SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2017] SC EDIN 75

EDI-SG60-17

NOTE BY SHERIFF KENNETH J MCGOWAN

In the cause

IAN DOUGLAS GRAHAM

Pursuer

Against

PAUL FARRELL

Defender

Edinburgh, October 2017

NOTE

Introduction

[1] This case came before me on the claimant's opposed application for expenses. The dispute concerned the level of expenses recoverable where a simple procedure action had initially been defended and then settled by tender and acceptance before the evidential hearing.

Procedural History

[2] The claimant raised the action for payment on 17 January 2017.

[3] No response having been received, the claimant made an application for a decision on 28 February 2017. On 20 March 2017, the court issued a decision to the claimant granting

an order for payment of the sum claimed together with undefended scale expenses of £315.37.

[4] By letter dated 5 April 2017, the claimant received intimation of an application for recall from the respondent's agents. Recall was sought on the basis that certain documents had not been served with the claim form and that there was a defence to the claim, set out in the Form D1 and Paper Apart E2 for the respondent. The claimant consented to recall which was granted unopposed on 15 June 2017, at which stage the court ordered parties to undergo mediation. Mediation took place but was unsuccessful.

[5] On 10 August 2017, the case called for a Case Management Discussion. The respondent was ordained to lodge revised answers within 14 days and an evidential hearing was fixed for 19 October 2017.

[6] Adjusted answers were lodged and intimated to the claimant on 22 August 2017.

[7] On 29 September 2017, the respondent lodged and intimated a Minute of Tender in the following terms:

> "MILLAR for the Respondent stated to the Court that without prejudice to and under reservation of our whole rights and pleas, the Respondent TENDERS and hereby TENDER to the Claimant the sum of THREE THOUSAND POUNDS (£3,000) STERLING, with the taxed expenses of Process to the date hereof, in full settlement of the claim set out in Part D5 of Form 3A."

[8] This tender was accepted on 3 October 2017 by Minute of Acceptance thus:

> "CLAIR for the claimant stated to the court that the claimant accepted and hereby accepts the Tender contained in the Minute of Tender No. of process (tendering the sum of THREE THOUSAND POUNDS (£3,000) STERLING with the taxed expenses of process to 29 September 2017) in full settlement of the claim set out in Part D5 of Form 3A."

[9] On the same date, the claimant thereafter lodged and intimated an application seeking an order (i) discharging the Hearing fixed for Thursday 19 October 2017; (ii) granting decree in terms of the Tender and Acceptance; (iii) fixing an expenses hearing; and

(iv) ordering the claimant to prepare an Account of Expenses and to lodge the same with the Sheriff Clerk and intimate on the respondent before the expenses hearing.

[10] The order was sought on the basis that (i) the parties had reached agreement as to disposal of the action in the Minute of Tender and Minute of Acceptance of Tender and (ii) the Court should order an Expenses Hearing as this was not an action to which capped expenses are applicable, in terms of Section 81(5)(a)(ii) of the Courts Reform (Scotland) Act 2014. The Court should therefore order the claimant to lodge an Account of Expenses with the Court and intimate the same on the respondent before the Expenses Hearing.

[11] On 5 October 2017, the respondent opposed the claimant's application (in part) in contending that while decree should be granted and the hearing discharged, it was not open to the court to "… *order expenses as taxed and then grant orders (iii) and (iv) as sought by the claimant…"* and that the expenses should be

> "…restricted to 10% of the sum decerned for in terms of section 3 of The Sheriff Court Simple Procedure (Limits on Award of Expenses) Order 2016 (2016/388) and section 2 of Paragraph 2(1) of the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provision) 1993, (1993/3080)."

[12] An order was then made fixing an expenses hearing.

Submissions for Claimant

Entitlement to Unrestricted Expenses

[13] The purpose of an expenses hearing is to assess the level of expenses (if any) that should be awarded to a party: Simple Procedure Rule ('SPR'), 14.5(1).

[14] The acceptance of the Minute of Tender in an unqualified form sets up an enforceable obligation on the respondent to pay to the claimant "the taxed expenses of process". The fact that there is a dispute as to what is meant by the expression "expenses of

process" does not mean that there is a lack of *consensus in idem* which would free the respondent from his obligation to pay to the claimant the expenses as assessed; and although the term "taxed" is used in both the Minute of Tender and Minute of Acceptance of Tender in relation to expenses, this should be construed as meaning "assessed", as applicable to Chapter 14 of SPR: *Gillespie* v *Fitzpatrick*, 2003 SLT 999 (which although not binding was apt to be followed).

