SHERIFFDOM OF LOTHIAN & BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2023] SC EDI 35

EDI-SF33-22 & EDI-SF34-22

NOTE BY SHERIFF DOUGLAS KEIR

in causa

MUJAHID ALI & TALIB HUSSAIN

Pursuers

against

ROYAL & SUN ALLIANCE INSURANCE LTD

Defender

Pursuers: Bergin, Advocate (Stewart Legal)
Defender: Hastie, Advocate (DWF LLP)

Edinburgh 30 October 2023

Introduction

[1] These are conjoined actions for damages following a road traffic accident on 4 April 2019. It was a matter of admission that the car occupied by both pursuers was parked in Nicholson Square, Edinburgh when it was struck by the van driven by the defender's insured. Liability was admitted with the proof restricted to consideration of whether or not the pursuers had sustained injury as a result of the collision and if they had, what was the appropriate quantification of damages. Following proof, decree of absolvitor was granted in favour of the defender. The defender subsequently lodged incidental applications in both actions for expenses.

Opposed motion

[2] There was a hearing on the defender's opposed incidental applications which were in identical terms:

> "The defender moves the court to grant an order:
>
> (1) under rule 23A.2 of the Summary Cause Rules 2002 ('SCR') awarding the defender the expenses against the pursuers, jointly and severally, on the grounds of fraudulent misrepresentation *et separatim* manifestly unreasonable conduct in terms of section 8(4)(a) *et separatim* (b) of the Civil Proceedings (Expenses and Group Proceedings)(Scotland) Act 2018;
>
> (2) in the event of the court granting the order sought at (1), to sanction the cause as suitable for the employment of junior counsel and to certify Mr Alan Bathgate as a skilled witness; and
>
> (3) under rule 23A.4(2) SCR ordaining the pursuers/their agents to lodge any document which sets out or records any agreement between the pursuers and/or their agents and/or any third party funder as to the liability for expenses in the case in the event of an award being made against the pursuer(s)."

[3] The pursuers opposed parts (1) and (3) of the motion.

Submissions for the defender

[4] The defender adopted the written submission lodged with the incidental applications and provided supplementary oral submission.

[5] The key to determination of the issues in dispute at proof had been the credibility and reliability of the pursuers. Neither were found to be credible or reliable. Such a finding was a touchstone for a finding of fraudulent representation. Both pursuers claimed to have been injured. That was not accepted by the court. The logical inference was that both pursuers had lied and, as such, had made fraudulent representations.

[6] If the court was not prepared to find that there had been fraudulent representations then the pursuers' conduct still amounted to unreasonable behaviour. This was primarily

on the basis that their evidence had been found to be peppered with significant inconsistencies and contradictions. Additionally, the first pursuer's (Mujahid Ali) pleadings included a claim for travel expenses arising from his attendance at medical appointments. The first pursuer agreed in cross examination that he had not travelled to any such appointments and agreed that the claim was false. During submissions, it was stated that claims of this nature were included as standard practice but there had been an error on the part of the first pursuer's solicitor in the failure to remove the claim during the adjustment period. The practice of including claims for losses that did not exist amounted to unreasonable behaviour.

[7] Should an award of expenses be made against both pursuers, it was submitted that such an award should be on a joint and several basis. Each pursuer's claim arose from the same collision and involved the same witnesses.

[8] In terms of part (3) of the applications, under reference to rule 23A.4(2), it was open to the court to make any order thought fit for dealing with the application. It was submitted that the order sought was necessary and reasonable to enable the defender to identify if there was a third party funder who might be responsible for any award of expenses made against the pursuers. The defender had incurred significant expense in taking the case to proof and the pursuers had been unsuccessful. It was therefore not unreasonable for the defender to ascertain who would meet the award of expenses if QOCS was disapplied.

Submissions for the pursuers

[9] It was for the defender to persuade the court that the benefit provided by QOCS should be removed. While it was appreciated that consideration of the issues arising was

fact sensitive and that the court had had the benefit of hearing the witness evidence, the threshold for removing the protection of QOCS was set deliberately highly.

[10] Reference was made to the unreported decision of *Lesley McKenzie* v *AXA Insurance UK PLC* 21 September 2023 which stated that QOCS was the default position, the point of which was to widen access to justice. If it became straightforward to disapply QOCS then that point was defeated. Reference was also made to *Lennox* v *Iceland Foods Ltd* [2022] SC EDIN 42 which stated that it would be an exceptional step to disapply QOCS.

