SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT FALKIRK

[2021] SC FAL 26

FAL-SG 291-20

NOTE BY SHERIFF DEREK LIVINGSTON

in the cause

BRUCE McKINLAY

Claimant

against

AVIVA INSURANCE LTD

Respondent

Act:Deans

Alt:Rehman

Falkirk 19 April 2021

I have considered the submissions lodged by both parties and have come to the view for a number of reasons that the claimant should be awarded expenses of £284. I will try to set out my reasoning as briefly as possible.

Background

[1] This is a fairly typical road traffic case in which the sum sued for by the claimant was £3,692.28 consisting mainly of credit hire costs together with £100 for inconvenience and £75 for miscellaneous costs.

[2] The respondent defended the case on quantum only. I am told that various offers were put forward to the claimant but it is a matter of agreement that it was only on 15 February 2021, some three working days before the second evidential hearing in the case,

that a figure of £1200 was agreed. Previous offers, all made within a period of less than week before the £1200 was accepted, were £796 and £945.20, with £1200 agreed coming about as a result of a counter offer by the claimant to settle for this sum.

[3] The respondent is arguing here for "capped" expenses whilst the claimant seeks Chapter V expenses ie expenses in terms of the Act of Sederunt (Taxation of Judicial Expenses) Rules 2019 at Schedule 5. Capped expenses would, I am told, mean that the claimant would be entitled to £284, whilst Chapter V expenses, even although subject to a number of percentage deductions due to the sum decerned, would be likely to be several times greater.

Submissions and Authorities

[4] Both parties lodged written submissions. The claimant referred me to a list of authorities and some of these were also referred to by the respondent. In short these were

i. Courts Reform (Scotland) Act 2014, section 81 ("the 2014 Act").

ii. Sheriff Court Simple Procedure (Limits on Award of Expenses Order 2016).

iii. Act of Sederunt (Taxation of Judicial Expenses) Rules 2019.

iv. *Davis* v *Skyfire Insurance* [2019] SC EDIN 24 (now reported at 2019 S.L.T. (Sh Ct) 272)

v. *Graham* v *Farrell* [2017] SC EDIN 75 (now reported at 2018 Rep.L.R.36)

vi. Chapter V Act of Sederunt (Fees of Solicitors in the Sheriff Court) etc 1993 ("the 1993 Act").

[5] Based upon the submissions the main issue in my view was whether, having stated a defence on quantum, the respondent had not proceeded with it and whether in any event I

should utilise the discretion referred to in Davis if I found this to be the case. The former is a scenario which means the respondent effectively loses the benefit of capping standing the terms of section 81(5)(a)(ii) of the 2014 Act. This situation has been dealt with in a number of cases not all of which are consistent.

The agreed law

[6] Parties, not surprisingly, were agreed on much of the law here. The general rule is that a successful party's expenses, in a defended case, will be capped in terms of regulation 3(b) of the Sheriff Court Simple Procedure (Limits on Award of Expenses) Order 2016 which caps expenses at 10% of the value of the claim where the value of the claim is greater than £1,500 and less than or equal to £3,000. However, that generality is clearly qualified by the specific provisions contained in section 81(4) and (5) of the 2014 Act. Subsection 4 provides that capped expenses do not apply to simple procedure cases such as those mentioned in subsection 5 and subsection 5(a) provides for an exception in which

> "(a) the defender –
>
> (i) has not stated a defence
> (ii) having stated that a defence, has not proceeded with it"

[7] The claimant's position was that the exception contained in subsection 5(a)(ii) applies and therefore the expenses cap was not applicable. He referred to Summary Sheriff Cottam's decision in *Davis* v *Skyfire* in which Sheriff Cottam concluded at paragraph 34 that subsection 5(a)(i) applies to defences on quantum as well as to liability . In his detailed judgment he referred to a number of cases and rejected the reasoning of Sheriff Principal Wheatley in *Semple* v *Black* 2000 SCLR 1098 preferring the reasoning of Sheriff Principal Stephen in *Tallo* v *Clark* 2015 SLT (Sh Ct)181 and Sheriff Principal Nicholson

in *Fenton* v *Uniroyal Englebert Tyres Limited* 1995 SLT (Sh Ct) 21. Sheriff Principal Wheatley took the view in *Semple* that the court has discretion in determining whether the respondent has proceeded with the defence whilst in *Tallo* and *Fenton* the Sheriff Principals agreed that not proceeding with their defence means that the respondent did not proceed to a hearing on evidence.

[8] Sheriff Cottam also dealt with the fact that he had a discretion in any event in terms of articles 3A and 5 of the 1993 Act.

[9] The respondent's argument, was that the respondent had proceeded with its defence to the effect that the hire charge was excessive and that once full information had been received the respondent speedily concluded a settlement. Reference was made to Davis as authority for the use of discretion, Graham was distinguished as involving a tender and to the dicta in Tallo in that the respondent's position was it had proceeded with the defence.