[15] The level of expenses to be awarded in a defended Simple Procedure case is determined by the Act of Sederunt (Fees of Solicitors in the Sheriff Court)(Amendment and Further Provisions) 1993, as amended ("the 1993 Act of Sederunt").

[16] Schedule 1 of the 1993 Act of Sederunt provides as follows:

> "The Table of Fees in this Schedule shall regulate the taxation of accounts between party and party; and shall be subject to the aftermentioned powers of the court to increase or modify such fees.": Paragraph 1;
>
> "The pursuer's solicitor's account shall be taxed by reference to the sum decerned for unless the court otherwise directs.": Paragraph 2;
>
> "In a simple procedure case, unless the sheriff orders otherwise- (a) only expenses under Chapter V of the Table of Fees shall be allowed; […]":Paragraph 3A.

[17] Part 2 (Disputed Claims) of Chapter V of the 1993 Act of Sederunt determines the default position for fees to be assessed in a defended Simple Procedure action. Subject to Paragraphs 2 and 3A of Schedule 1 of the 1993 Act of Sederunt, supervening acts of legislature and the general powers of the court to increase or modify such fees in accordance with the 1993 Act of Sederunt, the position is therefore that expenses shall be assessed by reference to Part 2 of Chapter V of the 1993 Act of Sederunt in a disputed Simple Procedure case.

[18] The basic entitlement to expenses in a disputed Simple Procedure case in accordance with Part 2 of Chapter V of the 1993 Act of Sederunt is qualified by the terms of The Sheriff Court Simple Procedure (Limits on Award of Expenses) Order 2016 ("the 2016 Order").

[19] Article 3 of the 2016 Order provides as follows:

> "3. Categories of simple procedure cases in which expenses awarded may not exceed prescribed sum
> In any simple procedure case in which the value of the claim is-
> (a) […];
> (b) 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."

[20] The terms of Article 3 of the 2016 Order are, in turn, qualified by the terms of Section 81 of the Courts Reform (Scotland) Act 2014 ("the 2014 Act").

[21] Subsection 1 to Section 81 of the 2014 Act provides as follows:

> "(1) The Scottish Ministers may by order provide that-
> (a) […]
> (b) in such other category of simple procedure cases as may be so prescribed, any expenses awarded may not exceed such sum as may be so prescribed."

[22] Subsection 1 to Section 81 of the 2014 Act is therefore the section which enables Article 3 of the 2016 Order.

[23] Subsection 4 to Section 81 of the 2014 Act goes on to provide as follows:

> "(4) An order under subsection (1) [of the 2014 Act] does not apply-
> (a) to simple procedure cases such as those mentioned in subsection (5),
> […]
> (5) The simple procedure cases referred to in subsection (4)(a) are those in which-
> (a) the defender-[…]
> (ii) having stated a defence, has not proceeded with it,[…]"

[24] Whilst *ex facie* the claimant may not therefore be entitled to expenses in excess of 10% of the value of the claim under Article 3 of the 2016 Order, this rule is qualified by the terms of Section 81 of the 2014 Act which stipulate that the restriction on expenses shall not apply in such a case where the defender, having stated a defence, does not ultimately proceed with

it. The expenses awardable in such a case would therefore fall to be determined in accordance with Part 2 of Chapter V of the 1993 Act of Sederunt.

[25] Further, it is clear from Paragraph 2 of Schedule 1 of the 1993 Act of Sederunt that the claimant's solicitors' account shall in any event be taxed (read to mean "assessed") by reference to the sum "decerned" (i.e. the sum sued) for, unless the court directs otherwise. The plain and ordinary meaning of "the sum decerned for" is the sum that is "sued for", not "the sum that is agreed in settlement of the principal sum sued for". If this interpretation is correct, then the 2016 Order and indeed the qualification thereto in the 2014 Act do not fall to be considered in this case at all. The claimant should simply be awarded expenses in accordance with Part 2 of Chapter V of the 1993 Act of Sederunt.

[26] In the event that the court is not with the claimant in terms of the foregoing paragraph, the respondent having stated a defence which was lodged and intimated on 5 April and further adjusted on 22 August, both dates 2017, and the action having since settled by judicial tender at the respondent's instance, the instant case is one which falls within the exceptions provided in terms of Section 81 of the 2014 Act. The respondent has clearly stated a defence and elected not to proceed with it. The claimant should not therefore be restricted in his entitlement to expenses and should be allowed to prepare and lodge an account of expenses, prepared by reference to Part 2 of Chapter V of the 1993 Act of Sederunt, for assessment and approval by the Sheriff Clerk.

