SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 6
A239/14

Lord Justice Clerk
Lord Malcolm
Lord Turnbull

OPINION OF THE COURT

delivered by LORD MALCOLM

in the Reclaiming Motion

by

N

Pursuer and Reclaimer

against

ASTORA WOMEN'S HEALTH LLC

Defender and Respondent

Pursuer and Reclaimer: Smith, QC; Drummond Miller LLP
Defender and Respondent: Ellis, QC; McAndrew; MacRoberts LLP

23 February 2022

[1] The issue in this reclaiming motion (appeal) is whether it is open to the court to order Astora Women's Health LLC (Astora) to state whether it has assets or insurance cover sufficient to meet any liabilities in damages and expenses arising from the current claims in respect of alleged defects in vaginal mesh products, and if it has such power, whether such an order should be pronounced. The actions against Astora are part of group proceedings against five defenders which are being managed concurrently with a view to a proof in

October 2022 in six lead cases, one of which is N's (the pursuer). She now challenges the Lord Ordinary's refusal to make such an order.

The Lord Ordinary's decision

[2] The submission was that the court's case management powers, which are designed to secure the efficient disposal of the actions, extend to giving claimants reassurance (or otherwise) that any decrees obtained will be enforceable against Astora. Absent that, and given the costs involved, it is unlikely that the proceedings against this defender will be maintained. The Lord Ordinary concluded that whether to pursue a case to judgment was a matter for the pursuer, not the court. Her case management powers concerned how best to address and resolve the merits of the claims. She rejected a short subsidiary argument that for an impecunious defender to resist an action was an abuse of process.

Submissions for the pursuer in support of the reclaiming motion

[3] While the case management proposition was maintained, the focus before this court shifted to a submission based on the inherent power of the court to do what is necessary for justice to be done. An analogy was drawn with cases struck out because undue delay had caused irrecoverable prejudice to a party, see for example *Tonner* v *Reiach and Hall* 2008 SC 1 and *Hepburn* v *Royal Alexandria Hospital NHS Trust* 2011 SC 20.

[4] The following factors were said to support the need for information as to insurance cover. Astora had raised the issue by volunteering that it might be unable to meet any decrees. If decrees are obtained, considerable costs will have been incurred. Indeed substantial sums have already been expended. The value of the claims depends on individual circumstances, but collectively a high value is involved. A post-action corporate restructuring resulted in liabilities for mesh products being transferred from a UK company

to Astora, which is based in the USA thereby creating enforcement difficulties. It might be difficult to provoke insolvency in that jurisdiction. On being informed of the change in corporate structure the pursuers assumed insurance would be in place and amended the pleadings to introduce the new defender. It was submitted that the court should not waste its time and resources on these actions if it be the case that even if successful the exercise is fruitless. Other claims are likely to be disrupted.

[5] In these circumstances, for Astora to remain silent would be an abuse of process which the court should not tolerate. It should assist the claimants and enable them to reach an informed decision as to whether to proceed against Astora. This is an access to justice issue. They should not have to wait till the end of the process to find out whether Astora is "good for the money". There is no justice in achieving worthless decrees. "Bluff and bluster" should not be allowed to see off genuine claims.

[6] It was recognised that there is no general right to demand this information, however an exception should be made in what is an unusual and special case. Case law cited included *West London Pipeline & Storage Ltd* v *Total UK Ltd* [2008] EWHC 1296 (Comm); *XYZ* v *Various* [2013] EWHC 3643 (QB); *Heather Capital Ltd (in liquidation)* v *Levy & McRae* [2015] CSOH 115; *Peel Port Shareholder Finance Co Ltd* v *Dornoch Ltd* [2017] EWHC 876 (TCC); *XYZ* v *Travelers Insurance Co Ltd* [2019] UKSC 48; and *Cheyne* v *Alfred Cheyne Engineering Ltd* 2021 SLT 405.

The submissions for Astora

[7] The court's case management powers, whether under rule 42A.10 or the practice direction for mesh claims (No 2 of 2015), facilitate its core function, namely the efficient determination of judicial proceedings, not inquiring into whether a pursuer will be able to

enforce a decree. Pursuers must take defenders as they are, otherwise speculative litigation will be encouraged. It is rare for caution (security for costs) to be required of a defender. The impecuniosity of someone exercising the right to resist liability does not render this an abuse of process. If decree is pronounced, a failure to pay is not a contempt of court. It is for the claimants to decide what to do. The administration of justice and the integrity of the court's procedures are not being compromised.

[8] Subject to the statutory exception provided for in the Third Parties (Rights against Insurers) Act 2010, which has no application here, insurance is a private matter. To open it to scrutiny would have profound implications for the flow and conduct of litigation. The particular factors relied upon by the pursuer are not so special or compelling as to justify a departure from the general rule.

[9] In any event, while the objection has never been waived, the application is unnecessary, or at least premature. Astora has produced voluminous information as to its financial position, all set out in an appendix. It is willing to produce more, including such information on insurance cover as is not prevented by the terms of the policies, but subject to receipt of agreement to keep it confidential to these proceedings. To date there has been no engagement with this offer. However, all that said, Astora would be within its rights to offer no information as to insurance or its ability to satisfy any decrees against it.

