

Scottish Civil Courts Review: Extract from Chapter 9 - Enhancing Case Management**(c) Effective sanctions for non-compliance with rules or court orders**

127. At present a judge or sheriff has a wide discretion to impose sanctions. These most commonly take the form of a penalising award of expenses. The court may refuse to allow a late amendment of the pleadings.⁵⁹ The rules of procedure for commercial actions in both the Court of Session and sheriff court provide the judge or sheriff with specific sanctions including: a refusal to extend any period for compliance with a provision in the Rules or an order of the court; dismissal of the action or counterclaim in whole or in part; the granting of decree in respect of all or any of the conclusions of the summons, or craves of the initial writ, or counterclaim; and the making of an award of expenses.

128. In awarding expenses a court may order taxation on the basis of solicitor and client, client paying, instead of the normal basis of party and party, as a mark of disapproval of a party's unreasonable conduct.⁶⁰ In *McKie v The Scottish Ministers*, Lord Hodge summarised the law in five propositions:⁶¹

"First, the court has discretion as to the scale of expenses which should be awarded. Secondly, in the normal case expenses are awarded on a party and party scale; that scale applies in the absence of any specification to the contrary. But, thirdly, where one of the parties has conducted the litigation incompetently or unreasonably, and thereby caused the other party unnecessary expense, the court can impose, as a sanction against such conduct, an award of expenses on the solicitor and client scale. Fourthly, in its consideration of the reasonableness of a party's conduct of an action, the court can take into account all relevant circumstances. Those circumstances include the party's behaviour before the action commenced, the adequacy of a party's preparation for the action, the strengths or otherwise of a party's position on the substantive merits of the action, the use of a court action for an improper purpose, and the way in which a party has used court procedure, for example to progress or delay the resolution of the dispute. Fifthly, where the court has awarded expenses at an earlier stage in the proceedings without reserving for later determination the scale of such expenses, any award of expenses on the solicitor and client scale may cover only those matters not already covered by the earlier awards."

129. Awards of expenses may also be made against solicitors personally for expenses occasioned by their own fault or where they are guilty of an abuse of process.⁶² It is not competent to make an award of expenses against counsel. That has been the subject of comment by Lord Maclean⁶³ and more

⁵⁹ Examples include *Rodwell v The City of Edinburgh Council* 2001 GWD 2-82 and *Henderson v The Royal Bank of Scotland plc* [2006] CSOH 164.

⁶⁰ *Bell v Inkersall Investments Ltd and Others* 2007 SC 823

⁶¹ 2006 SC 528. Followed in *Appa (UK) Ltd v The Scottish Daily Record and Sunday Mail Ltd* [2007] CSOH 196 and *UPS Supply Chain Solutions v Glasgow Airport Ltd* [2007] CSOH 202

⁶² *Stewart v Stewart*, 1984 S.L.T (Sh. Ct.)58; *Bremner v Bremner* 1988 S.L.T 844

⁶³ *Reid v Edinburgh Acoustics Ltd (No 2)* 1995 S.L.T 982

recently by Sheriff Ross.⁶⁴ In England and Wales and in other jurisdictions such as New South Wales, there is a statutory power to make such an award.⁶⁵

130. Where a court does not have an explicit power under the Rules of Court to impose a particular sanction, it may rely on its inherent power. In the decision of a bench of five judges in *Moore v The Scottish Daily Record and Sunday Mail Limited*, the Lord Justice Clerk confirmed that

“The court has an undoubted inherent jurisdiction to take action where there has been a contempt of court or an abuse of process; or where for some other reason a fair trial of a case has become impossible. In the case of contempt of court, the court has the power to fine. The court also has a wide discretion in the awarding of expenses.”⁶⁶

He went on to say:

“It is well-established in Scots law that the court can exercise its inherent jurisdiction in the case of an abuse of process by way of a procedural sanction such as dismissal (*Tonner v Reiach and Hall*, 2008 SC 1).”

131. In *Moore v The Scottish Daily Record and Sunday Mail Limited*, the court had to consider whether, on the late settlement of a reclaiming motion, it was competent for the court to make an order against either or both parties in respect of its administration costs, as had been done in *Billig v Council of the Law Society of Scotland*.⁶⁷ It ruled that such an order was *ultra vires*. In the opinion of the Lord Justice Clerk,

“The court’s disapproval of the petitioner’s conduct in *Billig* would have been appropriately marked by the severer penalty of an award of expenses to the respondents on an agent and client (client paying) basis.”

He continued:

It is a legitimate and necessary function of the court to minimise the occurrence of late settlements and their impact on its efficiency; but I think that problems in this area should be remedied through the normal processes of law reform.”

