ASPIC clarifies rules of the employment of Counsel

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In cases raised in the Court of Session the instruction of an Advocate or Solicitor-Advocate is required. In the Sheriff Courts, the position is much less clear-cut. Parties often elect to instruct Counsel in ASPIC or the Sheriff Court if the case has a high value or is particularly complex but, of course, Counsel come with a cost and therefore it is no surprise that expenses arguments spring off the back of their instruction.

In ***Daniel Graham v Enviroclean (Scotland) Limited [2019] ScotSC 12*** the defenders did not take issue with the instruction of Counsel *per se*, but felt that that they had been overused and that certain pieces of work could have been done by the solicitor alone; the result of this being that the defenders faced a hefty Account of Expenses with Counsel's fees peppered throughout. The defender therefore argued that sanction should be granted for only some items of work done by Counsel and it should be open to the Auditor of Court to restrict other items. The pursuer, not wanting to take their chances with the Auditor, asked the court to grant sanction for all of the items of work that Counsel had undertaken.

The Court clarified that the practice of seeking sanction for selected items of work was not the correct approach. The motion for sanction should be a blanket one, covering the case as a whole. It is then available to the Auditor to assess what work was reasonably undertaken by Counsel and remove any work which was unnecessary.

This means that the scrutiny of the work undertaken be Counsel will be carried out by the Auditor rather than the Court. This is not altogether surprising and it has often been the case that the Court will defer issues relating to the minutia of expenses to the Auditor. However, taxations are expensive and the waiting list for them is long. So, in deciding whether to proceed to taxation, defenders will still need to grapple with the old question; is the powder worth the shot?

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