The Prior Legislative Provisions

[27] Article 3 of the 2016 Order and Section 81 of the 2014 Act directly replace the provisions of Article 4 of the Small Claims (Scotland) Order 1988, as amended ("the 1988

Order") [now repealed] and Section 36B of the Sheriff Courts (Scotland) Act 1971, as amended ("the 1971 Act") [now repealed] respectively.

[28] Article 4 of the 1998 Order, prior to being repealed, provided:

> "Limit on award of expenses in small claims
> 4. (1) The provisions of this article are without prejudice to the provisions of section 36B(3) of the Sheriff Courts (Scotland) Act 1971.
> (2) No award of expenses shall be made in a small claim as specified in article 2 of this Order in which the value of the claim does not exceed £200.
> (3) In the case of any small claim other than a small claim to which paragraph (2) applies, the sheriff may award expenses-
> (a) not exceeding £150, where the value of the claim is £1500 or less; or
> (b) not exceeding 10% of the value of the claim, where the value of the claim is greater than £1500."

[29] Section 36B of the 1971 Act, prior to being repealed, provided:

> "Expenses in small claims
> 36B. (1) No award of expenses shall be made in a small claim in which the value of the claim does not exceed such sum as the Secretary of State shall prescribe by order.
> (2) Any expenses which the sheriff may award in any other small claim shall not exceed such sum as the Secretary of State shall prescribe by order.
> (3) Subsections (1) and (2) do not apply to a party to a small claim-
> (a) who being a defender- […]
> (ii) having stated a defence, has not proceeded with it."

[30] The Scottish Government's Revised Explanatory Notes to the Bill which became the 2014 Act states:

> "120. Section [81 of the 2014 Act] re-enacts section 36B of the 1971 Act with modifications to reflect the new system of simple procedure. […]
>
> 122. […] Subsection (5) is based on section 36B(3) of the 1971 Act and lists the circumstances in which the restrictions on expenses should not apply due to the behaviour of one of the parties to the case […]"

[31] Therefore, it was clearly the intention of the Scottish Parliament to preserve the effect of Section 36B of the 1971 Act under the terms of Section 81 of the 2014 Act.

Case Law

[32] The recent decision of the Sheriff Principal of Lothian and Borders in the appeal case of *Tallo* v *Clark,* 2015 SLT (Sh Ct) 181 discussed the operation of Section 36B of the 1971 Act.

[33] *Tallo* was an appeal to the Sheriff Principal against a decision of the Sheriff at first instance in a Small Claim finding that the successful pursuer was entitled to expenses on the Summary Cause scale on the basis that the defender, having stated a defence, had not proceeded therewith in terms of Section 36B(3)(ii) of the 1971 Act.

[34] The factual position in *Tallo* was that the case called before the Sheriff at first instance having settled, save as to any agreement on expenses. The hearing on expenses then turned on the meaning of the words *"having stated a defence, has not proceeded with it"* in terms of Section 36B(3)(ii) of the 1971 Act. It was accepted that where the restriction or limitation as to expenses does not apply, the liability for expenses was on the Summary Cause scale.

[35] The appeal in *Tallo* was solely confined to the correct interpretation of Section 36B(3)(ii). The question was whether the Sheriff at first instance had erred in finding the pursuer entitled to expenses on the Summary Cause scale where the case settled – save as to expenses – after the defender had lodged a defence to the claim.

[36] The Sheriff Principal answered the appeal in *Tallo* in the negative, holding:

> [18] The decided cases […] have interpreted the provision strictly in accordance with its terms acknowledging that the outcome can be harsh on occasion. I agree with that approach. In a procedure designed to be used by party litigants without legal representation and which is intended to be speedy and effective, predictability and certainty as to expenses is important. Small claims procedure can be contrasted with other forms of procedure in a number of ways. It is the only procedure to lay down fixed fees and is focused on resolution of the dispute at an early stage. The main event is the "Hearing" in terms of Pt 9 of the Rules. The hearing and its purpose is set out in r.9.1 and 9.2 . The focus is on securing the parties' attendance with the sheriff enjoined to have a positive role in finding out what the claim and any defence is about and seeking to negotiate and secure settlement of it. If settlement cannot be reached between the parties the sheriff must, if possible, reach a decision on the whole dispute and may only continue the hearing for evidence when he or she