[11] In the present case the defender relied on the finding that neither pursuer was credible or reliable and sought to elevate that to a finding of fraud. However, as per *Gilchrist* v *Chief Constable of Police Scotland* [2023] SC EDIN 30 at para [25], the threshold for fraud was high. The court had to make finding that pursuer had acted intentionally to mislead the court. A finding of incredibility was not enough to remove the protection provided by QOCS. The present case involved no more than a dispute on causation and the pursuers had failed to prove causation on the balance of probabilities.

[12] Turning to section 8(4)(b), the defender's approach was misconceived. It was not uncommon for there to be inconsistencies in the evidence presented to the court. If the defender's submission was correct then any inconsistent evidence would be categorised as unreasonable behaviour. In relation to the claim for travel expenses, an explanation for the discrepancy had been provided during submissions. The defender was looking to go behind that explanation and impugn the conduct of the solicitor as an officer of the court.

[13] In relation to part (3) of the applications, the defender had not provided a satisfactory reason for the production of the documentation sought.

Defender's response

[14] While it was accepted that QOCS widened access to justice for pursuers, this was limited to pursuers who conducted themselves appropriately. In the present case, both pursuers had been found to be neither credible or reliable in relation to all the critical issues. In *Gilchrist*, a finding of incredibility was viewed as a possible mechanism for the disapplication of QOCS protection.

Decision

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

> **"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."

[16] There is also a growing number of decisions where section 8(4) has been considered by the court and I was referred to the cases of *Lennox*, *Gilchrist*, *Love* v *Fife Health Board* [2023] SC EDIN 18 and *McRae* v *Screwfix and Another* [2023] SC EDIN 28.

[17] Subsequent to this hearing the decision in *Murray* v *Myktyn* [2023] SC EDIN 32 has been issued. In that decision, at paragraph [11], the presiding sheriff helpfully summarised a number of principles that can be discerned from the decisions detailed in paragraph [16] above. I would concur with this approach and repeat that summary here:

> "(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 [26]).
>
> (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 [26]).
>
> (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 [27]).
>
> (f) Unusual circumstances may or may not be exceptional; whether they are is context-specific (*Love*, paras [56] & [65])."

[18] In addition to these principles, with particular focus on section 8(4)(a), I would concur with the approach adopted by the presiding sheriff in *Gilchrist* at paragraphs [23] to [25]. While the governing legislation does not provide any further definition of what might constitute "a fraudulent representation" or "otherwise acts fraudulently", these are

not new legal concepts. The threshold for establishing a fraudulent representation or otherwise acting fraudulently is a high one and in considering the application of section 8(4)(a), the court will require to consider the whole facts and circumstances of the claim or proceedings. Having conducted such an exercise, if the court then concludes on the balance of probabilities that the pursuer or their legal representative has acted intentionally to mislead the court, the threshold will be met.

[19] While I note that the pursuers also referred to *McKenzie* v *AXA Insurance UK PLC*, the court's consideration of QOCS in that case was brief and in the context of an opposed motion regarding sanction for the employment of counsel. Moreover, the dicta highlighted by the pursuers add nothing to the summary detailed at paragraph [17] above.

[20] Turning to the particular facts and circumstances of this case, having had the opportunity to see and hear the evidence of both pursuers in this case, I concluded that neither could be viewed as credible or reliable. Their evidence was peppered with significant inconsistencies and contradictions.

[21] During the course of the first pursuer's evidence, he stated that a warning light had activated on his car's dashboard following the collision. However, despite agreeing that this caused him concern and that he would have wanted to have that investigated as soon as possible, his car was not assessed by a garage until 8 May 2019, over one month later. His explanation that the Mercedes garage he used was busy was unconvincing.

[22] In relation to the collision itself, he described the impact as causing "a big movement back" but having had the benefit of reviewing the CCTV footage of the collision (number 5/3 of process), it was clear that the movement of the car was restricted to rocking backwards on its suspension.

