**SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH**
**IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT**

**[2023] SC EDIN 31**

PIC-PN1409/22

NOTE BY SHERIFF K J CAMPBELL KC

in the cause

JOHN CARTY

Pursuer

against

CHURCHILL INSURANCE COMPANY LIMITED

Defender

**Pursuer: Petre; OJ Solicitors, Glasgow**
**Defender: Brotherhood; Clyde & Co, Solicitors, Glasgow**

EDINBURGH, 16 October 2023

**Introductory**

[1] This is an action of damages for personal injuries arising out of a road accident which befell the pursuer on 10 May 2021. The damages part of the action has settled. The case called before me on 14 August 2023 to consider the defender's motion under OCR3A.3 to limit expenses recoverable, and under OCR 31A.2(1)(a) and 2(1)(b) for an award of expenses against the pursuer. Having heard parties, in view of the range of issues raised, I made avizandum.

**Defender's submissions**

[2] For the defender, Ms Brotherhood adopted the written submission lodged along with the motion. In summary, the defender's position was:

(1) The tender which the pursuer accepted on 4 May 2023 is the same sum as a pre-litigation offer made on 8 April 2022, and the expenses awarded to the pursuer should therefore be on the compulsory pre-action protocol scale.

(2) Secondly, judicial expenses should be awarded in favour of the defender as it was manifestly unreasonable for the pursuer to raise an action to subsequently accept a pre-litigation offer, 5 days prior to a proof and the conduct of the case was manifestly unreasonable and an abuse of process.

(3) *Esto* the court did not find judicial expenses in favour of the defender, the defender sought a contra-account from date of tender to date, subject to the 75% maximum under QOCS.

(4) *Esto* the court finds the pursuer is entitled to judicial expenses to date of tender and does not apply a QOCS qualification, then any expenses awarded to the pursuer should be modified by 50% due to the conduct of the case.

***Sequence of events***

[3] Ms Brotherhood referred to the chronology in her written submission.

- The road traffic accident to which the action relates occurred on 10 May 2021.
- A letter of claim was issued on 21 June 2021. The defender agreed to deal with the case under the compulsory pre-action protocol ("PAP"). Liability was admitted.

- An offer of £3,700 was made to the pursuer on 8 April 2022. This was rejected on 20 April 2022 and a counteroffer of £10,000 was made.
- A warrant to serve was issued on 23 May 2022.
- The Initial Writ and warrant were sent to the defender's agents on 30 May 2022. Acceptance of service was made on 22 June 2022. No productions were provided.
- Defences were lodged on 23 June 2022.
- A timetable was issued by the court on 24 June 2022.
- A Specification of Documents seeking the pursuer's GP records, founded on statement 6 of the Initial Writ, was lodged by the defender's agents on 1 July 2022.
- A tender, for the pre-litigation offer amount of £3,700, was lodged and intimated on 10 August 2022.
- On 29 July 2022 the defender's agent emailed the pursuer's agent after being contacted by the GP Surgery, with information that there was no GP in the practice with the name averred by the pursuer. The defender's agent requested the correct name. There was no response. The defender's agent chased the pursuer's agent for an answer. A response was finally provided on 3 October 2022 advising the correct name of the pursuer's GP.
- The defender's agent reverted back to the GP surgery only to be advised that the pursuer's date of birth, as averred at statement 1 by the pursuer, was incorrect. Given this error, the defender's agent not only requested the correct date of birth, but also confirmation that the pursuer's agents were, in fact, instructed.

- There was again no response. The defender's agent sent follow-up correspondence to the pursuer's agent.
- On 27 October 2022 the defender's agent lodged a Statement of Valuation of Claim ("SOVC"), which narrated there were no supporting documents and nothing had been lodged for the pursuer.
- The pursuer's agent responded the same day stating they were surprised at the content of the SOVC as a First Inventory had been lodged at the time the Initial Writ was sent for warranting, they did not recall a request for its disclosure and the defender could have borrowed it from process.
- The defender's agent responded on the same day, 27 October 2022, pointing out that this was an ASSPIC case and productions were lodged electronically. The defender's agent pointed out that no SOVC for the pursuer had been lodged, which had been due by 29 September 2022, nor an e-motion to allow the Record, which had been due by 13 October 2022, to be received and a Proof assigned. There was no response.
- On 16 December 2022 the defender's agents emailed the court advising they had not received a SOVC for the pursuer nor a Record, both of which had been due in October 2022. The court replied on the same day, advising that no motions for the pursuer had been received.
- On receipt of the court's email on the 16 December 2022, the defender's agent emailed the pursuer's agent again, pointing out that no SOVC for the pursuer nor Record had been lodged and this had been brought to their attention in October 2022. Again, the defender's agent requested confirmation the pursuer's agent was instructed.