> cannot reach a decision. Parties cannot rely on a hearing of evidence being required. The sheriff has to be satisfied that the evidence requires to be led before a hearing on evidence will be fixed. That, in my view, informs the rules as to expenses. It is unhelpful to compare small claim procedure with ordinary procedure where parties are entitled to litigate to proof or conclusion subject to the rules of pleading and procedure. Accordingly, the reference to not proceeding with a defence means not proceeding with the hearing on evidence and obtaining a decision or judgment of the court. […] This is not a matter which calls for a discretionary or equitable determination but is a matter of statutory interpretation. [emphasis added]
>
> [19] […] It was argued before me that a strict interpretation of the provision is the enemy of settlement. Of course, compromise is a worthwhile and valuable objective in litigation. The appellant's argument however misunderstands small claims procedure. If small claims procedure is understood properly parties must pin their colours to the mast by the date of the first hearing. A defender cannot rely firstly, on a hearing on evidence and secondly, on negotiation following a defence being stated. Once the defence is stated and the sheriff appoints a hearing on evidence a defender will only be protected on expenses if he proceeds with his defence at the hearing of evidence in good faith unless, of course, the claim and the consequential expenses are settled extra judicially. [emphasis added]
>
> [20] I detect no error in law in the sheriff's decision on the matter of expenses. […] [T]he issue in this appeal is the interpretation of the statutory provision and a discretionary approach is the enemy of certainty and predictability. […] [emphasis added]
>
> [21] Accordingly, I answer the question of law in the negative and the appeal is refused. The appellant will be liable to the respondent in the expenses of the appeal on the summary cause scale."

[37] In reaching her decision in *Tallo*, the Sheriff Principal considered that the correct interpretation was that reached by a previous Sheriff Principal of Lothian and Borders in the appeal *Fenton* v *Uniroyal Englebert Tyres Ltd*, 1995 SLT (Sh Ct) 21 ("*Fenton*"), per *Tallo* at para 18.

[38] In *Fenton,* an appeal to the Sheriff Principal on similar grounds, it was held at page 22:

> "[T]he interpretation of a statutory provision is not to be determined in a particular way simply because in some circumstances a different interpretation may lead to undesirable consequences. A statutory provision must be interpreted according to its terms even if that interpretation may lead to undesirable consequences in certain

> circumstances. When I look at s 36B of the 1971 Act the clear impression which is conveyed to me is that Parliament intended to lay down clear and certain rules as to expenses in small claim cases. That is plainly the case in subss (1) and (2), and also in subs (3) (a) (i). I see no reason to suppose that, when it came to subs (3) (a) (ii), Parliament suddenly decided to depart from that approach and instead to make a provision which might be given a different application in every case. That view is confirmed in my opinion since, in any event, the words "proceeded with" can without any strain or distortion be construed […] as meaning "persisted in to the point of putting the defence before the court and receiving a decision from the court in respect of it". For those reasons, therefore, I am satisfied that the interpretation contended for by the defenders in this case cannot be supported, and that the sheriff reached the correct conclusion on this matter." [emphasis added]

[39] It is clear from *Tallo* and *Fenton* that the term *"having stated a defence, has not proceeded with it"* (as is used in identical phraseology in both Section 36B of the 1971 Act and Section 81 of the 2014 Act) should be interpreted strictly, regardless of whether it may produce a harsh outcome.

[40] Whilst neither *Tallo* nor *Fenton* are binding on this court on the basis that they are decisions in relation to a now-repealed piece of legislation, it is submitted that both decisions should be regarded as highly persuasive on the basis that they relate to a directly analogous piece of legislation to what is now Section 81 of the 2014 Act. The decision in *Tallo* particularly, being one of the sitting Sheriff Principal in this Sheriffdom, should be regarded as of the utmost persuasiveness. The judicial reasoning in both *Tallo* and *Fenton* is sound. The Sheriff Principal's particular comments in *Tallo* as to the spirit and unique features of the Small Claims procedure expressed in paragraphs 18 and 19 of the judgment resonate wholly with that of the Simple Procedure. Particular reference is made to Simple Procedure Rules 1.1 and 1.2.

Conclusion

[41] The claimant in this case does not seek an increase in the level of expenses above that

which may ordinarily be expected in a case of this type (as was the position under the previous legislation which allowed expenses for a Small Claims action falling under the exceptions in Section 36B of the 1971 Act being awarded on the Summary Cause scale). The claimant simply seeks his default entitlement to expenses on the defended Simple Procedure scale, as set out in Part 2 of Chapter V of the 1993 Act of Sederunt.

