SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND PERSONAL INJURY COURT

[2018] SC EDIN 57

PN1842/18 & PN1901/18

JUDGMENT OF SHERIFF K J MCGOWAN

in the causes

MARIOLA ZDRZALKA

Pursuer

against

SABRE INSURANCE

Defender

and

KRZYSZTOF ZDRZALKA

Pursuer

against

SABRE INSURANCE

Defender

Pursuers: Starczewska, Solicitor; Digby Brown
Defender: MacDougall, Solicitor; BLM

Edinburgh, 9 October 1018

NOTE

Introduction

[1] These two cases arise from a road accident as a result of which both the pursuers were injured. In the claim by Mariola Zdrzalka (whom I shall refer to as "the first pursuer"), the case came before me of the pursuer's motion for decree in terms of minutes of tender and acceptance, including expenses on the ordinary cause scale; and certification of Mr Ian

Anderson, Consultant in Accident and Emergency Medicine, as a skilled witness.

[2] In the claim by Krzysztof Zdrzalka ("the second pursuer"), the pursuer's motion was for decree in terms of the minutes of tender and acceptance, with expenses on the summary cause scale and outlays on the ordinary cause scale and certification of Mr Andrew Chappell, Consultant Orthopaedic Surgeon, as a skilled witness.

[3] Both motions were opposed in relation to expenses only, the defender's primary position being that (i) the pursuers' expenses should be modified and (ii) there should be a contra-award of expenses in favour of the defender.

Pursuer's submissions – Mariola Zdrzalka

CPAP

[4] The defender had breached Rules 9, 13 and 17 of Schedule 1, Act of Sederunt (Sheriff Court Rules Amendment) (Personal Injury Pre-Action CPAP) ("the CPAP") by making a non-binding admission of liability. Therefore, the first pursuer was entitled to litigate.

[5] This claim was solely litigated due to defender's express breach of the CPAP. The defender initially agreed that the case should proceed under the CPAP but then made an express non-binding admission of liability. This was a breach of Rules 9, 13 and 17.

[6] The first pursuer had fully complied with the terms of the CPAP and reasonably followed the aims of it. The defender had been invited to follow the CPAP in the initial letter of claim. Stage 3 of the CPAP permitted up to three months for investigation. The defender had until 4 August 2018 to investigate but provided its position on liability on 31 May 2018.

[7] Reliance was placed on Rules 9 and 13 of the CPAP. Admissions were expected to be binding: Rule 17.

[8] The CPAP expressly gives a claimant the right to raise court proceedings if a non-

binding admission is made.

[9] The first pursuer was willing to follow the CPAP and co-operate with the defender. The first pursuer would have been prepared to disclose medical evidence and a statement of valuation of claim at the earliest opportunity if a binding admission of liability was made by the defender while CPAP was engaged.

[10] The first pursuer's agent acted promptly and reasonably in releasing medical evidence in the early stages of litigation and taking instructions on the offer made by the defender as soon as it was made.

[11] It was a matter of agreement that the CPAP was designed to encourage early settlement and the use of litigation as a last resort. But the first pursuer had followed these aims and did not resort to litigation prematurely.

[12] The first pursuer's case was ready for litigation. She was expressly entitled to litigate under the CPAP and should not be penalised for following the CPAP.

The insured loss claim

[13] The defender argued that the first pursuer, her solicitors or insurers failed to intimate a claim for insured loss prior to litigation commencing. The first pursuer's agent was unaware of the pursuer's insurer actions or purported failures to provide the defender with vouching for their outlay. The first pursuer was unaware of the usual practice between insurers to recover outlays. This type of recovery was regularly dealt with between insurers separately from a personal injury claim. Consequently, the first pursuer cannot be criticised or penalised for her insurer's failure to settle the insured loss and motor claim. The pursuer's agent had a duty to investigate all aspects of the first pursuer's claim and thus in the course of the investigation of the claim, the insurer was contacted. The insurer instructed solicitors, Jackson Boyd, who requested that the first pursuer seek to recover their outlay in the claim.

The pursuer's agent did not include the subrogated claim in a rush or to increase the value of the pursuer's claim.

[14] The insurer was first written to on 11 April 2018: production 5/8. The first email from Jackson Boyd was received on 9 May 2018: production 5/9; and responded to on 15 May 2018: production 5/10. The first pursuer's agent had a duty to include the subrogated claim into the litigation. The first pursuer's agent was not aware why this part of the claim had not been settled earlier.