- On 13 February 2023, the pursuer lodged a motion to vary the timetable, which was opposed. The court allowed the variation at the opposed hearing on 13 March 2023 and continued the matter to Proof assigned 21 March 2023 and reserved expenses.
- On 20 March 2023 the pursuer discharged the proof assigned for 21 March 2023 and expenses of the discharge were awarded in the defender's favour. A fresh diet of Proof was assigned for 9 May 2023.
- The pursuer thereafter lodged the Record and sought a 2-day diet of Proof and the court assigned a further day on 10 May 2023.
- On 4 May 2023 the pursuer contacted the defender's agent and advised they were instructed to accept the tender and a motion would follow. On the same date, a PIAS form was lodged, and the interlocutor of 4 May 2023 was issued.

[4] As to the timing of the motion, Ms Brotherhood explained that the PIAS form was lodged with the court by the pursuer's agent on 4 May 2023. No motion to dispose of the action was enrolled within the usual 28 days, and the matter called before the court on 19 June by order. Having heard parties, the sheriff fixed an opposed motion hearing for 24 July, in order that the defender could intimate and lodge a written motion as required by OCR 31A.4. The defender lodged its motion on 21 June. On 24 July, the case called again, coincidentally before me, and the motion was continued to a hearing on 14 August, because there was an issue about the timing of the hearing and availability of agents, and because pursuer had not then yet lodged a Minute of Acceptance of Tender.
Ms Brotherhood noted that, in fact, the Minute of Acceptance had only been intimated on the morning of 14 August, some 58 days after the original by order. The failure to lodge a Minute of Acceptance had put the defender's agents in a quandary as to the timing of the

motion, but as the pursuer had clear notice of the motion, and had, finally, lodged a formal acceptance, Ms Brotherhood insisted in the motion today.

***Compliance with the pre-action protocol***

[5] The first branch of the defender's submission concerned the pursuer's agent's non-compliance with the PAP. OCR 3A.3 allowed the court to take account of failure, without cause, to comply with the PAP, or unreasonable failure to accept an offer of settlement made in accordance with PAP.

[6] In the written submission, the defender argues that the court should award only expenses on the PAP scale. The pursuer rejected a pre-litigation offer made under the PAP and thereafter accepted the same amount after litigation. The offer made was fair and reasonable. The pursuer had breached the protocol by rejecting the offer, then litigating and 5 days prior to proof accepting the pre-litigation offer. The pursuer had not been successful in the litigation: he accepted the same amount offered prior to litigation. The defender's position was that only PAP expenses, in the sum of £1,836.60 inclusive of VAT, plus reasonable pre-litigation outlays should be awarded.

***QOCS***

[7] The defender's submission in support of the motion to disapply QOCS was founded on sub-sections 8(4)(b) and 8(4)(c) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. No dates within the timetable had been obtempered by the pursuer's agent. No adjustments had been received. No SOVC had been lodged. The Record had not been lodged. The proof had not been fixed. No list of witnesses had been lodged. In short, since 24 June 2022 when the timetable was issued, the pursuer has not obtempered any of

the dates or progressed the case. Furthermore, the pursuer averred the incorrect GP and, more importantly, the wrong date of birth for the pursuer. The court allowed the variation, which kept the diet of Proof assigned for 21 March 2023. The defender was prepared to proceed to proof at that point. The expenses up to the date of variation, which were reserved, should be found in the defender's favour due to the manifestly unreasonable behaviour of the pursuer's agents. On 20 March 2023 the proof assigned for 21 March 2023 was discharged as the pursuer did not have witnesses available. Expenses for the discharge were found in the defender's favour. A fresh diet of proof for 9 May 2023 was assigned. The tender was accepted on 4 May 2023.

