SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2023] SC EDIN 40

PIC-3435/22

NOTE BY SHERIFF KENNETH J CAMPBELL KC

in cause

JAMIE ANDERSON

Pursuer

against

EMTELLE UK LIMITED

Defender

Pursuer: Bergin, adv; Digby Brown LLP, solicitors, Edinburgh
Defender: Miller; Clyde & Co (Scotland) LLP, solicitors, Edinburgh

EDINBURGH, 14 November 2023

Introduction

[1] This action arises out of an accident which befell the pursuer in the course of his employment on 29 December 2019. The action has been resolved as to damages, and the matter came before me on 6 October 2023 on the pursuer's motion (7/3 of process) for decree in terms of a Minute of Tender and Minute of Acceptance, certification of a skilled witness, and an application for sanction for the employment of junior counsel. The pursuer's motion was opposed only in relation to sanction for junior counsel. The defender had a countermotion for the expenses from the date of tender.

Preliminary issue - competence of defender's motion

[2] At the outset of the hearing, Mr Bergin referred to the motion the defender intended to make in relation to expenses, and observed that there was not a formal motion in writing before the court to that effect. He drew my attention to the defender's notice of opposition to the pursuer's motion in which the terms of the motion proposed to be made by the defender were set out there. Counsel called my attention to OCR 31A.4, which is mandatory in its terms, and which was discussed in my decision in *Gilchrist* v *The Chief Constable of Police Scotland* [2023] SC EDIN 30; (2023) SCLR 244. In his submission, it was not competent for a motion of this kind to be made simply in the form of opposition to a motion for sanction for counsel. Ms Miller frankly conceded that she had not considered this point, however in her submission, the ground of opposition set the motion out and gave full notice of the defender's position.

[3] In my view, the starting point is, as Mr Bergin indicated, OCR 31A.4, which requires an application under rule 31A.2(1) to be made by written motion. As I discussed in *Gilchrist* v *The Chief Constable of Police Scotlan*d, at paragraph 5, that is an unambiguous mandatory provision and, in my view, is there for a good reason, namely to ensure that all parties to an action have clear notice that a motion is to be made and the terms on which it is to be made. In *Gilchris*t, the court was able to proceed because parties were not prejudiced, detailed written submissions having been produced by both parties some weeks prior to the hearing. In the present case, with some prompting, the defender's agent invited the court to exercise the dispensing power in OCR 2.1 on the basis that the failure to deal with the matter by way of written motion, notwithstanding the terms of *Gilchrist,* was an oversight on her part and that given the circumstances of the procedural history the motion the pursuer had had adequate notice of the defender's position.

[4] On balance, I was satisfied that it was appropriate to exercise the dispensing power because the motion had been intimated and lodged a number of weeks prior to the hearing, on 24 August 2023, and it was evident that Mr Bergin was not taken by surprise by the defender's position. Nonetheless, it is unfortunate that the matter had to be approached in this way from a procedural perspective, and in future, the court would expect a written motion. There is no reason why such a motion could not be intimated as soon as a defender received intimation of the pursuer's motion of the kind enrolled in this case. The court would thereafter make all reasonable efforts to ensure that both motions were dealt with at the same time.

Expenses - pursuer's submissions

[5] In support of the pursuer's motion, counsel began by setting out a chronology:

29 December 2019 - date of accident

26 October 2022 - pursuer contacts his agents for the first time to instruct proceedings

10 November 2022 - pursuer's agents instruct medical report

24 November 2022 - action raised

16 December 2022 - action sisted until 22 May 2023

14 March 2023 - tender lodged

10 August 2023 - counsel instructed for open record consultation

17 August 2023 - medical report (instructed 10 November 2022) received by agents; consultation between pursuer, agents and counsel; instructions to accept tender

21 August 2023 - minute of acceptance lodged

[6] Counsel explained it was also necessary to understand something of the sequence of events in relation to the medical report because there had been several appointments

rescheduled, most of which were not entirely the pursuer's fault. On 10 November 2022, the report had been instructed. The medical expert contacted the pursuer's agents on 1 December 2022, to arrange an appointment. On 19 January 2023, an appointment was offered in May 2023. The pursuer advised he would be on holiday at the time. An appointment for 19 July 2023 was offered and accepted by the pursuer. The appointment on 19 July was subsequently cancelled by the expert and an appointment on 2 August 2023 was offered. The pursuer attended the appointment on 2 August. On 9 August 2023, agents contacted the expert and stressed the urgency of the report being produced. On 16 August, a further chasing email was sent. On 17 August 2023, the report was produced.

