OUTER HOUSE, COURT OF SESSION

[2020] CSOH 89

PD255/18

OPINION OF LORD WEIR

In the cause

SUSAN KEENAN

Pursuer

against

EUI LIMITED

Defenders

Pursuer: Stuart QC, F Thomson; Gildeas Limited
Defender: A. Smith QC; DAC Beachcroft Scotland LLP

15 October 2020

Introduction

[1] In this action the pursuer sought reparation for loss, injury and damage sustained as a consequence of a road traffic accident which occurred on 6 August 2015. The sum sued for was £1,250,000. The action was settled by the acceptance of a Minute of Tender in the sum of £43,500, inclusive of an earlier payment of £3,500 by way of interim damages, and free and net of any recoupment of social security benefits, together with the expenses of process to the date of the tender. The pursuer enrolled a motion for decree in terms of the Minutes of Tender and Acceptance, together with the expenses of the action "to date" and certification of various medical and other skilled witnesses. The motion was opposed by the

defenders on the matter of the expenses of the action. They moved for modification of the pursuer's expenses to the date of the tender to nil, and an award of expenses in their favour from that date. Failing modification to nil, the defenders moved that the pursuer's expenses be restricted to the Sheriff Court scale without sanction for counsel.

Background

[2] The pursuer was the front seat passenger of a car being driven by her daughter when it was struck from behind by a car being driven by the defenders' insured. In correspondence following intimation of a claim shortly after the accident the defenders confirmed to the pursuer's agents that liability would not be disputed. Before the action was raised the defenders made a without prejudice offer to the pursuer of the sum of £43,500, inclusive of the interim payment of £3,500. That offer was communicated by letter to the pursuer's agents on 26 October 2017, and was stated to be open for 21 days "after which it should be considered withdrawn". It was declined and an action was raised in July 2018.

[3] The pleadings disclose that the pursuer claimed to have sustained a whiplash injury to her neck, together with other soft tissue injuries. She also claimed to have developed adhesive capsulitis and was suffering from fibromyalgia with associated sleep disturbance, fatigue and poor concentration. It was as a result of this condition that the pursuer claimed to be unfit for work, with consequent loss of earnings and pension. A statement of valuation of claim, lodged during the progress of the action, quantified the pursuer's claim at £1,110,880.74. A proof in the action was due to commence on 5 August 2020. At the end of May 2020 the defenders intimated to the pursuer's agents surveillance footage of the pursuer, taken on dates in 2016, 2018 and 2019. On 9 July 2020 the defenders intimated a

minute of amendment containing averments which relied on that footage. The minute of tender was intimated on 14 July 2020 and accepted six days later.

Submissions of parties

[4] It is convenient to consider first the submissions made on behalf of the defenders. In arguing that the pursuer's expenses should be modified to nil, the essence of senior counsel's argument was that the defenders had made a pre-litigation offer of settlement in the same sum as that at which the case had eventually settled. The offer had been reasonable, even generous, and should have been accepted. The whole litigation was an unnecessary waste of time and expense. It had been caused because the pursuer had been dishonest in her claim to have fibromyalgia. The surveillance footage showed the pursuer on a number of occasions behaving in a manner inconsistent with her claimed disability. There were, cumulatively, seven factors from which the court could, and should, infer that the pursuer had fabricated, or at least grossly exaggerated, her symptoms. They were (i) the disparity between the figure in the pursuer's Statement of Valuation of Claim and the sum at which the action settled; (ii) the absence of any supplementary report from Dr Lambert, a consultant rheumatologist instructed on behalf of the pursuer, or any disclosure of his views on the surveillance footage (for which views the Court had continued the opposed motion for receipt of the defenders' minute of amendment on 16 July 2020); (iii) the observations of Dr Harris, a consultant rheumatologist instructed on behalf of the defenders, who, upon viewing the footage, expressed the opinion in a supplementary report, that the pursuer had "acted deceptively in an attempt to win compensation as a result of her accident…"; (iv) the observations of Professor Stone, a consultant neurologist instructed on behalf of the pursuer, whose consideration of the surveillance footage in a report dated 17 June 2020, while

forgiving, hardly represented an endorsement of the pursuer's position; (v) the contrast between the surveillance footage and the detailed description of her disabilities in the pursuer's pleadings; (vi) the lack of any explanation of substance for what the surveillance showed in a statement prepared by the pursuer on 8 June 2020 in response to the surveillance footage, and (vii) the contrasting description of the debilitating effect of her symptoms contained in the pursuer's application for disability benefits on 9 May 2017 (no 7/7 of process). The court should be careful to mark its disapproval of dishonest litigants, and that it could do so by denying them the expenses of the action (*Grubb* v *Finlay* 2018 SLT 463).