[15] The defender's motion to reduce the pursuer's expenses to the CPAP scale and award the expenses of the action in favour of the defender was not competent. It was the defender's conduct which caused this claim to be litigated. The pursuer should not be penalised for the defender's express choice to breach the terms of the Compulsory CPAP.

[16] The court should grant the pursuer's motion to award expenses in favour of the pursuer on the ordinary cause scale. If the pursuer was successful in this motion, the expenses of this hearing should be in favour of the pursuer.

Pursuer's submissions – second pursuer

Protocol

[17] The submissions in respect of the first pursuer were adopted. The pursuer had been entitled to litigate. The defender's motion to modify the second pursuer's expenses and to find the pursuer liable in the expenses of the action to date should be refused.

Scale of expenses

[18] Expenses should be awarded in favour of the pursuer on the summary cause scale with outlays on the ordinary cause scale.

[19] The claim settled with an award to the pursuer in the sum of £4,250.

[20] It was reasonable to raise proceedings in the All-Scotland Personal Injury Court.

[21] Assessing quantum in a personal injury claim was not an exact science. In assessing quantum, the pursuer's agent must consider the best case scenario. In this case the pursuer was claiming for past and future solatium and inconvenience. At the time of raising the court action, quantum was assessed as likely to exceed £5,000.

[22] Mr Chappell diagnosed soft tissue injuries to neck with radiation into his right arm. He considered that the second pursuer would make a full recovery from his symptoms by 13 to 14 months from the accident.

[23] Assistance as to the likely value of the claim could be derived from

a. the Judicial College Guidelines, Chapter 7, Orthopaedic Injuries, (A) Neck Injuries, (c)(ii) Minor (£3,470 to £6,290);

b. *John Wilson* v *The National Insurance and Guarantee Corporation Limited (16 June 2008, Ayr Sheriff Court)*;

c. *Spink* v *Lawrie (9 May 2006, Aberdeen Sheriff Court)*.

[24] While the claim settled for £4,250, a pursuer has a right to choose his forum and it was appropriate to raise the action in All-Scotland Personal Injury Court. The fact that the pursuer later decided to accept an offer of a lower value does not alter the question of what was reasonable or appropriate at the time of raising proceedings: *Jordan MacDonald* v *Karen Auld, PIC, 18 July, 2016 (unreported)*, Sheriff Mackie.

[25] Schedule 1 (paragraph 2) of the General Regulations (Fees of Solicitors in the Sheriff Court) 1993 SI 1993 provides:

> "The pursuer's solicitors account shall be taxed by reference to the sum decerned for unless a Court otherwise directs".

[26] McPhail, paragraph 19.03 says:

> "In an ordinary action the court has an inherent discretionary common law power, which it may exercise in every case that comes before it unless the power is expressly taken away or qualified by statute, to determine whether to make an award of expenses and, if making an award, to determine by whom, on what basis and to what extent expenses are to be paid"

[27] And at paragraph 19.07:

> "An award of expenses according to our law is a matter for the exercise in each case of judicial discretion".

[28] The Court therefore has discretion in relation to the award of expenses. The Court should use its discretion in this matter to grant expenses in favour of the pursuer on the summary cause scale with outlays on the ordinary cause scale.

Submissions for defender

Introduction

[29] There was no opposition to decree passing in the terms sought nor for certification of the witnesses.

[30] The motions for the expenses of process to date were opposed and the defender sought (a) modification of the pursuers' expenses to the level as set out in the CPAP and (b) that the pursuers be found liable to the pursuer in the expenses of process to date. That would put the parties in the same position as they would have been had the claim settled prior to court proceedings being raised. Alternatively, the defender seeks modification of the pursuers' expenses to nil or reduction thereof by such a percentage as the court saw fit.

[31] The issue was one of interpretation of the CPAP and the conduct of parties having regard to the aims and spirit of the CPAP. The pursuers' interpretation of the CPAP in suggesting that: (a) a non-binding admission of liability was a breach of it and (b) if such a admission was made, this gave the pursuers a right to raise court proceeding without any

further discussion or negotiation was misconceived.

[32] That interpretation was not in keeping with the aims of the CPAP and, in all the circumstances, the pursuers had acted unreasonably in the raising of actions in the face of an admission of liability, request for medical evidence and the clear intention on the part of the defender to settle the claims.

Background

[33] Both pursuers were occupants of a car (SV07 UKJ) that was hit by another car (SJ06 UDP) on 30 August 2017. The other car (SJ06 UDP) was insured by the defender. The defender's policy holder was Janice Hendry. The pursuers were in no way to blame for the accident. The defender's car had been stolen and the thief was later apprehended by the police.