[7] Counsel accepted that there had been delays but submitted these were not unreasonable in the context. In the first place, the action had been sisted from December 2022 until May 2023. Counsel submitted the question was whether the delay had been unreasonable or whether there had been acceptance within a reasonable time, and that was in turn influenced by the stage at which the action had reached. In this case the proof was not imminent and accordingly the pursuer was entitled to greater latitude of time. The report had been instructed in good time and appointments had been cancelled primarily for reasons outwith the pursuer's control.

[8] Counsel submitted that it appeared from the defender's motion that a point appeared to have been taken that medical advice was not required. The defender's position was that it had been able to value the case purely on the basis of the medical records. Counsel submitted that that was a choice for the defender to make, however it did not mean that it was unreasonable for the pursuer to instruct a medical expert. Counsel submitted that it would be expected that the pursuer would come to court with medical evidence.

Accordingly, it was appropriate to have instructed medical evidence and the delay was not unreasonable in the whole circumstances.

Expenses - defender's submission

[9] For the defender, Ms Miller's primary position was that the court should award the pursuer expenses to the date of tender and thereafter the defender should be awarded the expenses from the date of tender to date. Alternatively, the expenses should be limited to the date of tender. In relation to the chronology offered by the pursuer, Ms Miller noted that the pursuer's agents had only sought a report from one particular expert who appeared to have a long waiting list for appointments. Her enquiries disclosed that another equally qualified expert could have been able to see the pursuer more quickly. Further correspondence produced indicated that the pursuer had been offered an appointment in January 2023 but had not replied and his agents were told on the 19 January 2023 that the pursuer had not been in contact about that appointment. There was no evidence that an alternative expert had been considered at that stage and it was submitted the pursuer should have sought and obtained a report from another expert more immediately available. Further, the pursuer waited to cancel the May appointment for a month after it had been offered and again no effort had been made to find an expert more readily available. In short, the defender's submission was that had the pursuer obtained a report timeously the offer in the tender could have been accepted much sooner. The delay of five months was not reasonable. The pursuer had disclosed medical records and the defender had tendered on the basis of that information because the treating surgeon offered a view on prognosis in material in the records and in addition there were physiotherapy records both which were sufficient to enable the defender to value the case. That had been a genuine effort to achieve

early resolution. The defender did not criticise the pursuer for instructing a medical report, rather the point was that it should have been obtained earlier than it was in fact obtained.

[10] Ms Miller submitted that if the defender was unable to obtain cost protection through a tender it was not clear why that had not been included within the scope of the exceptions to QOCS. There could be no benefit to a defender if it was not possible to get expenses in a situation such as this. In her submission this was exactly the sort of case that OCR 31A.2(2)(b) was there to deal with. The test was unreasonable delay, not manifestly unreasonable delay. Ms Miller submitted that in the circumstances, the time taken by the pursuer to accept the tender was unreasonable and the defender should be entitled to expenses from the date of tender.

Expenses - discussion and decision

[11] The pursuer has been successful in obtaining an award of damages. On the face of it, he is therefore entitled to expenses. The question is whether QOCS should be disapplied, which emphasises the importance of proper notice being given, as discussed above. The starting point is OCR 31A.2, which, so far as material, provides:

> **"31A.2**. (1) Where civil proceedings have been brought by a pursuer, another party to the action ('the applicant') may make an application to the sheriff for an award of expenses to be made against the pursuer, on one or more of the grounds specified in either or both -
> (a) section 8(4)(a) to (c) of the Act;
> (b) paragraph (2) of this rule.
> (2) The grounds specified in this paragraph, which are exceptions to section 8(2) of the Act, are as follows -
> …
> (b) unreasonable delay on the part of the pursuer in accepting a sum offered by way of a tender lodged in process;
> …"

[12] It is trite to observe that a pursuer is entitled to a reasonable time to decide whether to accept a tender (cf Macphail *Sheriff Court Practice* (4th ed.) para 14.53). Whether a pursuer unreasonably delayed in a accepting the tender will always be a matter of the facts and circumstances of a given case. In my view, relevant considerations will include the stage which proceedings have reached when the tender was made and when it was accepted, the length of delay, and the reasons given for that.