132. The decision in *Tonner v Reiach and Hall* has now been put on a formal footing in an act of sederunt which provides for the dismissal of a claim on the ground of inordinate or inexcusable delay.⁶⁸ This was necessary in order to set out the appropriate procedure for the determination of

⁶⁴ *Bell v Inkersall Investments Ltd and others* Dumfries 7 December 2007

⁶⁵ Supreme Court Act 1981, section 51, as amended by the Courts and Legal Services Act 1990

⁶⁶ [2008] CSIH 66

⁶⁷ 2008 SC 150. The Inner House ordered a party which had abandoned its appeal shortly before the date set for the hearing to pay the court fees which would have been charged for the hearing had it gone ahead. The court held that the making of the order demonstrated the court’s inherent jurisdiction to exercise real control of its procedures and timetables.

⁶⁸ Act of Sederunt (Rules of the Court of Session Amendment No. 5) (Miscellaneous) 2008; SSI 2008 No. 349

such an application. The court had expressed the view that the procedure to be adopted should not be the subject of extensive pleadings or other time-consuming or costly requirements. It further considered that in view of the drastic nature of the remedy sought, the pursuer was entitled to fair notice of the arguments and that the court should be provided with at least the minimum of documentary material upon which it could rely in reaching its decision. The relevant Rule gives effect to the court's views and provides for a minute and answers procedure.⁶⁹

Sanctions for non-compliance – responses to the Consultation

133. Just over half of the respondents on this issue considered that the courts should have greater powers to impose sanctions in cases in which parties or their representatives behaved unreasonably or failed in a material respect to comply with the court rules. Some considered that the court's powers at common law, or as provided for in the rules, are sufficient and that the difficulty lies in an apparent reluctance to exercise them. It was proposed that the court should adopt a more proactive role in this respect. Some respondents drew a picture of a *laissez faire* approach with repeated failures to comply with the rules and time limits being tolerated. It was suggested that the delays and costs suffered by opponents were not adequately recognised by the court.

134. Others suggested that there should be more rigorous sanctions available in relation to expenses. In serious cases, payment of expenses should be a condition precedent of further procedure by the offender. In the most extreme cases, it was suggested that judges should be able to dismiss claims or to grant decree on the ground of abuse of process.

135. One respondent considered that reliance on judicial activism based on the inherent powers is too uncertain. Instead, specific rules or regulations should be promulgated with express penalties and enforcement procedures.

136. Respondents who favoured a greater range of sanctions made the following suggestions:

- serious consideration should be given to dismissal;
- the court should be given the power to specify on a broad brush basis the amount of expenses to be paid;
- a charge for late lodging of documents should be levied;
- forfeiture of the right to charge clients or SLAB for steps taken;
- termination of a legal aid certificate;
- more swingeing penalties in expenses – finding agents and counsel liable;
- wasted costs orders; and
- expenses sanctions to reflect actual costs.

⁶⁹ The Sheriff Court Rules Council is currently considering whether to introduce a similar rule in the sheriff court.

137. Several respondents were of the opinion that if judicial case management is introduced, sanctions for non-compliance will be essential.

Sanctions for non-compliance – other jurisdictions

138. The need for an effective system of sanctions for non compliance with rules, practice directions and orders was endorsed by Lord Woolf in his Final Report on Access to Justice. He stressed four important principles:

- a) The primary object of sanctions is prevention, not punishment.
- b) It should be for the rules themselves, in the first instance, to provide an effective debarring order where there has been a breach, for example that a party may not use evidence which he has not disclosed.
- c) All directions orders should in any event include an automatic sanction for non-compliance unless an extension of time has been obtained prospectively.
- d) The onus should be on the defaulter to apply for relief, no on the other party to seek a penalty.⁷⁰

139. The range of sanctions provided for by the Civil Procedure Rules 1998 in England and Wales is set out in Annex C to this chapter together with a brief review of the use of ‘unless orders’⁷¹ and ‘wasted costs orders’⁷² in that jurisdiction. In practice it is open to the parties to apply for extensions of time and to apply to the court for relief from any sanction imposed by the rules, practice directions or court orders.

140. The approach in England and Wales has been followed in other jurisdictions. Section C of the Annex provides further information about the position in Ireland and in parts of Australia and Canada. The recent work done by the Victorian Law Reform Commission is particularly interesting. The Commission agreed with the view of Lord Woolf that the primary object of sanctions is prevention, not punishment. It also agreed in principle that it is desirable for the rules themselves, in the first instance, to provide an effective debarring order where there has been a breach; for example, a rule to the effect that a party may not use evidence that has not been disclosed. It thought that it is also desirable, where practicable, for all orders for directions to include an automatic sanction for non-compliance unless an extension of time has been obtained prospectively. In principle, the

⁷⁰ Lord Woolf (1996), *op. cit.*, Chapter 6 para 4

⁷¹ An unless order is an order of the court requiring somebody involved in the case to do something, usually within a certain time limit, failing which certain sanctions will apply e.g the claim or defence will be struck out. It is only made if there has previously been a breach of some order or rule.