[34] The reason behind the "non-binding" admission was that there were indemnity issues as the theft had not been timeously reported to the defender by the policy holder. This was a requirement under the policy of insurance. It was accepted that there was unlikely to be any defence available, but if indemnity was to be declined then any action would need to be raised against the driver (the thief, for whom the defender has no liability or contract in place). That thief may have wished to have his own representation in defending the claim. The defender then might have a liability in terms of the Road Traffic Act to satisfy any unsatisfied decree against the driver. The policy holder may have wished to instruct her own solicitors to protect her interest in matters if indemnity was refused. This was because the defender would need an agreement from the policy holder to handle the claim for her on the basis that they could recover any sums paid out from her upon conclusion of the case.

[35] The defender's logic was a wish not to prejudice any defence/position that the policy

holder or any other party may have had while the question of indemnity was being considered.

[36] It was accepted that the pursuers' agents were not given a full explanation for the non-binding admission although it was made clear that the car had been stolen. On the other hand, no further inquiries were made of the defender before commencement of litigation.

[37] The claim for first pursuer settled for £8,000. The CPAP expenses (excluding outlays) would have been £2,611.20.

[38] The insured loss claim was never intimated pre-litigation. It was normal practice for insurers to agree to settle insured loss claims outside of the litigation process. Had vouching for insured losses been disclosed by the insurers, it would have been paid immediately by the defender on a without prejudice basis. This was a common practice between insurers in similar sorts of cases.

[39] As such, if the insured loss element was to be ignored, the value of the claim for the first pursuer would have been £5,543.64 and thus the CPAP expenses would have been £2,245.89.

[40] The claim for the second pursuer settled for £4,250. Had the claim settled before litigation, the CPAP expenses (excluding outlays such as the medical expert fees) would have been £1,958.70.

[41] It was hard to be precise about what the pursuers' expenses are likely to be on the judicial scale. Estimates were £4,975.74 for the first pursuer and £3,518.70 for the second pursuer.

[42] Accepting that these are figures based on assumptions, it was still submitted that the costs of litigation are significantly greater than the costs allowed under the CPAP. It was not

clear what advantage it has been to the pursuers in raising an action. All that seems to have done is increase the legal fees (including court dues) but there had not been a faster or better settlement of the claims.

[43] In addition, the defender had had to instruct its own solicitors at its own expense to defend the actions. Legal fees and court dues had been incurred. The defender's judicial expenses, to illustrate the additional costs they have needed to incur are, for each action, estimated at £2,380.95.

[44] It was unreasonable for the defender to meet the additional costs of these litigations, which the defender contends were premature and unnecessary and against the aims of the CPAP.

Legal framework

[45] All claims for personal injury for accidents that occurred after 28 November 2016, which are worth less than £25,000, must be dealt with in terms of the CPAP which was set out in the Act of Sederunt (Sheriff Court Rules Amendment) (Personal Injury Pre-Action CPAP) 2016 no. 215 at Schedule 1, Appendix 4. The court's express powers were in OCR, Chapter 3A.

[46] In addition, while Chapter 3A made express provisions about what the sheriff can and ought to do where there is an issue about the CPAP, the court also had a very wide discretion at common law to deal with the question of expenses and could, even before Chapter 3A being in force, do all the same things that Chapter 3A specifically states. The defender contends that the main aspect of the CPAP and Chapter 3A relevant for this opposed motion are: CPAP, Paragraphs 3, 9, 10, 13 and OCR 3A.2, 3A.3, 3A.3(4) and (5).

The nature of the alleged breach and the conduct of the defender

[47] It was accepted that the CPAP makes it clear that a claimant is expected to refrain

from commencing proceedings unless liability is not admitted or such an admission is made on the basis that the defender does not wish to be bound by such an admission in any subsequent proceedings: Paragraph 9.

[48] The pursuer also relies on paragraph 13 which states that: "Paragraph 9 above confirms that the claimant may raise proceedings if a non-binding admission is made."

[49] The pursuers' position is understood to be that this non-binding admission was: (a) a breach of the CPAP and (b) gave the pursuers a right to raise court proceedings without any further negotiations or discussions (in particular without any disclosure of medical evidence) taking place.

[50] This gives rise to two questions:

a. Is a non-binding admission a breach of the CPAP?

b. Does a non-binding admission "entitle" a pursuer to raise court proceedings without any further negotiation, correspondence or discussion?

Is a non-binding admission a breach of the CPAP?

