause, GRANTS DECREE against the Defender for payment to the Pursuer of the sum of ONE THOUSAND FOUR HUNDRED POUNDS (£1,400.00) STERLING, and DECERNS; FINDS the Defender liable to the Pursuer in expenses in accordance with Chapter 10 of the Table of Fees for General Business in force prior to January 2004 ; ALLOWS an account thereof to be given in and Remits the same when lodged to the Auditor of Court to tax and to report. NOTE This is an action of reparation in which the Pursuer seeks damages arising out of a road traffic accident which occurred on 27 January 2005 . The matter called before me on the Pursuer's motion (No 7/1 of process) for decree in terms of a Minute of Tender and Minute of Acceptance. The issue between the parties concerns expenses. For the Defender, Miss McKenzie sought one of the following: expenses in favour of the Defender; no expenses due to or by either party; expenses in favour of the Pursuer on the summary cause scale. For the Pursuer, Miss Henderson sought an award of expenses in favour of the Pursuer on the summary cause scale failing which expenses by reference to the extra judicial scale in force either at January 2004 or January 2006. I do not understand the basic factual position to be in dispute between the parties. Miss McKenzie stated that the principal sum in the tender (£1,400) had been offered before the action was raised. I was told that an offer to settle in the sum of £1,250 was made on or about 26 August 2005. That offer was initially rejected. The Pursuer wanted to recoup the amount of excess on a policy of insurance amounting to £150. Settlement was agreed in the sum of £1,400. The Defender's representative (and I do not think it matters whether that be the Defender's insurers or agents) offered to pay to the Pursuer's agents the sum of £350 plus VAT and outlays by way of expenses. That, I was told, was calculated by reference to the extrajudicial scale in force prior to January 2004. That was rejected by the Pursuer's agent who sought a sum calculated by reference to the extra judicial scale in force as at

January 2004. That would have brought out a sum of £678.56 plus VAT and outlays. The main difference between the two scales was the investigation fee. I will refer to these scales later. In support of her motion, Miss McKenzie referred me to the following authorities:- *Gunn v Hunter*

(1886) 13 R 573; *Mavor and Coulson v Greerson*

(1892) 19 R 868; *Crombie v British Transport Commission* 1961 SLT 115. These cases showed that, where an extrajudicial offer had been made of a sum later accepted by the Pursuer then the court had the power to order the Pursuer to bear the expenses of process. In this case, the parties had agreed the principal sum. That which was tendered was the same sum as previously agreed and was the one accepted by the Pursuer in terms of the Minute of Acceptance. In opposition, Miss Henderson said that the Pursuer had acted reasonably in refusing the expenses tendered in the sum of £350 plus outlays. That amount was not enough to cover the costs of the Pursuer's agents to their client. Certain time costs were lodged in process and reference was made thereto. These time costs brought out sums in excess of £350. Miss Henderson referred me to the case of *Calder v Rush* 1970 SLT (Sh Ct) 51. If I was against her in her primary submission, Miss Henderson submitted that the Pursuer should be entitled to expenses on an extrajudicial scale; either that in force in January 2004 or January 2006. In support of that submission she referred me to *Neilson v Motion* 1992 SLT 124 and *Paterson v The North of Scotland Milk Marketing Board* 1993 SLT 781 and "Civil Practice" December 2005. I should add that reference was made in the course of the debate to *McPhail on Sheriff Court Practice* (Second Edition) and, in particular, paragraph 14.38. It was agreed that I could have regard to *McPhail*. The Minute of Tender is in the following terms:- "Graham for the Defender stated and hereby states to the court that without admission of liability and under reservation of his/her/their(sic) whole rights and pleas the Defender tendered and hereby tenders to the Pursuer the sum of ONE THOUSAND FOUR HUNDRED POUNDS (£1,400.00) STERLING together with such expenses as the court deems appropriate (under declaration that for the avoidance of doubt, the Defenders will in addition to the foregoing sums be responsible for discharging any liability in respect of recoverable benefits in terms of Section 6 of the Social Security (Recovery of Benefits) Act 1997 or any amendment of re-enactment thereof)." The Minute of Acceptance of Tender is in the following terms:- "Stead for the Pursuer stated and hereby states to the court that he hereby accepts the Defender's Minute of Tender No of Process." The Initial Writ was warranted on 30 November 2005 . A Notice of Intention to Defend was lodged on 22 December 2005 . Defences were lodged on December 2005 together with the Minute of Tender. The Minute of Acceptance was lodged on 13 February . The Initial Writ is in what I might describe as standard terms for a reparation action of its kind. The Defences admit liability but take issue as to quantum. Neither party made any reference in the pleadings to the negotiations which took place prior to the raising of the action. I have set out the full terms of the Minute of Tender. It is not in the terms approved by the Inner House in the case of *McKenzie v H D Fraser & Sons Limited* 1990 SC 311, a point I did comment upon in the debate before me. Neither party argued that the Tender was invalid. Indeed, as in the case of *Crombie* , the Pursuer could hardly

