



Blog: Sanction for counsel clarified

Carly Forrest and Katie Anderson explain the implications of a recent case in which sanction for counsel was refused.



Carly Forrest (left) and Katie Anderson

The case of [William Cullen-v-Scan Building Services Ltd SC EDIN 15](#) is the most recent in a long line of decisions in the All Scotland Personal Injury Court considering when it is reasonable to instruct counsel in the Sheriff Court.

This case is significant in that it is the first reported employers' liability case where sanction for counsel has been refused. It is also helpful in setting out some guidance on what information the court expects to be given when hearing these motions.

William Cullen was involved in a 'slip and trip' accident at work. He suffered an injury to his shoulder. Mr Cullen sued his employers for £50,000. Liability, contributory negligence and quantum were all in dispute. The case ultimately settled for £11,750. The pursuer instructed counsel for the whole of the case. The defenders argued that sanction for counsel should not be granted because the case was not complex or high value. The defenders had not instructed counsel, and there was no other reason why sanction for counsel should be granted.

Section 108 of the *Court Reform (Scotland) Act 2014* states that the court must grant sanction for employment of counsel if in all the circumstances of the case it is reasonable to do so. The court must have regard to:

- the difficulty or complexity, or likely difficulty or complexity, of the proceedings;
 - the importance or value of any claim in the proceedings;
 - the desirability of ensuring that no party gains an unfair advantage by virtue of the employment of counsel; and
 - any other such other matters as it considers appropriate.
- The test to be applied is one of objective reasonableness at the time that the court hears the motion. The Sheriff in this case agreed with the defenders that it had not been reasonable to instruct counsel.

Every case will turn on its own facts and historically it has been difficult to predict how a court will rule in any given case. This uncertainty can be unsettling for defenders and can make the decision of whether or not to oppose a motion for sanction for counsel a tricky one. The court in the *Cullen* case set out some helpful guidance in relation to 'difficulty or complexity' arguments:

“Where reliance is placed on a factor (mandatory or otherwise) the party seeking sanction must be in a position to (i) point to material or information which supports the factor relied on and (ii) show a link between the factor relied upon and the decision which the court is being invited to make. Once the actual or potential difficulty has been identified, it is necessary then, first, to show how it leads to the conclusion that the proceedings are such as to merit the employment of counsel; and, second, how that informs the test of ‘objective reasonableness?’”

Hopefully the above guidance will encourage parties to think more closely before instructing counsel in a case where it may not objectively be reasonable to do so.



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