[51] A defender was entitled to make a non-binding admission of liability and doing that did not constitute a breach. The CPAP did not set out that such an admission is a breach. However, it does say that if such an admission is made a claimant *may* raise proceedings. It was not, however, a breach to make such an admission and there are many circumstances where an admission made in such terms was reasonable.

[52] If the pursuers were not aware that they had been hit by a car which had been stolen before the letters of claim were sent, then they were made aware of that upon receipt of the defender's letter of 31 May 2018. As explained above, there was a good reason for the defender to make a non-binding admission in light of: (a) the insured not being the driver of the car; (b) the car being stolen; (c) the indemnity issues in light of the insured not reporting

the theft and (d) the concern that the defender had in relation to a party being sued who does not have its backing under a contract of insurance wishing to defend a claim themselves and not wanting to bind them.

[53] It was accepted that prior to the raising of the action the defender agreed with its insured to indemnify her and that was why no defence was made to the action being raised under the European Regulations directly against the defender.

[54] However, the defender's non-binding admission was reasonably made at the time. There cannot be any criticism of a defender who wishes to make an early admission to move settlement forward prior to the full 3 month investigation period. A practice of quick admissions is to be encouraged.

[55] A non-binding admission is a factor to consider in whether or not proceedings can be made BUT that is a different thing to a breach of the CPAP. As such, there is no breach of CPAP on the part of the defender in the circumstances of this case.

[56] Even if that was wrong, and the court considered that this admission was a breach, any breach needs to be looked at with reference to Rule 3A.3(1)(a) which allows for a requirement to be failed if there is "just cause". There was just cause for the breach, if that was what such an admission was, in the circumstances of this case. There is no basis to level any criticism at the feet of the defender for the position it took. In fact, this was pro-active and should be commended.

[57] The defender had been very clear in relation to its desire to settle the claim and cannot be criticised in all the circumstances.

Does a non-binding admission "entitle" a pursuer to raise court proceedings without any further negotiation, correspondence or discussion?

[58] To answer this question, the conduct of the pursuers has to be considered.

THE PRE-LITIGATION CONDUCT OF THE PURSUERS

[59] The court is required to look at the conduct of the parties with reference to the aims of the CPAP: paragraph 10, which sets out that both parties are expected to co-operate with each other to meet the aims of the CPAP. See also Rule 33A.3(5).

[60] The aims of the CPAP are set out at paragraph 3 of the CPAP and they are:

a. to assist the parties to avoid the need for, or mitigate the length and complexity of, civil proceeding by encouraging fair, just and timely settlement of disputes before litigation;

b. early and full disclosure of facts/documents;

c. to narrow issues in dispute.

[61] The pursuers' rush to litigate and suggestion of "entitlement to litigate" is contrary to the aims of the CPAP.

[62] There was some form of admission of liability and a clear intention to progress the claim to settlement. There was a request for sight of medical evidence and a statement of valuation. The request from the defender was ignored.

[63] It is of note that, no further explanation was sought by the pursuers from the defender about the nature of the admission made. That would not have required much additional work. A quick call or email would have been sufficient if it was thought that there was some form of concern in progressing settlement. The lack of any communication at all until the day after proceedings were commenced at least strongly infers a reluctance to engage in any settlement discussions at all and a strong desire to litigate. The approach taken was not one of co-operation. It was not one where a genuine attempt was made to settle the claim or restrict the scope any dispute. It was not an approach which had early disclosure.

[64] This was an abuse of the CPAP, was unreasonable and caused a premature and unnecessary litigation.

[65] It was not clear what was hoped to be achieved by the pursuers not being more pro-active in settlement discussions. It was not clear what the reason was for withholding the medical reports and statement of valuation of claim until the matter was litigated. It seems that the reason is no more than "because I can". Such an approach should be actively discouraged by the courts.

[66] If the aim of the CPAP was co-operation and to have fair, just and timely settlements before litigation with early and full disclosure of facts/documents to narrow issues in disputes, then the pursuers had not met that aim.

[67] In fact, failing to co-operate as set out in paragraph 10 is a breach of the rules of the CPAP.

Discussion on expenses

[68] Even if the pursuers were entitled to litigate in the circumstances of this case (which was not accepted), then it did not follow that there was an entitlement to full judicial expenses. This issue was always in the discretion of the court.

[69] The court has the power at common law and in terms of Chapter 3A to award either party some or all of the expense of process.

[70] If the court accepts that the defender had acted reasonably and the pursuers have not, then it was open to the court to award or restrict expenses in any way it saw fit.

[71] The behaviour here that needed to be discouraged was the rush to litigate without disclosure of medical evidence in the face of a clear willingness to engage in settlement discussions.