do so having lodge a Minute of Acceptance. However, in the intervening period, I have become aware of the decision in *Brackencroft Limited v Silvers Marine Limited* 2006 SLT 85. I have considered whether I ought to put this matter out by order for parties to address me further. I decided not to do so. Although this may be a matter of principle, the sums at stake are not large and do not warrant the expense of a further hearing. Secondly, and more importantly, for reasons I shall come to, I do not think it affects the outcome. In the cases of *McKenzie* and *Brackencroft* the Inner House made it plain that, in order to be classified as a judicial tender, a tender ought to be in a form which carries with it an offer of expenses. In *Brackencroft* it did not and was therefore not regarded by the court as a valid tender. Unlike *McKenzie* and *Brackencroft*, this is a case in which the Defender maintains the action should never have been raised at all. In *McPhail on Sheriff Court Practice* (Second Edition) at para 14.38, footnote 76, under reference to *Crombie*, it is stated that it is questionable whether an offer of expenses should be required where an extrajudicial offer of the sums tendered had been made before the raising of the action (the same text appears in the first edition at para 14.36, footnote 42, written before the decision in *McKenzie*). As a simple matter of drafting, it does seem odd that a Defender should state in a tender an offer to pay expenses in a situation where he considers that not only are no expenses payable, but that he should be entitled to seek expenses from the Pursuer. None of the authorities to which I was referred seems to have addressed this issue fully and, in any event, those most relevant pre-date *McKenzie* and *Brackencroft*. It could be said that the cases of *McKenzie* and *Brackencroft* were dealing with cases in which the action either settled after sundry procedure or after proof and that cases such as the present form an exception to the rule. I have reached the conclusion that such an approach should not be followed. Firstly, the Inner House made very clear that tenders ought to follow a particular style, at least in so far as expenses are concerned. If an exception is introduced, almost inevitably, there will be scope for argument as to when it does or does not apply. Furthermore, although an offer of expenses by the Defender, in cases such as this, may, as a matter of drafting seem odd, provided it is regarded as being a trigger for the exercise of the court's overall discretion as to the awarding of expenses, then there is nothing objectionable in principle. Accordingly, in my opinion, even where a Defender disputes whether the action should have been raised at all, the lodging of a tender in the form specified by the Inner House, permits the Defender to seek, and the court to award, expenses against the party accepting the tender. If I am correct in that view, then, following *McKenzie* and *Brackencroft*, I must conclude that the tender was not a valid tender because it did not contain an offer to pay expenses. However, as the Inner House pointed out in *Brackencroft*, the tender may be a relevant factor in determining the issue of expenses. So far as the authorities to which I was referred are concerned, neither *Gunn* nor *Mavor and Coulson* involved a minute of tender. In both actions an averment was made on record by the defender narrating a prior offer to settle, a practice which has subsequently been viewed with some disfavour. In *Crombie* it was accepted that the pursuer had raised an action against the defenders without intimating a claim beforehand. The defenders averred that no intimation of the claim had been made beforehand and

lodged a minute of tender which was immediately accepted although the tender itself does not seem to have featured greatly in the decision. In each of these three cases, the defender was held entitled to an award of expenses against the pursuer. *Calder v Rush* concerned an extrajudicial offer which proved to be less than the sum awarded. *Nelson v Motion* concerned the premature and unreasonable raising of an action. *Paterson v The North of Scotland Milk Marketing Board* arose where a claim had been compromised but the pursuer's agents alleged that the compromise was entered into in error, the error relating to the pursuer's wage loss. As a result, an action was raised, a tender was lodged and decree granted in terms thereof. The Lord Ordinary held that the action should not have been raised at all; any error arose because of the fault of the pursuer's agent. I note that in both *Neilson* and *Paterson* the disposal was that the pursuer should be entitled to his expenses in accordance with Chapter 10 of the Table of Fees then in force (the extrajudicial scale). In so doing, the court was exercising its power to modify an award of expenses. Chapter 10 of the Table of Fees has, for some time, been a feature of practice. Chapter 10 is part of the Table of Fees published by the Council of the Law Society of Scotland. As I read it, that concerns certain recommended methods of how a solicitor should calculate a fee to his client. For example, the Table of Fees deals, not only with negotiated settlements but also executries and conveyancing. The relevant part of Chapter 10 in force immediately before January 2004 provided as follows:- "Chapter 10. Negotiated settlements. Negotiating and completing settlement of claims for compensation or reparation on any ground whatever Maximum fee: 20U Up to £2,500 25 per cent Notes:- (i) This fee may be charged where the settlement was effected on or after 1 April 1996. The charge to be made by the solicitor for each party against his own client." Chapter 10 of the Table of Fees in force as at 2004 provided:- "Chapter 10. Negotiated Settlements. Negotiating and completing settlement of claims for compensation or reparation on any ground whatever. (1) Investigation fee Settlements up to and including £1,500 25 U Notes:- (i) This fee may be charged where the settlement was effected on or after 1 January. (ii) In all cases the solicitor has the option of charging a detailed account against his own client in accordance with Chapter 3, under deduction of fees recovered from the other party or their insurer." The principal difference between the 2004 table and the 2003 table was the investigation fee. I was told by Miss McKenzie and Miss Henderson that it was this which proved the difficulty in the current case. The question of the investigation fee was not generally resolved until the introduction of a Pre action Protocol being, as I was told, a document agreed between the Council of the Law Society of Scotland and a number of insurers. The Pre action Protocol allows for an investigation fee on settlements up to and including £1,500 in the sum of £300 rather than by reference to a number of units. As I was also told, the matter was yet further complicated by the fact that in February 2005, the Council of the Law Society withdrew the Table of Fees altogether (see the *Journal of the Law Society* (2005) page 45). The issue in this case is the entitlement, if any, of either party to an award of expenses in the current process. As I understand it, and although it might be a trite observation to make, there is no absolute entitlement to an award of expenses. An award of expenses is a matter for the