[42] There are no cogent reasons why the Court should depart from the default position of awarding the claimant expenses in accordance with Part 2 of Chapter V of the 1993 Act of Sederunt. Indeed, the decisions in *Tallo* and *Fenton* support the contention that it would be perverse and contrary to the interests of justice for the expenses of the successful claimant in an action such as this to be capped.

[43] The claimant should therefore be allowed to prepare and lodge an account of expenses, prepared in accordance with Part 2 of Chapter V of the 1993 Act of Sederunt, for assessment and approval by the Sheriff Clerk.

Submissions for Respondent

[44] The respondent's motion is for the Court to order that the expenses be restricted to 10% of the sum decerned for in terms of Article 3 of The Sheriff Court Simple Procedure (Limits on Award of Expenses) Order 2016 (2016/3880 and section 2 of Paragraph 2 of the Act of Sederunt (Fees of Solicitors in the Sheriff Court (Amendment and Further Provisions) 1993, (1993/3080.)

[45] In terms of Regulation 2, of Schedule 1 of the Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further provisions) 1993/3080

> "…the Pursuer's Solicitor's account shall be taxed with reference to the sum decerned for unless the Court otherwise directs." (emphasis added).

[46] The sum decerned for does not mean the same as the sum claimed for. The word "decern" is defined as *"a formal word meaning to give decree or judgement and authorises an extract of the decree or order"*: Glossary from the Scottish Judiciary on this, (produced at tab 4).

[47] In terms of the Court's Order of 12 October 2017, the sum ordered to be paid was £3,000 and this will ultimately become the sum decerned for.

[48] Therefore, the figure of £3,000 is the figure that the Court must use to determine the level of expenses that are appropriate.

[49] If the Court agrees with that position, it is my submission that the Court must then take into account the terms of provision 3(b) of the Sheriff Court Simple Procedure (Limits on Award of Expenses) Order 2016, (produced at Tab 2 of the respondent's List of Authorities.) Provision 3(b) provides that: *"In any Simple Procedure case in which the value of the claim is….(b) 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.*

[50] In terms of the Order of 12 October 2017, the sum decerned for is £3,000. On that basis, the sum decerned for falls within provision 3(b) of the Sheriff Court Simple Procedure (Limits on Award of Expenses) Order 2016. Accordingly, it is appropriate for the Court to award the expenses at 10% of the sum decerned for.

[51] Alternatively, the claimant's arguments in relation to Article 3A of the Act of Sederunt 1993; section 81(5) of the Court's Reform (Scotland) Act 2014; and the applicability of the case law under s.36B of the Sheriff Court Scotland Act, including *Tallo*, should not succeed. In relation to the expenses, the sheriff is entitled to *"order otherwise":* Paragraph 3A, 1993 Act of Sederunt. That wording implies that the Sheriff still has a discretion. That discretion should be exercised in favour of the respondent for the following reasons:

(i) The court is dealing with the situation where a Tender has been lodged;

(ii) The claimant's argument makes much about the fact that the defence was not proceeded with, but that completely disregards both the terms and the effect of the tender;

(iii) the terms of the tender clearly state that it was made *"without prejudice to and under reservation of our whole rights and pleas..."*;

(iv) the tender was made without any admission of liability: and

(v) the respondent still intended to run his defence. There was a stateable defence which the respondent fully intended to go ahead with. It was entirely open to the claimant not to accept the tender.

[52] In S*emple* v *Black* 2000 SCLR, Sheriff Principal Wheatley at page 1101D-E, stated that

> "Where a defender states a defence and subsequently has a tender accepted, this does not necessarily mean that he has, or has not, insisted upon his defence."

[53] Just because the respondent has lodged a minute of tender in this action, that does not mean that he has not insisted upon his defence. In the circumstances, the claimant cannot be absolved of all responsibility for its actions in respect of the expenses.

[54] The claimant's argument also relies on the reasoning in *Tallo*. While it was accepted that that was a decision by the Sheriff Principal of this Sheriffdom, it could be distinguished from the present case.

[55] In *Tallo* the court was being asked to determine expenses where settlement had been reached, rather than where a Tender had been lodged with a sum decerned for.

[56] The proposed distinction between expenses where there has been a settlement rather than a tender, with a decerned sum, failed to take account of Regulation 2 of the 1993 Act of Sederunt.