[72] In *Gibson* v *Menzies Aviation (UK) PLC 2016 SLT (Sh Ct) 179*, the pursuer intimated a

claim in terms of the VPAP. Liability had been admitted. The claim proceeded under VPAP pre-litigation but no medical evidence was disclosed. The pursuer sought additional wage records from the defenders (the employers). The medical evidence was repeatedly asked for but never disclosed. An action was raised (first one in the Court of Session and then one in this court). The defenders argued for modification on the basis that the action would have settled without litigation had the medical evidence not been withheld.

[73] At paragraph [43], the court held that the failure to disclose medical evidence until 10 days after the litigation was raised was inexcusable. (In the present cases, the litigation commenced on 19 July and the medical evidence was disclosed on 26 July so it was accepted that that was not as long a delay post-litigation).

[74] At paragraph [50] the court reached the conclusion that the failure to disclose the medical evidence was unreasonable and deprived the defenders of a genuine opportunity to settle the claim. To mark the court's disapproval a substantial reduction of two thirds of the expenses was made (leaving the pursuer with only a third of the judicial expenses of process).

[75] The conduct of the pursuers in the present cases was worse in that at least there were some discussions between the parties pre-litigation. In this case, there was a more apparent refusal to enter into any discussions at all on the part of the pursuers.

[76] In *Devine* v *Laurie 2016* GWD 40-712; [2016] SC EDIN 83 there was a settlement by way of acceptance of tender and there was a discussion pre-litigation about contributory negligence. The pursuer was unhappy about the suggestion of there being any contribution at all and thus litigated without disclosing any medical evidence until after the action was raised.

[77] The VPAP was not properly engaged but the court looked at the conduct of parties to

reach a view on expenses. The court did feel that the pursuer was entitled to raise an action due to the issue of contributory negligence not being capable of being resolved: para [58]. *Gibson*, para [44] was mentioned and it was reiterated that that medical reports should be disclosed as soon as available: *Devine*, para [60]. There was no good explanation for the medical report being withheld and disclosing it could have narrowed the scope of litigation if it did not settle it: paras [6] and [62].

[78] The court reached the view that:

> "Even if the medical reports had been disclosed, it appears to me that the pursuer would have been entitled to commence proceedings given the live issue on contributory negligence. But it also appears to me that settlement of the action may have occurred sooner than it did had the medical reports been disclosed earlier.": para [64].

[79] Modification was considered appropriate for the potential delay in settlement and to reflect the fact that the defenders had been put to more expense than they would have been had the action not been raised and reduced the pursuer's expenses by 20%: para [65].

[80] This case offers some assistance in ascertaining the approach to modification of expenses but it is of note that in *Devine* there was a "live" issue to be determined by litigation (contributory negligence). There was no such live issue at the time when the present actions were raised. As such, it was not reasonable for litigation to commence without further inquiry on the part of the pursuers.

[81] Even if the pursuers were entitled to raise these actions when they did, *Devine* (and also *Gibson*) both rightly criticise the lack of disclosure of medical evidence. The refusal to enter into any discussions at all before litigation and to not disclose medical evidence is unreasonable and does require the court to mark its disapproval.

Defender's motion

[82] Decrees should pass in terms of the Minutes of Tender and Acceptance thereof and

the witnesses mentioned in the pursuers' motion should be certified.

[83] Both parties should be put back into the position that they would have been had no action been raised. The appropriate finding was for the pursuers to be entitled to the CPAP expenses with pre-litigation outlays and the defender entitled to the expenses of process of the unnecessary and premature litigation as taxed for both actions.

[84] If the intention of the court was to actively discourage litigation of this sort then such an outcome is likely to cause any agent to pause before litigation under similar circumstances in future cases.

[85] If the court was not willing to grant any expenses to the defender then it was submitted that the pursuers' expenses be significantly reduced. A minor reduction is unlikely to have the desired effect of encouraging more interaction between parties prior to litigation. As such, a 50% reduction for both actions was suggested, although modification to nil would be justified.

[86] In relation to the second pursuer's case, expenses on the summary cause scale but with ordinary cause outlays are sought. It is quite proper that any expenses of the pursuer for that case are taxed on the summary cause scale due to the sum decerned for being under £5,000. However, there is no good reason for the pursuer being entitled to outlays on a different scale.

[87]

Grounds of decision

First pursuer

Timeline

[88] The relevant sequence of events is as follows:

2017

August

30 – accident.

2018

May

14 – letter and claim form sent to defender: production 6/1.