[13] In this case, just over five months passed between the date the tender was lodged, and the date of acceptance. That is a period of time which calls for explanation. During part of that time, the action was sisted on the pursuer's unopposed motion to allow both parties to investigate matters further, the action having been raised shortly before expiry of the triennium. A timetable having thereafter been issued, the tender was accepted during the adjustment period. It was entirely appropriate for the pursuer's agents to seek a medical report in order to vouch the pursuer's losses and to assist with quantification. I do not accept the submission that, like the defender, the pursuer could have relied on the medical records and the report of the treating surgeon in those records. There may be cases of minor injuries where that might be an appropriate course, but the injuries narrated in this case seem to me to make independent expert evidence essential.

[14] The delay in obtaining that report goes to the heart of the motion. While the time taken to obtain the report is clearly sub-optimal, I am satisfied that the explanation offered is, in the circumstances, reasonable. The first appointment offered was on a date when the pursuer was to be on holiday. The second appointment was cancelled by the expert. The third appointment took place, and the report was made available within an appropriately short space of time. I can detect no wilful failure or other unreasonable conduct by the pursuer. The defender's agent submitted that the pursuer's agents could have obtained a

report from another expert more quickly. However, as I understood it, at the point when the replacement appointment in July was offered, the tender had not been lodged. That appointment was cancelled because of difficulties at the expert's end, and the appointment was re-scheduled for a date 2-3 weeks later, with the report available two weeks after. Taking all those circumstances into account, I consider that while the delay was lengthy, it was not unreasonable. I will therefore refuse the defender's invitation to disapply QOCS, and I will grant the pursuer's motion for expenses.

Sanction for counsel - pursuer's submission

[15] In relation to this aspect of the case, counsel adopted his written submission. The pursuer relied upon both difficulty and likely difficulty viewed at the time counsel was instructed. This action dealt with the consequences of a potentially significant crushing injury. The pursuer was still complaining of pain in his hand at the point when counsel was instructed. Liability had been denied and there was also an issue of contributory negligence. Accordingly, the question of risk and how that might be reflected in quantification of damages was also live. In all the circumstances, the instruction of counsel was reasonable.

Sanction for counsel - defender's submission

[16] In relation to difficulty and complexity, liability was denied but it was submitted the facts were not in dispute. The key question was whether the pursuer ought to have been carrying out the operation which he was doing at the time of the accident. In the defender's submission there were no complex or novel points arising from that. The issue of contributory negligence was likewise neither complex nor difficult. The law is well

established and the issue is a question of fact and evidence. In this case it was quite straightforward.

[17] In relation to quantification, again the defender's submission was this was not particularly complex. The pursuer had no functional impairment and had returned to work since the accident. There was nothing unusual in the circumstances relating to causation. Likewise it could not be said that the case was one of significant importance to the pursuer certainly not more important than any other claim for damages for personal injuries would be to the pursuer in any given case. Taken in the round this was a straightforward case and it was not reasonable in terms of section 108 of the 2014 Act for sanction to be granted.

Sanction for counsel - discussion and decision

[18] The test for sanction for counsel in terms of section 108 of the Courts Reform (Scotland) Act 2014 is now well known. Its application in any given case is context-specific. I am satisfied that at the point counsel was instructed, the evidential issues relating to both liability and quantification identified in the pursuer's written submission and elaborated on in oral argument were sufficiently difficult and complex to justify the instruction of junior counsel, and I will accordingly grant sanction.

Conclusion

[19] In the result, I will grant the pursuer's motion 7/3, including sanction for junior counsel.

[20] As the pursuer has been successful on all aspects of the motion, I will also award the expenses of the motion to the pursuer.