[23] The first pursuer stated that the front number plate bracket and the private hire plate that sat beneath it had been damaged by the impact. While images of both had been lodged in process (numbers 5/8 and 5/9 of process), they were unsatisfactory. The first set of images (5/8 of process), which showed both plates attached to the front of the car, were of poor quality and it was not possible to identify damage to either plate. The second set of images (5/9 of process) were of a higher quality but had been taken at a different time as the private hire plate had been removed from the front of the car. The number plate remained in place and cracks to the bracket holding the plate in place could be seen together with some minor cracks around the retaining screw on the top right corner of the plate. While the first pursuer stated that the images had been taken around one week after the collision, the images themselves were undated and had been produced in a manner whereby the forensic road traffic investigator instructed on his behalf could not check the corresponding metadata from the images to ascertain their actual date and time.

[24] There were significant discrepancies in relation to the first pursuer's reporting of his injuries. In his Pre-Action Protocol Claim form (page 46 of the Joint Bundle), his injuries were stated to be "neck, back, shoulders pain". His evidence in court was that his injuries were restricted to the right side of his neck and the top of his right shoulder. Of particular concern was his assertion that he had sought medical advice for his injuries. He stated that he had telephoned his GP on 5 April 2019 to make an appointment but following a discussion with the receptionist at the GP practice, he accepted advice to take painkillers for his symptoms and only phone back if things got worse. According to his GP records, which had been agreed by parties as true and accurate, there was no corresponding entry to confirm the telephone call on 5 April 2019. It was also clear that he was an infrequent attendee at his GP with only two entries between 2013 and 2018. If one accepted that he had

been sufficiently troubled by his symptoms to contact his GP to make an appointment, I considered it implausible that he would simply accept telephone advice from a receptionist rather than proceed with a formal appointment.

[25] The second pursuer was not an impressive witness. His evidence was confusing and contradictory. He described the impact of the collision as causing the car to "move a lot". He stated that the collision was so great that he thought the front bumper would have been "completely gone". As detailed above, it was clear from the CCTV footage that the movement of the car was restricted to rocking backwards on its suspension. Moreover, taking the pursuers' case at its highest, the only damage sustained was minor damage to the front number plate bracket.

[26] In terms of damage to the car, the second pursuer maintained that he could see damage to the car in the low quality images (5/8 of process) notwithstanding that no other witness could identify any damage from those images.

[27] A significant issue arose in relation to the handwritten description of the accident provided by the second pursuer to his solicitors (page 64 of the Joint Bundle). He had signed this document on 9 April 2019. It contained a detailed description of the movement of the van in the moments leading up to and including the collision together with a sketch plan. In stark contrast to this signed description, he stated in court that he had not seen the van at all prior to the collision and only noticed it following the impact. When shown the signed document, he confirmed that it contained his signature but stated that the handwritten accident description was not his handwriting. Moreover, he maintained that he had not seen the van prior to the collision and the content of the handwritten document was wrong. Considering that the document was signed with a declaration which stated "I

hereby declare that the above information is true to the best of my knowledge and belief", such a discrepancy was of considerable concern.

[28] Similar concern arose from the disparities between the second pursuer's reporting of his injuries and the contemporaneous records. In his Pre-Action Protocol Claim form (page 62 of the Joint Bundle), his injuries were stated to be "neck, back, shoulders pain". His evidence in court was that his injuries were to his neck and back. When he was examined by Dr Vohra for the purposes of a medico-legal report on 16 July 2019 (around three months post-collision), Dr Vohra noted that the second pursuer was suffering from symptoms of pain and restricted movement in his neck. There was no mention of back pain. Dr Vohra limited his physical examination of the second pursuer accordingly. Dr Vohra also noted that the second pursuer told him that he had attended his GP two days after the collision and was advised to use painkillers and do mobilising exercises. In court, the second pursuer asserted that he had attended his GP in person on one occasion and had two separate telephone consultations with his GP in connection with the injuries sustained in the collision. He also asserted that he had told Dr Vohra that he had symptoms of pain in his back as well as his neck.