discretion of the court. As Lord Milligan said in *Crombie*, referring to *Mavor and Coulson v Greerson*, when considering the question of expenses, the court will attach importance to the reasonableness of the conduct of the parties (at page 116). Later on in the course of his opinion (at page 117), Lord Milligan also referred to the importance of "the attitude of the parties" and "whether the action was really necessary". The general rule in relation to expenses is set out in *McPhail* at paragraph 19.07 in which the learned author quotes from the opinion of Lord President Cooper in the case of *Howitt v Alexander and Sons* SC 154 at page 157. In turn, Lord Cooper quoted from *McLaren on Expenses* at page 21. As Lord Cooper observed, the conditions upon which judicial discretion as to expenses should be exercised have never been fixed within a framework of rigid and unalterable rules. As the passage quoted by *McPhail* makes clear, if a party is put to expense in vindicating his rights he is entitled to recover such expense from the person by whom it was created unless there is something in his own conduct that gives him the character of an improper litigant in insisting on things which his title does not warrant. When it is said that expenses follow success, that is really an application of the principle in the sense that the rights of the parties are taken to have been all along such as the ultimate decree declares them to be and whoever unsuccessfully resisted the vindication of those rights is *prima facie* to blame. As I understand it, the parties agreed the principal sum. They could not agree the question of expenses. Much of the disagreement appears to have centred around the application or otherwise of the Table of Fees in force immediately prior to January 2004 and that which was said to be in force as at January 2004. The immediate difficulty that I have is that, it seems to me that Chapter 10 of the Table of Fees constituted a statement by the Council of the Law Society as to what might be a reasonable fee which a solicitor was entitled to charge his client. In other words, Chapter 10 had no direct bearing between pursuer and defender. So much appears to be acknowledged in Note (ii) to the January 2004 Table. It was not suggested to me, nor am I aware of any authority for the proposition, that Chapter 10 of the Table of Fees was an enforceable right as between pursuer and defender. It was not suggested to me that the Pursuer had a right to expenses. As a matter of general principle, legal expenses may, or may not, be recoverable as a head of damages, depending upon the Pursuer's cause of action or as part of the expenses of process in the litigation itself. The former was not advanced before me and, in relation to the latter, the expenses being sought have occasioned the commencement of the action, the principal sum having been agreed already. Therefore, on a strict analysis, the Pursuer was litigating for something to which there appears to have been no legal entitlement. However, I do not think matters are quite as clear cut as that. In *Neilson* Lord Osborne was faced with a similar issue. Although no agreement had been reached on the principal sum, the defender's insurers had intimate a willingness to settle the claim, given a reasonable time to investigate it. The Pursuer had acted unreasonably by litigating when he did. Lord Osborne held that, had no proceedings been raised, the Pursuer could have expected to be offered expenses in accordance with the Table of Fees then in force. As I read the opinion, it appears to have been accepted that expenses would have been paid on this basis had the claim settled before proceedings commenced. The obvious complication here is that

parties do not agree which Table of Fees ought to apply. In my opinion, I do not think the Pursuer is entitled to an award of expenses on a judicial scale. The Defender offered to pay a sum which, I was told, the Defender had previously offered to pay and which, as a principal sum, the Pursuer was willing to accept. The litigation had as its purpose recovery of an award of damages which amounts, in effect, to the principal sum. On the other hand, to award expenses against the Pursuer does not seem wholly fair as it seems to me that both parties had, to use Lord Osborne's phrase, an expectation that something would be payable by way of extra judicial expenses and that expectation characterised their actings. I cannot identify any basis upon which I can determine the correctness, or otherwise, as to a choice between the differing Tables of Fees. As I have said, there is no legal entitlement thereto, as between Pursuer and Defender; at best it was an expectation, based upon practice in dealing with such cases. On the basis of what I was told, there was no shared expectation as to the January 2004 Table of Fees, certainly not until agreement of the Pre action Protocol in force as at January 2006. If there had been, this issue would not have arisen. In my view the most appropriate disposal is to make an award of expenses in favour of the Pursuer but limited to Chapter 10 of the Table of Fees in force prior to January 2004. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotSC/2006/26.html>

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