[57] In addition, paragraph 14.42 of MacPhail Sheriff Court Practice Third Edition states that:

> "the [1993] Act of Sederunt provides that "the Pursuer's Solicitor's account as between party and party shall be taxed by reference to the sum decerned for unless the Sheriff otherwise directs, a tender in an ordinary action of an amount below the limit of value for summary causes with the taxed expenses of process to date is a Tender of expenses as taxed on summary cause scale unless the Sheriff otherwise directs."

[58] Notwithstanding that that is the rule applicable for ordinary actions and that the Sheriff Principal in *Tallo* said that the position under the small claims was different, in the circumstances, it would be appropriate for the Court to award expenses restricted in terms of the 2016 Statutory Instrument because the position here concerned a tender with a sum decerned for.

[59] In *Tallo*, the Sheriff Principal used the phrase "where the interests of justice lie": paragraph 20. It was accepted that this was said in relation to *"the discretionary or equitable approach."* However, in this instance the interest of justice lay in awarding the expenses on the basis of 10% of the sum decerned for.

[60] In *Gillespie*, Lord Eassie was clear that expenses are always at the discretion of the Court and that "*expenses are merely incidental to the cause."*

[61] The procedural history relied on by the claimant was also challenged. The original order was recalled as the claimant failed to serve the Claim form in accordance with SPRT 6.11(3). That meant that the respondent was not aware of what he had to do to respond to the claim. By the time the respondent took legal advice, there was insufficient time to respond.

[62] The court should order that the expenses be restricted to 10% of the sum decerned for in terms of section 3 of The Sheriff Court Simple Procedure (Limits on Award of

Expenses) Order 2016 (2016/3880 and section 2 of Paragraph 2 of the Act of Sederunt (Fees of Solicitors in the Sheriff Court (Amendment and Further Provisions) 1993, (1993/3080.)

Grounds of Decision

The Recall of the Original Order

[63] In my opinion, this is irrelevant to the matter which falls to be decided by me. Any issue about the expenses occasioned by the granting of the original order or the recall thereof, that is a matter which can be raised before and dealt with by the auditor of court: 1993 Act of Sederunt, Schedule 1, paragraphs 8 and 9.

The Structure and Interpretation of the Statutory Framework

[64] Subject to one matter, in my opinion, the submissions for the pursuer are to be preferred. The exception is that I do not agree with the submission that the sum decerned for is the same as the sum claimed. It is clear in my view that it is the court which "decerns" by granting decree. Other than that, the legislation enacted and in force was intended to replicate that which had gone before in relation to small claims actions.

[65] On behalf of the respondent, I was invited to hold that since the sum (to be) decerned for was £3000, the matter was regulated by the 2016 Act of Sederunt and expenses were thus limited to £300, being 10% thereof.

[66] In my view, that is to ignore completely the meaning and effect of section 81(4) of the 2014 Act.

[67] It follows that the decision in *Tallo*¸ if not binding on me, must be treated as being highly persuasive. On the face of it, there is no relevant factor distinguishing the present case from that in *Tallo* which would entitle me not to follow it.

Does the Tender Make a Difference?

[68] It was contended that Article 3A of the 1993Act of Sederunt still permitted the court to exercise a discretion. That may well be so, but there would have to be a valid ground for doing so.

[69] In my opinion, the fact that settlement was achieved by way of tender and acceptance is nothing to the point. Many cases which are settled will be settled by the putting forward, orally or in writing, of a 'without prejudice' offer. A tender does the same, except in a more formal manner – and also carrying with it an offer to pay expenses.

[70] The case of *Semple* was specifically considered by the Sheriff Principal in *Tallo* and the reasoning rejected in favour of the approach set out in *Fenton* and other cases.

[71] The crucial point is the meaning of the phrase "… has not proceeded with [the defence stated]…". In my opinion, the meaning of those words was definitively determined in *Tallo* to mean "… not proceeding with the hearing on evidence and obtaining a decision or judgement of the court…": *Tallo,* paragraph 18.

Disposal

[72] In the whole circumstances, I make an order (i) finding the respondent liable to the claimant in the expenses of process as assessed; (ii) under SPR 14(4), requiring the claimant to send to the court and to the respondent an account of expenses by no later than Friday 10 November 2017; under SPR 14(5) requiring the sheriff clerk to assess the level of expenses that should be awarded to the claimant and to send a notice of that assessment to the parties by not later than Friday, 17 November 2017; and (iv) thereafter, continuing the case to the continued expenses hearing previously fixed.