31 – defender acknowledges receipt confirming that "*this claim is to be handled under the relevant Pre-Action CPAP*" and "*we are in this instance prepared to make a non-binding admission of liability.*": production 6/3.

July

18 – writ served on defender; email sent advising that making an express non-binding admission of liability is a breach of the CPAP and that proceedings are being served against them. The pursuer attached a copy of the Initial Writ.

23 – defender instructed solicitors and lodged a Notice of Intention to Defend.

26 – pursuer intimated and lodged productions and Statement Valuation of Claim: 5/1–5/6 of process.

31 – production 5/7 lodged and intimated.

August

1 – Minute of Tender lodged and accepted by the pursuer on the same day.

The CPAP

[89] The CPAP is now found in Appendix 4 to the Ordinary Cause Rules ("OCR") and Chapter 3A OCR contains the rules pertaining thereto.

[90] The relevant part of Rule 9 provides:

> "The claimant is expected to refrain from commencing proceedings unless:
> … the defender refuses to admit liability, or liability is admitted on the basis that the defender does not intend to be bound by the admission in any subsequent proceedings;…".

[91] Rule 13 provides:

> "The defender has a maximum of three months from receipt of the Claim Form to investigate the merits of the claim. The defender must send a reply during that

> period, stating whether liability is admitted or denied, giving reasons for any denial of liability, including any alternative version of events relied upon. The defender must confirm whether any admission made is intended to be a binding admission. Paragraph 9 above confirms that the claimant may raise proceedings if a non-binding admission is made."

[92] Rule 17 provides:

> "If an admission of liability is made under this CPAP, parties will be expected to continue to follow the stages of the CPAP, where: the admission is made on the basis that the defender is to be bound by it (subject to the claim subsequently being proved to be fraudulent); and the admission is accepted by the claimant."

Was the first pursuer entitled to sue when she did?

[93] This is the primary question to be considered. The starting point for that is a consideration of the terms of CPAP.

[94] In my view, the correct approach is to ask what the ordinary meaning of the relevant rules (9, 13 and 17) is, when read together, taking account of the other parts of CPAP.

[95] The words of Rule 9 are clear. A claimant should not sue if certain things are done by the defender. That suggests – but does not make explicit – that any obligation not to sue flies off if the defender refuses to provide an unqualified admission of liability.

[96] Any ambiguity is resolved by Rule 13. The last sentence can only mean that the pursuer is free to sue if a non-binding admission of liability is made.

[97] Paragraph 17 appears to me to mean that the obligation to follow the CPAP only arises where a binding admission of liability is made and accepted.

The present case

[98] It was not suggested that the admission made in this case was other than non-binding. Accordingly, in my view, reading Rules 9 and 13 together, the pursuers, insofar as the CPAP is concerned, were entitled to sue.

Did the CPAP continue to have relevance?

[99] The obligation to proceed under the CPAP - and hence for it to remain relevant – only arises if the conditions of Rule 17 are met. If they are not, the CPAP no longer applies.

[100] It was said that I should have regard to the 'Aims' of the CPAP: Paragraph 3, Appendix 4, OCR. But in my view, as the CPAP no longer regulates the position between parties (see above), it can have no continuing relevance, because the CPAP cannot, like Schrodinger's cat be both 'alive' and 'dead' at the same time (i.e. simultaneously applicable and not applicable).

[101] Even if that is not correct, Paragraph 3 contains generalised statements, whereas Paragraphs 9 and 13 – which are headed 'Protocol Rules' – are specific and clear. So while the Aims may inform how the Rules are to be applied, I do not think they can alter the meaning or otherwise trump the latter where they are clear.

[102] The foregoing is sufficient to dispose of the defender's argument insofar as it relies on CPAP.

[103] Reference was also made to OCR 3A.3. In passing, I observe that there is an unfortunate lack of consistency in terminology. OCR 3A.3 uses the word "requirements", but that term does not appear in the CPAP which uses variously 'aims', 'rules' and 'stages'. Thus it is not clear whether OCR 3A.3 is supposed to be referring to all of the CPAP or just part of it. On balance, it appears to me to be more likely to be a reference to paragraphs 11 onwards of the CPAP i.e. the stages.

[104] Assuming that is correct, while the defender can make generalised complaints about the first pursuer's alleged failure to comply with the aims of the CPAP, there is no specific allegation of a breach of it. Thus, OCR 3A.3 is not engaged.

[105] The other difficulty for the defender is that the reason for the non-binding admission

of liability was not explained to the pursuers' agents. Moreover, the defender could legitimately have held back on saying anything about liability until the issue of indemnity was resolved. There was a three month window for this to be done.