[8] Ms Brotherhood referred to the court's consideration of "manifestly unreasonable" in this context in *Lennox* (where the court held that "manifestly" simply means "obviously unreasonable") and *Love* (where the court held the circumstances in that case were unusual but not exceptional). Missing five dates on the court timetable was highly unusual and exceptional. The unreasonableness was, Ms Brotherhood submitted, obvious to anyone. The pursuer had raised the action, and costs had been incurred which were huge when compared with that likely under PAP. Court time had been used needlessly. The pursuer had ignored the timetable. In the result, the pursuer had secured what had been offered pre-litigation.

[9] Separately, the defender submitted the pursuer's conduct amounted to an abuse of process. Ms Brotherhood referred to Macphail *Sheriff Court Practice* (4th ed) para 2.23, and *Lennox*, para 11. In particular, the series of failures already outlined, and also the fact that the pursuer accepted an offer identical to the pre-litigation offer 5 days prior to proof.

*Contra-account*

[10] As a fall-back, the defender sought expenses against the pursuer on the Ordinary Cause scale from the date of tender, though capped at a maximum of 75% of the damages figure in the tender, due to unreasonable delay on the part of the pursuer in accepting a sum offered by way of a tender lodged in process, with reference to Chapter 31A.2(2)(b) and 31A.3.(2)(b) of the Ordinary Cause Rules. The pursuer accepted the tender some 9-months after the tender was lodged, which it was submitted amounted to unreasonable delay.

*Modification of expenses*

[11] As a further fall-back, the defender submitted the court should modify any award of expenses in favour of the pursuer by 50%, to show the court's disapproval of how the case has been conducted.

**Pursuer's submissions**

[12] For the pursuer, Ms Petre explained the reasons why she had not obtempered the timetable were, first, that she had had a period of ill-health, for which vouching had been provided at an earlier hearing, and secondly that her firm had dissolved, with her business partner departing, leaving her to deal with all of the cases. Ms Petre had already apologised to the court at the hearing on the motion to vary the timetable in March 2023. The by order had called in a very busy court and been continued till 24 July, and there had been confusion about the time of the continued hearing as between the interlocutor and the Webex link, which was how the matter had come to be continued.

[13] Turning to the substance, and to the argument that the pursuer's conduct had been manifestly unreasonable and an abuse of process, Ms Petre referred to *Lennox* v *Iceland Foods*, at paragraphs 10-12 and submitted that none of the criteria there for manifestly unreasonable conduct was made out. The action had not been raised in bad faith, there was no question of fraud, or of an ulterior motive. The pre-litigation offer of £3700 had been rejected because case-law suggested a valuation of £8000; the pursuer had a psychologist's report which was consistent with a valuation of £4000 on that head alone. However, as the proof diet approached, agents were unable to contact the GP expert witness, despite pursuing a number of avenues. That was the reason for the motion to discharge the original proof diet, and re-fix. By that point, the proceedings had become so protracted, the pursuer chose to accept the £3700 tendered in order to be done with the action. All of this background had been explained to the defender's agent.

[14] Ms Petre submitted that the test for disapplying QOCS is very high - see *Lennox*, at para 79. She submitted that it was in effect, *Wednesbury* unreasonableness. Abuse of process involved a party deliberately setting out to deceive the court. She did not accept that had happened in this case. Nor was this an instance of a case without merit being pursued. It was likely the pursuer would have been awarded a higher figure had he gone to proof. Ms Petre accepted there had been some delays, but that was because she had taken the case over from her former business partner. Her firm belief was the case had a value in excess of £3700. The pursuer had chosen to accept that figure, and pursuers often accepted less than full valuations. Ms Petre submitted the pursuer had complied with CPAP because she had supportive medical reports, which justified the valuation on which the action had been raised. The motion should be refused.