[10] The corporate restructuring was public and above board. The claimants' representative was informed as to the transfer of any mesh liabilities to Astora. At the time no questions as to covenants were asked, and nothing was done to restore the original UK based defender to the companies register. Additional authorities mentioned included *Lawrie* v *Pearson* (1888) 16R 62; *Clarke* v *Fennoscandia Ltd (No 3)* 2005 SLT 511; and *Russell* v *Russell* 2018 SC 130.

Analysis

[11] It is not difficult to understand why a party to a dispute in or headed to court would like to have information as to the other side's ability by way of insurance or otherwise to meet any liabilities. To date, and subject to the limited exception provided for by the 2010 Act, the general approach has been to respect the privacy of indemnity agreements. Reference can be made to *Travelers Insurance* in the UK Supreme Court (cited earlier) at paragraphs 59 and 81, and to the discussion at paragraphs 4.21/23 in the Joint Law Commissions' report (Law Com No 272/ Scot Law Com No 184) preceding the 2010 Act. Thus if someone sued for £X is asked whether they can pay £X plus expenses, they can reply – "mind your own business". This is not the case everywhere, for example in the USA there is provision for the mandatory disclosure of insurance information - Federal Rules of Civil Procedure, rule 26(a)(1)(A)(iv).

[12] For a short period in England and Wales it appeared that a more liberal approach was under development. This was nipped in the bud by David Steel J in *West London Pipeline & Storage Ltd* v *Total UK Ltd*, citation above. Reliance was placed on decisions refusing disclosure orders concerning a party's assets, including *Cox* v *Bankside Members Agency Ltd*, 29 November 1994, CA where Sir Thomas Bingham (as he then was) observed that it is highly advantageous for a litigant to know what his opponent is worth, but "the ease or difficulty of enforcement cannot bear on matters of legal principle in question in the cause." David Steel J stated (paragraph 21) that the defendant's insurance policies "do not support or adversely affect any party's case, they are not relevant to the issues, nor do they constitute documents which may lead to a train of inquiry enabling a party to advance his own case or damage his opponent's." They do not relate to a matter in dispute. A claimant

must take a defendant as he finds him. The contrary approach would encourage "deep pocket" litigation (as to which see also *Heather Capital*, cited earlier, at paragraph 31). The judge held that the case management provisions in CPR part 18 and the accompanying practice direction could not be construed as giving him jurisdiction to grant an order for disclosure of the defendant's insurance policies.

[13] In *Dowling* v *Griffin* [2014] EWCA Civ 1545 the Court of Appeal noted that in *XYZ* v *Various* (cited above) "a very limited extension" to the *West London Pipeline* position was allowed. While information as to whether insurance would cover any damages plus expenses was beyond reach, case management powers allowed Thirlwall J to direct the defendant to inform her, confidentially, as to whether it could fund its participation in the litigation to the end of the trial. In *Peel Port Shareholder Finance Co Ltd*, cited earlier, Jefford J relied on "the established practice" and rejected an argument that pre-action disclosure of an insurance policy should be ordered under CPR rule 31.16.

[14] In our view no materially different considerations arise when it comes to the case management powers granted in either the mesh claims practice direction or chapter 42A. As one would expect they address the management of the action, with the focus on the relevant factual and legal issues. Rule 42A.5 deals with amongst other things the exchange of information by parties, but there is no mention of financial or insurance particulars of the kind desiderated here. The purpose of the case management hearing under rule 42A.7 is to identify the matters truly in dispute; ensure that parties are ready for the proof; and regulate matters in the intervening period. For example the court will seek confirmation that expert reports and witness statements have been exchanged; non-controversial matters are agreed in a joint minute; a meeting between experts if useful will take place, etc. The power in rule 42A.10 to make such further orders as are "necessary to secure the efficient determination of

the action" is to be construed in the context of the preceding provisions. It does not give the court jurisdiction to make an order of a different nature and which would run counter to the general rule that personal financial and insurance information is private. (There was some uncertainty as to whether the current proceedings have passed the procedural stage at which the mesh claims practice direction ceases to apply, but if it remains relevant similar comments can be made.)

[15] We have little difficulty in rejecting the proposition that the application should be granted in exercise of the court's inherent power to do what is necessary to discharge its function and to address abuses of the court or its procedures. While the existence of the power and that it might deal with the conduct of a defender are not in doubt, it is not triggered by reliance on a right to retain private information which is of no assistance to resolution of the matters in dispute. Furthermore any person called as a defender, even if impecunious, is entitled to appear and lodge defences. It is not suggested that Astora's defence is bound to fail.

[16] Counsel recognised that an application of this nature is unusual and contrary to practice. He relied upon the particular factors outlined above as providing special justification. However we see nothing particularly compelling such as might lead to an exception to the general rule. It follows that we need not address the subsidiary submission that the application is unnecessary.

Decision

[17] The reclaiming motion will be refused and the case remitted for further procedure.