[106] I do not doubt that the defender was acting in good faith in putting forward the admission of liability which it did, but unfortunately, by doing so, it left itself exposed in terms of the CPAP.

[107] Accordingly, I have concluded that insofar as the CPAP is concerned, I am unable to detect any failure (under the CPAP) by the first pursuer which would justify an exercise of the power under OCR 3A.3(2).

The application of the common law principles

[108] Common law principles continue to apply: OCR 3A.3(6).

[109] The question then arises: what is to be done if a pursuer is 'entitled to sue' in terms of the CPAP but circumstances exist which may suggest that the court should exercise its existing powers to modify or otherwise deal with expenses: McPhail, paragraph 19.10?

[110] In my opinion, that requires an examination of the circumstances relied on in support of the motion to modify to see if they are sufficiently weighty.

<u>The medical report – delay in disclosure</u>

[111] Mr Anderson's report is dated 24 June and I was told that the pursuer's agents had it a few days later. It seems to me to be reasonable to allow a period for them to consider it and to allow for a copy of it to be sent to the first pursuer herself to be checked for accuracy. The writ was warranted on 11 July and served on 18 July. Carrying that timeline through, the report was not disclosed until 26 July when a copy of it was intimated to the defender's solicitor who had by that time been instructed. A notice of intention to defend had been lodged on 23 July.

[112] As a matter of generality, medical reports which are to be relied on should be disclosed within a reasonable period of their having been obtained. A failure to do this may have consequences in expenses: see, for example, Paragraph 5, Sheriffdom of Lothian and Borders Practice Note Number 3 of 2016.

[113] In this case, my judgment is that the medical report could and should have been disclosed no later than the date upon which the writ was served. In seeking to establish whether there was any impediment to that, I was told that it was the pursuers' agents' 'policy' not to disclose medical reports until actions were defended.

[114] No explanation or justification for such a 'policy' was put forward. In any event, the court's discretion to deal with expenses in any given case cannot be constrained by the internal policies of practitioner firms.

[115] While it is true that the notice of intention to defend was lodged well before the expiry of the notice period, I infer that the medical report would not have been disclosed until that had happened.

[116] Once the medical report was disclosed, settlement was achieved quickly.

[117] It is reasonable to proceed on the basis that had the pursuer's agents acted reasonably and disclosed the medical report at the time the writ was served (at the latest) the action would have settled within a similar time period and thus within the notice period (i.e. when the action was still 'undefended').

[118] In these circumstances, I have concluded that the pursuer's agents' conduct can be criticised and that that should be reflected in the matter of expenses: McPhail, paragraph 19.10.

[119] I did consider whether it was appropriate to restrict the pursuer's expenses to those for an undefended action (albeit as taxed) but concluded that the formulation of a suitable

interlocutor would be difficult. Accordingly a broader approach is required. I shall find the pursuer entitled to the expenses of process as taxed, modified (i.e. restricted) by 50% to the date of tender.

[120] On the same basis, I am satisfied that the defender has been put to legal expense which it would not otherwise have incurred. However, given my decision to the effect that the raising of the action was reasonable, I think that the defender would have incurred some legal expense in any event. I shall find the pursuer liable to the defender in the expenses of process from the date of tender, again modified by 50%.

Recovery of records by specification

[121] Before leaving this case, there is one other matter which I wish to mention. This was a point not raised by the defender, but one that arises from the court's general power to oversee the conduct of litigation and the costs associated therewith.

[122] On preparing for hearing this case, I observed that a PI2 specification had been approved at warranting. It contained calls directed at recovery of the pursuer's GP and hospital records from, respectively, The Vale Centre for Health and Care and Vale of Leven District General Hospital, both in Alexandria. The GP records had been lodged in process on 31 July: production 5/7.

[123] However, the report from Mr Anderson dated 24 June 2018 suggested that he had had access to the same records: production 5/1/2.

[124] I was told that the medical records had indeed been recovered under mandate and had been seen by Mr Anderson to assist him in preparing a report. That was an entirely proper exercise. What I could not understand was why, if the records had already been recovered under mandate, it was thought appropriate for there to be recovery of the same material by commission and diligence. It was accepted that there was no good reason for

that procedural step having been taken.

[125] In my view, that should not have happened. Apart from anything else, it creates additional work for havers and unnecessarily increases expense.

[126] So, in my view, no fee should be recoverable by the first purser for the work occasioned by the PI2 specification as that was a step of procedure which was quite simply unnecessary.

Second pursuer

Timeline

[127] The timeline in this case was substantially similar to that in the first pursuer's case.