[5] Senior counsel for the pursuer submitted that the court should not infer from the fact that the case settled for £43,500, free and net of recoverable benefits, that it was a simple one of modest value. There were a variety of reasons why parties might agree to settle, and claims of complexity and significant value might be resolved at a relatively modest sum (*Allison* v *Orr* 2004 SC 453, at paragraph [36]). For the defenders to invite the court to conclude that the pursuer had been dishonest was to go too far. Such a conclusion, in all but the rarest of cases, should only be drawn following proof (*Grubb* v *Finlay, supra*, at paragraph [36]). The court should eschew the invitation to undertake a granular examination of untested medical, and other, evidence in order to try and work out what might have been proved (cf. *Hendren* v *Glasgow Housing Association and another*, Unreported, All Scotland Sheriff Personal Injury Court, PN1498/16 and PN236/17). Nor should the court take into consideration the pre-litigation offer (*Van Klaveren* v *Servisair UK Ltd* 2009 SLT 576). That offer had expressly been open for acceptance only for a period of 21 days, after which it was to be considered withdrawn. It was open to the defenders to protect themselves on expenses by either (i) repeating the pre-litigation offer, and/or (ii) lodging an early minute of

tender. Far from doing so the defenders had denied liability on record. Moreover, it appeared that the defenders had instructed surveillance as early as April 2016, and through 2018 and 2019, but that evidence had only been intimated in May 2020, and no tender was forthcoming until 14 July 2020. Against that background, and viewed from the perspective of the time when they were instructed, there was nothing unreasonable in raising proceedings (cf. *McIlvaney* v *A Gordon & Co. Ltd*, [2010] CSOH 118). There was no justification for departing from the usual rules on tenders (McFadyen ed: *Court of Session* Practice, paragraph L[104]; *Grubb* v *Finlay*, *supra*, paragraph [38]). Likewise, there was no justification for modification of the pursuer's expenses to the Sheriff Court scale. For the same reason that the court should not entertain a hypothetical re-run of a proof that never was, there was no factual basis to inform the extent of any modification of expenses.

Decision

[6] From the submissions of parties and the authorities to which I was referred I derive the following propositions. (i) Litigation should neither be commenced nor prolonged unnecessarily; (ii) although an action may have settled on the basis of acceptance of a Minute of Tender which included an offer of the expenses of process to date, it is within the discretion of the court to modify expenses, even to nil; (iii) in the exercise of that discretion the court is entitled, indeed bound, to consider all relevant material presented by the parties, including that which touches on the conduct of a litigant, but that (iv) in considering whether expenses should be so modified in circumstances such as the present, it is likely to be only in rare cases that a factual finding of dishonesty could properly be made in the absence of proof, justifying a departure from the usual rules relating to tenders. Senior counsel for the pursuer submitted that it was not permissible for the court to draw any

inference, adverse to the pursuer, from the sum at which the case settled (*Allison* v *Orr, supra*.). That is to overstate the position. It is, as senior counsel for the defenders put it, a factor which, although not determinative, may be taken into account along with others. The weight to attach to it will inevitably vary from case to case.

[7] It was said that the pursuer had acted unreasonably in refusing the pre-litigation offer and raising the action because, as the surveillance evidence demonstrated, she had been dishonest about her condition with her solicitors and medical experts. Had she been honest about her condition there would have been no necessity for the raising of the action. It had been both commenced and prolonged unreasonably. On the material available to me I feel unable to come to that conclusion. It is important to bear in mind that this action settled without any evidence having been led. It is not, therefore, possible to subject the material to the kind of assessment and scrutiny which would have occurred after the hearing of witness testimony. The cases of *Allison* v *Orr* and *Hendren* v *Glasgow Housing Association,* cited in the pursuer's submissions, were of course concerned with the reasonableness of instructing skilled witnesses, in the context of an argument about certification, rather than the reasonableness of a pursuer's conduct before and during a litigation. But where they may be thought to be of assistance is in the way that they shine a light on the difficulty faced by the court in attempting to re-construct the outcome of a proof which never happened.