[29] As with the first pursuer, the second pursuer's GP records had been agreed by parties as true and accurate. There was no dispute that the first entry in his records following the collision, dated 5 April 2019, related to a request for blood pressure medication that had been prescribed on previous occasions. The next entry, dated 9 April 2019, was labelled "Administration NOS" and did not involve any discussion with or attendance by the second pursuer. The following entries in the records on 12 April 2019 and 14 May 2019 stated as follows:

> "12 April 2019 Telephone triage encounter. Sugar levels and blood pressure high. Wishes to speak with you regarding this. Says feels not right re BP – for checks here. DNA diabetes follow-up. Tired etc. For bloods for diabetes check. Low to mid back pain on and off couple of weeks. I will leave MSK leaflet."
>
> "14 May 2019 Medication requested. SR lisinipril – patient rang to check if had been done yesterday but no SR being processed – looks like been missed be us in reception says handed in request last weekends blood test and BP check. Given one week supply 6 weeks ago…"

[30] While these entries confirmed that the second pursuer did have a telephone consultation with his GP following the collision, this occurred eight days later rather than two, and was by telephone and not in person. More significantly, the clear focus of the consultation was to discuss pre-existing issues with diabetes and blood pressure. The only reference to musculo-skeletal symptoms was to "low to mid back pain" which was noted to have been present for a couple of weeks, i.e. pain that pre-dated the collision on 4 April 2019. The entry did not contain any reference to neck pain or to a road traffic collision. The subsequent entry on 14 May 2019 related to blood pressure issues with no reference to musculo-skeletal symptoms or a road traffic collision. The second pursuer attempted to maintain that mistakes had been made by both his GP when updating the medical records and Dr Vohra when completing his report but that was simply not credible. He added that he had been subsequently referred for physiotherapy by his GP but, again, there was no corresponding entry in the medical records and no other vouching was produced in that regard.

[31] In summary, neither pursuer was credible or reliable in relation to the core issues of their claims. Other than their evidence that a collision occurred, they were both wholly incredible witnesses. The significant issues with their evidence went far beyond the more common scenario where there are competing versions of events and the court has preferred one version over the other.

[32] As per section 8(5), the standard of proof for the purposes of section 8(4)(a) is the balance of probabilities. Given all the facts and circumstances of this particular case, I am satisfied on the balance of probabilities that both pursuers acted intentionally to mislead the court. The threshold for section 8(4)(a) has accordingly been met.

[33] Turning to section 8(4)(b), standing my conclusion that both pursuers were neither credible or reliable in relation to the core issues of their actions and, having regard to the particular facts and circumstances of this case as detailed at paragraphs [21] to [30] above, I am satisfied that the threshold for manifestly unreasonable conduct has also been met.

[34] With regard to the submission that the first pursuer's inclusion of a claim for travel expenses amounted to unreasonable behaviour, I accept the explanation provided that this resulted from an error on the part of his legal representative. That said, while the practice of using style pleadings to assist with the drafting of proceedings is not a new concept, the court expects pleadings to be framed accurately and it is the responsibility of the drafter to ensure that the pleadings only contain references to relevant heads of claim. As more fully detailed in Macphail's Sheriff Court Practice (4th Edition) at paragraph 9.13, this is a task that must be discharged very carefully. The fact that an erroneous head of claim remained in the pleadings at proof is, at the very least, unfortunate but I do not consider in the circumstances of this particular case that it amounted to unreasonable behaviour.

[35] While I am prepared to make an award of expenses against each pursuer in their respective actions, I am not persuaded that the liability for such awards should be on a joint and several basis. Their claims for injury were independent of each other. Each claimed for their own distinct losses. While the conjunction of the actions for the purposes of the proof undoubtedly assisted the court by avoiding duplication of procedure and expense, this does

not automatically justify a finding of joint and several liability for expenses on the part of each pursuer.

[36] Finally, in relation to part (3) of the applications, while I can understand the defender's rationale, I am not persuaded that the court can make such an order at this juncture. The wording of rule 23A.4.(2) states that where an application is made under rule 23A.2(1), the sheriff may make any such orders as thought fit "for dealing with the application". For the reasons detailed above, I have dealt with the defender's application and made an award of expenses against each pursuer in terms of SCR 23A.2(1). No further orders are required to enable the court to deal with the application. This part of the motion is accordingly refused.

Conclusion

[37] I will therefore grant the defender's incidental applications in respect of each action in the following terms:

(i) Part (1) is granted under deletion of the words "jointly and severally".

(ii) Part (2) is granted in full.

(iii) Part (3) is refused.

[38] Expenses of the incidental applications should follow success. I therefore find the defender entitled to the expenses of the incidental applications.