⁷² A wasted costs order is an order that costs which were incurred improperly, unreasonably or negligently by or on behalf of a party’s legal representative should be disallowed from an award of costs to be paid to that party, or that they should be paid by the party’s legal representative. See section 51 of the Supreme Court Act 1981 (c.54) as amended by the Courts and Legal Services Act 1990(c. 41)

Commission agreed with the position taken by Lord Woolf that the onus should be on the defaulter to apply for relief, not on the other party to seek a penalty.

141. However, the Commission was also mindful that there are many understandable reasons why parties, particularly those who may be less experienced or less wealthy, may not always be able to comply with orders and directions within the required time. Large law firms acting for affluent clients or large corporations or insurers can usually mobilise resources to ensure that required tasks are completed within time limits. Not all litigants are in the same position. Accordingly, the Commission concluded that although there is considerable scope for the use of presumptive sanctions to apply in the case of default, in large measure sanctions will have to be applied in light of the circumstances and the conduct of litigants and lawyers. This will usually require the exercise of judicial discretion.

142. Although the courts in Victoria already have extensive general and specific powers to impose sanctions, including costs orders, the Commission concluded that there was benefit in having a clear framework of rules incorporating express provision for a range of disciplinary and case management orders. It considered that a range of disciplinary and case management orders that included, but were not limited to, costs sanctions, would be useful. It was of the view that sometimes costs might not be the most appropriate sanction, particularly where a party had substantial resources.

Sanctions for non-compliance – recommendations

143. We consider that the object of sanctions is to encourage efficiency and high standards of competence. The cost of litigation, when coupled with a system of judicial case management, places a duty on a judge or sheriff to have regard to the efficient management of resources.

144. In a judicially case managed system, there is a need for sanctions to encourage parties and their representatives to comply with case management orders. On one view, explicit and specific powers to impose sanctions may be of greater use than a broad general power. Clearly identifying the range of sanctions for non-compliance with case management orders may also enhance the effectiveness of case management.

145. Another view is that the courts already have extensive express powers and an inherent jurisdiction to impose sanctions. Accordingly, further rules are not required. There is also a concern that sanctions will be overused, and may be automatically imposed for procedural default, without proper regard for extenuating circumstances. Some consider that parties are entitled to control adversarial civil proceedings and that the courts should not be unduly interventionist. Others think that applications and hearings in respect of sanctions may also add to costs and delays and give rise to undesirable satellite litigations and appeals.

146. We do not consider that parties are entitled to control adversarial civil proceedings without the intervention of the court. Under our recommended system of case management, parties will remain

responsible for the progression of the action, subject to the supervision of the court. Where there is a failure to comply with a rule or court order, the rules of court should provide a general power for the

court to impose such sanctions as it considers appropriate. This power is without prejudice to the court's inherent jurisdiction to take action where there has been a contempt of court or an abuse of process, or where for some other reason a fair trial of a case has become impossible.⁷³

147. In addition to a general power, we consider that the rules of court should specify types of sanctions that may be imposed in particular instances. Such sanctions may also apply where parties or their representatives have behaved unreasonably.

148. We recommend that the rules of court should entitle the court to:

- a) dismiss the action or counterclaim, in whole or in part;
- b) grant decree in respect of all or any of the conclusions of the summons, or of the craves of the initial writ, or counterclaim;
- c) refuse to extend any period for compliance with a provision in the rules or an order of the court;
- d) make an award for expenses;
- e) disallow a party from amending or upgrading part of its claim;
- f) disallow a party from calling one or more witnesses, including expert witnesses;
- g) deprive a pursuer who is in default of all or some of the interest that would otherwise have been awarded;
- h) order caution for expenses; and
- i) order immediate payment of expenses incurred in procedural matters and assess them summarily. Payment of the sum would be a condition precedent of further procedure.

We do not propose this as an exhaustive list.

149. As far as the conduct of legal representatives is concerned, we recommend that the court's power to make solicitors personally liable for expenses occasioned by their own fault, or where they are guilty of an abuse of process, ought to be incorporated in statute; and that it should be extended to cover all those with rights of audience.

150. In addition, we recommend that the courts should have the power to order that agents or counsel may not charge their clients or SLAB for any work that is occasioned by any improper, unreasonable or negligent act or omission on their part. The court should have the power to order that a copy of the court's interlocutor be notified by the clerk of court to the client personally or to SLAB. This, we hope, will meet the objection that has been urged on us that in current practice mistakes make money.

⁷³ *Moore v The Scottish Daily Record and Sunday Daily Mail Limited* [2008] CSIH 66