**Analysis and decision**

[15] The starting point for this motion is section 8 of the Civil Litigation (Expenses and Group Proceedings (Scotland) Act 2018, which provides:

> "**8 Restriction on pursuer's liability for expenses in personal injury claims**
>
> (1) This section applies in civil proceedings where—
> (a) the person bringing the proceedings makes a claim for damages for—
> (i) personal injuries, or
> (ii) the death of a person from personal injuries, and
> (b) the person conducts the proceedings in an appropriate manner.
>
> (2) The court must not make an award of expenses against the person in respect of any expenses which relate to—
> (a) the claim, or
> (b) any appeal in respect of the claim.
>
> (3) Subsection (2) does not prevent the court from making an award in respect of expenses which relate to any other type of claim in the proceedings.
>
> (4) For the purposes of subsection (1)(b), a person conducts civil proceedings in an appropriate manner unless the person or the person's legal representative—
> (a) makes a fraudulent representation or otherwise acts fraudulently in connection with the claim or proceedings,
> (b) behaves in a manner which is manifestly unreasonable in connection with the claim or proceedings, or
> (c) otherwise, conducts the proceedings in a manner that the court considers amounts to an abuse of process.
>
> (5) For the purpose of subsection (4)(a), the standard of proof is the balance of probabilities.
>
> (6) Subsection (2) is subject to any exceptions that may be specified in an act of sederunt under section 103(1) or 104(1) of the Courts Reform (Scotland) Act 2014.
>
> (7) In subsection (1)(a), 'personal injuries' include any disease and any impairment of a person's physical or mental condition."

[16] Section 8(4) has been considered by the court in a number of decisions. Subsections 8(4)(b)&(c) were considered in *Lennox* v *Iceland Foods Ltd* ([2022] SC EDIN 42) 2023 SLT (ShCt) 73. Subsections 8(4)(a)&(b) were considered in *Gilchrist* v *Chief Constable of Police Scotland* ([2023] SC EDIN 30) (2023) SCLR 244. Subsections 8(4)(b)&(c) were also

considered in *Love* v *Fife Health Board* [2023] SC EDIN 18. While the number of cases continues to grow, a number of principles can be discerned from the decisions thus far.

(a) Each case in which the issue of disapplying QOCS arises must be considered on its own facts and circumstances (*Lennox*, para 61; *Gilchrist* para 27).

(b) "Manifestly unreasonable" means "obviously unreasonable" (*Lennox*, para 60).

(c) The legislative history and language indicates that the circumstances where proceedings were not conducted in an appropriate manner are likely to be exceptional (*Lennox*, para 61).

(d) Where there is a finding that the pursuer is incredible on a core issue in the action, the issue of manifestly unreasonable conduct may arise, but does not invariably arise (*Gilchrist*, para 27).

(e) The court preferring the defender's witnesses over the pursuer's account does not of itself give rise to disapplication; whether it does depends on the court's reasons (*Gilchrist*, para 28).

(f) Unusual circumstances may or may not be exceptional; whether they are is context-specific (*Love*, paras 56 & 65).

[17] Also relevant is OCR 3A, which makes provision about the PAP.

**"Application and interpretation**

**3A.1.** —(1) This Chapter applies to an action of damages for, or arising from, personal injuries.
(2) In this Chapter 'the Protocol' means the Personal Injury Pre-Action Protocol set out in Appendix 4, and references to the 'aims of the Protocol', 'requirements of the Protocol' and 'stages of the Protocol' are to be construed accordingly.

**Requirement to comply with the Protocol**

**3A.2.** In any case where the Protocol applies, the court will normally expect parties to have complied with the requirements of the Protocol before proceedings are commenced.

**Consequences of failing to comply with the Protocol**

**3A.3.**— (1) This rule applies where the sheriff considers that a party ('party A')—

(a) failed, without just cause, to comply with the requirements of the Protocol; or

(b) unreasonably failed to accept an offer in settlement which was—

(i) made in accordance with the Protocol; and

(ii) lodged as a tender during the period beginning with the commencement of proceedings and ending with the lodging of defences.

(2) The sheriff may, on the sheriff's own motion, or on the motion of any party, take any steps the sheriff considers necessary to do justice between the parties, and may in particular—

(a) sist the action to allow any party to comply with the requirements of the Protocol;

(b) make an award of expenses against party A;

(c) modify an award of expenses; or

(d) make an award regarding the interest payable on any award of damages.

(3) A motion made by a party under paragraph (2) must include a summary of—

(a) the steps taken by parties under the Protocol with a view to settling the action; and

(b) that party's assessment of the extent to which parties have complied with the requirements of the Protocol.

(4) In considering what steps (if any) to take under paragraph (2), the sheriff must take into account—

(a) the nature of any breach of the requirements of the Protocol; and

(b) the conduct of the parties during the stages of the Protocol.