Application of the CPAP to the present case

[128] I adopt the same approach as set out above in relation to the first purser's case and arrive at the same conclusion. In my view, the second pursuer was entitled to litigate and I can detect no failure (under the CPAP) by the second pursuer which would justify an exercise of the power under OCR 3A.3(2).

The application of the common law principles

[129] Again, I adopt the approach set out in relation to the first pursuer.

<u>The medical report – delay in disclosure</u>

[130] Adopting the approach set out in relation to the first pursier, my opinion is that there was an unreasonable delay in disclosing Mr Chappell's report in this case. It could and should have been disclosed no later than the date upon which the writ was served. No explanation other than the 'policy' already alluded to was put forward as justification.

[131] I have the same concerns in this case as that of the first pursuer and come to the same conclusion. Had the pursuer's agents acted reasonably and disclosed the medical report at

the time the writ was served (at the latest), it is likely that the action would have settled within a few days.

[132] That falls to be reflected in the matter of expenses and I shall in this case also find the pursuer entitled to the expenses of process as taxed, modified (i.e. restricted) by 50% to the date of tender. The defender shall be entitled to the expenses of process from the date of tender, modified by 50%.

Scale of expenses

[133] In the present case, the motion was for expenses on the summary cause scale with ordinary cause outlays. Given the court's wide and unfettered discretion on expenses, I do not agree with the defender's submission that that is not a permissible approach. As to whether it is appropriate, I accept the pursuer's submission to the effect that valuing claims is not an exact science and that it is a question of whether it was reasonable to raise this action as an ordinary action. In my opinion it was. The pursuer is not seeking ordinary cause expenses but only ordinary cause outlays. That seems to me to be fair in the circumstances and I shall exercise my power under Regulation 2 of Schedule 1 of the 1993 Act of Sederunt to so direct.

Recovery of records by specification

[134] The point raised under this heading in the first pursuer's case arises here also.

[135] At warranting stage on 16 July, a PI2 specification was approved, containing calls directed at recovery of the pursuer's GP and hospital records. The GP records were then recovered and lodged in process on 31 July: production 5/2. (It is not clear if the hospital records were ever recovered under specification).

[136] The report from Mr Chappell discloses that he had had access to the GP and hospital records: production 5/1.

[137] I was told that the records seen by Mr Chappell had been recovered under mandate. Thus, material that had already been recovered under mandate was recovered (at least in part) for a second time by commission and diligence. It was accepted that there was no good reason for that procedural step having been taken.

[138] For the reasons already set out in the first pursuer's case, that should not have happened and no fee should be recoverable for the work occasioned by the PI2 specification.

Disposal

[139] I shall pronounce an interlocutor in the first pursuer's case granting decree for payment in terms of the tender and acceptance; certifying Mr Anderson as a skilled witness; finding the defender liable to the pursuer in the expenses of process to the date of tender, modified by 50% (under exclusion of any fee occasioned by or arising from the PI2 specification); taxation to be on the summary cause scale with ordinary cause outlays; and finding the pursuer liable to the defender in the expenses of process from the date of tender to the date hereof, modified by 50%.

[140] In the second pursuer's case, I shall pronounce an interlocutor granting decree for payment in terms of the tender and acceptance; certifying Mr Chappell as a skilled witness; finding the defender liable to the pursuer in the expenses of process to the date of tender, modified by 50% (under exclusion of any fee occasioned by or arising from the PI2 specification), taxation to be on the summary cause scale with ordinary cause outlays; and finding the pursuer liable to the defender in the expenses of process from the date of tender to the date hereof, modified by 50%.

[141] Finally, I observe that questions of expenses have been decided according to principle and the application of discretion: McPhail, paragraph 19.07. As a result of the

introduction of the CPAP, we now have a set of rules.

[142] But the structure of the CPAP and the relevant OCR creates a number of challenges for practitioners and the court.

[143] Firstly, deciding matters according to a set of rules does not necessarily create more certainty. Indeed, it is a well-known jurisprudential phenomenon that a set of rules may create more room for dispute, because there is more to argue about, such as the limits of application of any given rule and any exceptions thereto.

[144] Secondly, the CPAP has not displaced but sits alongside the existing common law rules.

[145] Thirdly, the CPAP contains "Aims", "Rules" and "Stages": it is unclear if this is intended to be a hierarchical arrangement.

[146] Fourthly, the court's powers under OCR 3A.3(2) arise only if OCR 3A.3(1) is engaged, but the latter uses the phrase "…requirements of the Protocol…", thus making it unclear what part of CPAP is being referred to.