Discussion

[10] In the case of *Semple* v *Black* 2000 SCLR 1098 Sheriff Principal Wheatley, of this Sheriffdom, looking at equivalent rules in relation to small claims which of course were the predecessor of simple procedure stated:

> "Where a defender states a defence and subsequently has a tender accepted, this does not necessarily mean he has, or has not, insisted upon his defence. The statute does not distinguish between a substantive defence on the merits, and one restricted to quantum. Therefore, so long as the defender continues to dispute quantum, even where he has conceded liability, he can be said to have persisted in his defence. It is essentially a matter for the Sheriff to decide whether in all the circumstances the defender can be said to have in fact persisted in his defence. Given that section 36B(3)(a)(ii) appears to intend that the restriction in expenses should be available where the lodging of defences has not protracted the process, it does not seem to matter whether the reason for a defence being stated and not proceeded with is a dispute on the merits, or quantum of damages, or both. Significant preparation may still have to be done by the pursuers even when liability is admitted and the only matter which has to be decided is the quantum of damages. It may be that

> somewhat different consequences are involved for the pursuer if a defender agrees liability as opposed to agreeing the measure of damages, but in effect any significant or substantial point of a defence to an action is not immediately conceded when defences are lodged, then it would appear that the defender may not be able to avail himself of the restriction in expenses allowed by section 36B of the Act."

[11] Sheriff Principal Wheatley's view is not the same view as is taken in a number of cases including *Graham* v *Farrell*, *Tallo* v *Clark* 2015 SLT (Sheriff Court) 181 and *Glover* v *Deighan* 1992 SLT (Sheriff Court) 88. Sheriff Cottam also did not follow it in *Davis* v *Skyfire*. In both *Graham* and *Tallo* the view was taken that the concept of proceeding is proceeding all the way to a decision after a proof or other evidential hearing. In *Tallo* it was stated that not proceeding with the defence: "means not proceeding with a hearing of evidence in obtaining a decision and judgment of the court". It should also be noted that *Graham* was a simple procedure case whilst *Tallo* was a small claims case but that Sheriff McGowan held that the small claims decisions on capped expenses were "highly persuasive" in simple procedure.

[12] The view taken in Glover, which was a liability defence case, by Sheriff Principal Hay was "in my opinion, expenses on the summary cause scale fall to be awarded where a defence is stated initially but the claim is subsequently met, whether in full or by compromised settlement. The only exception will be in a case where the parties agree otherwise in relation to expenses." Fenton also was a case in which liability was disputed and a similar view taken by Sheriff Principal Nicolson.

Decision

[13] With due respect to a number of learned Sheriffs and Sheriff Principals it does seem to me that whilst a literal interpretation has to be taken relative to section 81(5)(a)(ii) that does not exclude the situation where a party defends on quantum being held to have

proceeded with its defence when that party settles the case for substantially less than the sum sued for. Putting it another way if a party disputes liability that party is effectively saying "I don't owe you anything no matter what your losses were". A party disputing quantum is not saying that at all. The party who is simply arguing matters on this aspect is saying, "You are asking for too much and I am not going to pay you that". Sheriff Principal Wheatley's decision must be highly persuasive standing the location of the hearing of this case but in any event it also seems to me to be eminently sensible. Each case should depend upon its own facts where the issue is simply one of quantum. Equally, in my view, where the pursuer or claimant comes close to what was claimed by way of settlement it may be that that does constitute a defence not being proceeded with.

[14] The main issue in this case was, the unfortunately frequent one, of credit hire charges. Here, the claimant sought the sum of £3,692.28, £3517.28 of which constituted hire charges, eventually settling for £1,200. That is very substantially below what was originally sought and whilst it is accepted that there will often be an element of optimistic craving of damages that should be less a problem in cases which do not involve personal injury and thus should be capable of more accurate calculation. The amount accepted clearly shows that the claimant waived most of the hire charges. The respondent had argued a failure to mitigate loss and the reduction of over 60% in these hire charges is clearly indicative that the claimant gave way on the point. In my view it is not the case that respondent failed to proceed with its defence. The facts show otherwise.

[15] If I am wrong in my interpretation of the statute there is still, as was accepted by both parties, an element of discretion open to me regarding what I do with expenses. As Sheriff Cottam pointed out in *Davis* the principles of simple procedure as set out in rule 1.2 require to be looked at and the encouragement throughout the simple procedure rules to

parties to settle their disputes by negotiation. I entirely agree with Sheriff Cottam's view that the interpretation whereby a negotiated settlement by a defender will always result in an award of uncapped expenses is completely counter to that principle. Using the same discretion as set out in paragraph 38, 39 and 40 of his judgment and articles 3A and 5 of chapter V of the 1993 Act I would have found only capped expenses should be awarded in this case with the respondent having settled matters without a proof and on a considerably lower basis than the sum sued for.

[16] In the circumstances outlined I consider the respondent did maintain its defence here but in any event it would be entirely reasonable to reduce the expenses awarded using my discretion where the respondent has settled matters for a substantially lower sum than that sued for and has apparently succeeded on the issue of mitigation of loss.

[17] I have also taken into account that it might have been possible for the respondent to have lodged a tender. A tender would however in my view simply have affected the period for which the respondent (if the tender had not been beaten) would have been liable for expenses and would not have altered issues about capped expenses. Similarly the claimant's entitlement to summary cause expenses as opposed to capped ones would be a separate issue to that of liability for expenses had a tender been beaten.

[18] Either way I accept the capped expenses will result in an expenses award of £284 to the claimant and have found the claimant entitled to this modified sum.

Summary Sheriff Derek Livingston

Sheriffdom of Tayside Central and Fife at Falkirk