[8] Fundamental to the defenders' argument in favour of modification is that it can be inferred that throughout the course of the litigation the pursuer had been materially dishonest about the symptoms she was reporting – an inference which, in the statement of 8 June 2020 previously referred to, the pursuer denies. Amongst the factors relied on by the defenders is the opinion of Dr Harris to the effect that the pursuer had acted deceptively to

gain compensation. That might be thought to be a factor of some weight. But it is not a conclusion that has ever been tested. While he expressed the view that the surveillance evidence raised serious concerns about the pursuer's ability accurately to describe her day to day functioning, Professor Stone stopped short of postulating deception. Indeed, notwithstanding the passages in the surveillance evidence summarised in his report, and to which I was referred during the defenders' submissions, he appeared to maintain that his own assessments of the pursuer (if not those of the defenders' experts) were compatible with the surveillance. The defenders pointed to the absence of any update on Dr Lambert's views (although it appears to have been at the prompting of the defenders' written argument for the motion hearing that Professor Stone's second supplementary report was disclosed). It is understandable why the defenders make the assumption that he was no longer supportive of the pursuer's case. To what extent that assumption is justified is unclear. But even if it is, I note that, in his first report (no 6/5 of process), Professor Stone described the pathophysiology and aetiology of fibromyalgia as complex, involving multiple levels of the nervous system, but also *cognitive and emotional components in most individuals* (my emphasis) (p16 of 22). Given his comments on the surveillance evidence I am unable to reach a firm conclusion either that the pursuer has been dishonest about the symptoms giving rise to a diagnosis of fibromyalgia, or – to the extent that the surveillance evidence may be indicative of exaggeration of the effects of her symptoms – that the conduct of the pursuer has been conscious or deliberate, such as would justify me in subjecting the pursuer's expenses to modification. There is no suggestion in Professor Stone's second supplementary report that he would defer to the views of a rheumatologist on the significance of what the surveillance showed. Even after taking into account cumulatively all of the seven factors relied on by the defenders, the only inference I can safely draw is that, at the point in time when the tender

came to be considered, there was considered on the part of her advisers to be a material litigation risk – which I cannot accurately measure on the information available to me - that the pursuer would be unable recover in damages a sum greater than that offered.

[9] I therefore turn to the question whether settlement of the case at the same level as the pre-litigation offer of settlement itself rendered the action unnecessary or unreasonable. I answer that question in the negative. Protection against the cost of such an action is in principle afforded to a defender who makes a pre-litigation offer of the full value of the pursuer's claim and who then repeats that offer as a judicial tender including an offer of expenses (*Gunn* v *Hunter* (1886) 13 R 573; *McIlvaney* v *A. Gordon & Co. Ltd, supra*.). In this case the pre-litigation offer was stipulated to be open only for a finite period of time after which it was to be considered withdrawn. It is apparent from the terms of the defenders' letter of 26 October 2017 that, at the time when the offer was made, the pursuer's agents had been following up medical information which, to put it neutrally, pointed to the potential for a claim where future wage loss would be in issue. It was not like the situation in *McIlhaney* where the action appears to have been raised in order to improve the pursuer's outcome relative to the amount he had contracted to pay to a claims company. I note that the surveillance reports for both April 2016 and November 2018 postulated evidence of contrasting levels of mobility. If the defenders harboured significant concerns about the veracity of the pursuer's self-reporting, it was open to them to take steps to protect their position (with or without disclosure of any surveillance evidence they held) by either a repetition of the pre-litigation offer in the defences, or a tender at a significantly earlier stage than was actually done (some 2 years and 8 months later). In the circumstances I do not consider it appropriate to depart from the usual rule allowing the pursuer the expenses of process to the date of the tender.

[10] Finally, since I am not prepared to make a finding that the pursuer was materially dishonest, the argument about modification to Sheriff Court expenses only arises in the context of the level at which the case settled. In that respect, I am prepared to accept that, at the time when the pre-litigation offer was made, the pursuer's advisers were investigating a claim which had the potential to exceed significantly not only the value of that offer but also the privative jurisdiction of the Sheriff Court. They would appear to have been in possession of medical evidence supportive of a diagnosis of fibromyalgia and justifying the need for further assessment at the conclusion of a multi-disciplinary pain rehabilitation programme (see, for example, the report by Dr Lambert dated 10 January 2017, no 6/4 of process). My conclusion is consistent with the position properly taken by senior counsel for the defenders not to oppose certification of the pursuer's skilled witnesses if I were otherwise against him on the matter of the pursuer's honesty.

[11] I will therefore grant decree in terms of the Minute of Tender and Minute of Acceptance of Tender, together with the expenses of process, without modification, to the date of tender. It will be for the auditor to determine when the tender ought reasonably to have been accepted. I will certify, as skilled persons who prepared reports for the pursuer, the individuals named in part 6(iii) of the motion. I have reserved all questions of expenses arising from the hearing of the motion and the outstanding minute of amendment procedure initiated in July of this year.