(5) In assessing the conduct of the parties, the sheriff must have regard to the extent to which that conduct is consistent with the aims of the Protocol.

(6) This rule does not affect any other enactment or rule of law allowing the sheriff to make or modify awards regarding expenses and interest."

[18] With those observations in mind, I turn to the circumstances of this case. As is clear both from the QOCS cases summarised above, and from OCR3A.3(1), it is the circumstances of *this* case, taken in the round, which are relevant. Other cases may be illustrative, but are not definitive in this context. The pursuer's agent took issue with some elements of the chronology, but not with most of it, nor with the overall picture. On any view, that overall picture is of unsatisfactory management of the action by the pursuer's agents. There was an apparent failure to respond to correspondence from the defender's agents, either in a timely

fashion or at all, and a persistent failure to adhere to dates in the court timetable once the action was raised. The pursuer's agent has provided a context for that, which suggests that the pursuer was not personally at fault, and that as a result of the actions of others, the pursuer's agent was herself overwhelmed.

[19] I found the explanation for the apparent non-availability of one of the pursuer's skilled witnesses for the proof perplexing. However, the more important point is that the pursuer had reports from a GP and a psychologist. There was thus some basis in evidence for the pursuer's approach to valuation at the outset. It is not satisfactory that there appears to have been a delay in providing one or more of the reports to the defender's agents. Nonetheless, I cannot say with certainty that had all of the material been provided in a more timely fashion, the claim would have resolved before an action was raised. Liability was admitted, but valuation was plainly a live dispute. For those reasons, I am unable to accede to the part of the defender's motion that I should award expenses on the PAP scale only.

[20] Turning to QOCS, the account given by the pursuer's agent is of somewhat unusual circumstances, and circumstances which do not suggest the fault lay with the pursuer personally. Subsection 8(4) of the 2018 Act makes clear that the conduct of a party's legal representative may also be a relevant factor when the court is being asked to disapply QOCS and award the expenses of the action to the defender. On any view, the conduct of the pursuer's side of the action was unsatisfactory; the question at this stage is whether it was manifestly unreasonable or an abuse of process.

[21] I do not consider that the conduct of the action amounted an abuse of process (cf Macphail *Sheriff Court Practice* (4th ed) paras 2.23), because, as I have explained in the context of the PAP part of the motion, there was some basis in evidence for the pursuer's approach to valuation.

[22] As the chronology confirms, the pursuer persistently failed to comply with the timetable until a very late stage in the action. It bears being repeated that the timetable in a personal injuries action is a key element of the procedure of this court, and is a document which has the effect of an order of the court (see OCR 36.G1(2)). The pursuer's agents also failed or delayed in responding to a series of prompts from the defender's agents about the (lack of) progress of the action. It was not until a relatively late stage, 13 February 2023, that a motion to vary the timetable was enrolled by the pursuer's agents to address some of the failures and to discharge and re-assign the proof. The reasons provided in the pursuer's submissions were in substance mitigation on behalf of the solicitor now having conduct of the case. No doubt the dissolution of the firm and the re-allocation of business was a busy and a stressful time. However, practitioners' obligations to their clients and to the court are not in any way diluted by such pressures. The onus is on the practitioner to make appropriate mitigations, and how they do so will depend on the nature of the circumstance faced at the time.

[23] I am not satisfied that the explanation offered entitles the court to overlook the persistent failures to comply with the timetable or to engage in a timely fashion with the defender's agents. The operation of all court process depends on the due observance of the procedural framework and that is especially so in a case-flow managed court such as ASSPIC, which relies in part on appropriate engagement with the process by agents. The integrity of the process and the effective management of the cases before it depends on that, and the powers the court has to secure compliance includes section 8(4)(b) of the 2018 Act. I am accordingly satisfied that the conduct of the pursuer's agents in the management of the action was manifestly unreasonable in terms of section 8(4)(b) of the 2018 Act. I will

therefore grant the part of the defender's motion which invites the court to disapply QOCS and seeks an award of expenses.

[24] Given my decision on the QOCS element of the motion, it is not necessary for me to address the defender's fall-back arguments in detail.

**Conclusion**

[25] In the result, I will find the defender entitled to the expenses of the action. For the avoidance of doubt, those expenses shall include the expenses of this motion.