SHERIFF APPEAL COURT

[2017] SAC (Civ) 22
GLW-A710-16

Sheriff Principal C D Turnbull

OPINION OF THE COURT

in the appeal by

NAZIR AHMED

Pursuer & Appellant

against

QBE INSURANCE (EUROPE) LIMITED

Defender & First Respondent

and

ADMIRAL INSURANCE COMPANY LIMITED

Third Party & Second Respondent

Appellant: McConnell; Thompsons
First Respondent: MacDougall (sol adv); BLM
Second Respondent: Calderwood; Harper Macleod LLP

16 June 2017

[1] It is well understood that questions of liability for expenses are for the discretion of the court (see Macphail *Sheriff Court Practice* 3rd edition at 19.03). An appellate court will only interfere with a discretionary decision in certain defined classes of case (see Macphail *op. cit.* at 18.111). The consequence of the relationship between these two well established principles

is that appeals on questions of expenses only are severely discouraged and are only entertained in limited circumstances. This is one such case.

[2] The background is an unremarkable collision between motor vehicles on the south side of Glasgow. The owner of one vehicle sues the insurer of the other. In turn, that insurer convenes as a third party the pursuer's insurer, the pursuer's vehicle having been driven by his son at the time of the collision.

[3] The procedural history is equally unremarkable. The initial writ was warranted in late July 2016; a notice of intention to defend was lodged; an options hearing assigned for 11 November 2016; and defences lodged by the defender. Shortly before the options hearing the defender's motion to bring in the third party was granted unopposed. Intimation on the third party was made on 15 November 2016. The defender lodged three separate minutes of tender on 17 November 2016. As set out in paragraph [13] below, the defender and the third party reached an agreement on 6 December 2016. The third party lodged answers on 29 December 2016.

[4] The defender lodged a fourth minute of tender on 31 January 2017. On 6 February 2017, the pursuer lodged a minute of acceptance of tender, accepting one of the tenders lodged on 17 November 2016, namely, that which did not involve the third party. A motion to grant decree in terms of the minute of tender and acceptance was then enrolled. That motion was opposed, no doubt to allow the question of expenses to be addressed.

[5] On 10 February 2017 the sheriff granted decree in terms of the relevant minute of tender and the minute of acceptance and found the pursuer entitled to the expenses as taxed up to the date of the tender, which the interlocutor stipulated as being 17 November 2016. Thereafter, the pursuer was found liable to the defender and the third party in the expenses

incurred in the action from 18 November 2016 onwards. It is this interlocutor which is the subject of the appeal.

[6] The interlocutor of 10 February 2017 did not deal with the disposal of the action against the third party. In response to an email from the third party's solicitors, the sheriff pronounced an interlocutor on 2 March 2017 attempting to rectify that omission and dismissed the action in so far as directed against the third party.

[7] The pursuer's appeal is directed against the finding of expenses made against him in favour of the third party and in relation to the sheriff's stipulation of the date of the tender in his interlocutor. No opposition was offered by the defender or the third party in relation to the latter aspect, it being conceded that it was for the Auditor of Court to determine the true date of the tender.

[8] As explained by the Inner House in *Albert Bartlett & Sons (Airdrie) Ltd* v *Gilchrist & Lynn Ltd & Others* [2010] CSIH 33, the general rule in relation to expenses is that the cost of litigation falls upon the person who has caused it. In the ordinary course, and in the absence of some unreasonable behaviour, a party cannot be liable for the expenses of a party whom he has not introduced into the process and against whom he has directed no case (see *Albert Bartlett & Sons (Airdrie) Ltd* at paragraph [12]).

[9] In this case, the sheriff's note is silent as to the basis upon which the pursuer was found liable for the expenses of the third party. The parties accepted that the sheriff's note was unsatisfactory. They indicated that the motion could, in effect, be re-heard by this court or the court could allow the appeal and remit the cause back to another sheriff to re-hear the motion. After an adjournment, the parties confirmed that they were content that the appeal should be allowed and the pursuer's motion be heard of new by this court.

Submissions

[10] The pursuer moved his motion for decree in terms of the relevant minute of tender and the acceptance thereof; he also sought the expenses of the cause against the defender up to the date of the tender. The defender did not oppose the pursuer's motion. The defender then moved for an award of expenses against the pursuer from the date of the tender. This was not opposed by the pursuer.

[11] The third party thereafter sought dismissal with expenses against the pursuer; which failing against the defender; which failing against the pursuer and defender jointly and severally. The third party accepted that no case was directed against them by the pursuer. The third party sought expenses against the pursuer on the basis of the length of time the pursuer had taken to accept the tender.

[12] To put the third party's motions, and the defender's opposition to certain of them, in context, it is necessary to set out in some detail the terms of the discussions between, and the agreement reached by, the defender and the third party. The court was provided with a copy of the relevant correspondence.

[13] The third party wrote to the defender on 27 October 2016 offering to settle the claim "on a 50/50 without prejudice basis". The defender maintains that they did not receive that letter. There was a telephone call between the defender and the third party on 31 October 2016, in the course of which it was agreed that the third party's losses did not require to be included in the court action. The third party wrote to the defender on 5 December 2016. That letter again indicated a willingness to settle "on a 50/50 without prejudice basis"; and invited an acceptance from the defender. Also on 5 December 2016, the defender's solicitors sent an e-mail to the third party indicating that the defender wished "to settle the claim on a 50/50 basis". The defender's solicitors indicated that the third party required "to lodge answers or

confirm settlement on a 50/50 basis with (the defender's solicitors) in writing." The third party wrote to the defender's solicitors on 6 December 2016 stating, "We can confirm that we accept to settle this claim on a 50/50 without prejudice basis." A letter from the third party's solicitors appears to have been written in similar terms on 13 December 2016, albeit the court was not provided with a copy of that.

[14] The third party maintained that they should not have been brought into the action. On that basis, if the court was not with the third party on their motion for expenses against the pursuer, the third party sought expenses against the defender on the basis that they had brought the third party into the action and the third party had been successful. Following the agreement that was reached between the defender and third party, the defender had not agreed to release the third party from the proceedings. The defender wished the third party to remain in the action until an adjustment had been made by the pursuer to the heads of the claim. The defender was not prepared to release the third party until the repairs element of the claim had been adjusted out by the pursuer. The third party maintained that they had been successful as they were not making any contribution to the settlement figure. The third party maintained that they had no liability in relation to the non-repair cost elements of the claim.

[15] No submissions were made by the third party in support of a joint and several finding of expenses in their favour against the pursuer and defender.

[16] The defender provided the court with a timeline of material events. The defender's primary position was that they consented to the third party's motion against the pursuer and opposed the third party's motion for expenses against them. If the court was minded to find the defender liable to the third party, the defender sought a right of relief against the pursuer. The defender also maintained that the expenses in issue were caused by the

pursuer's undue delay in accepting the tender. It was conceded that the pursuer did not know about the exchanges, offers and agreements as between the defender and the third party.

[17] The defender contended that the third party had no right to expenses against the defender. On 31 October 2016 the defender and third party had reached an understanding that their respective losses need not be included within the court action. From that date forward the repairs element of the claim should not have been included in the action. Whilst the pursuer would not know about any agreement at warranting, subsequently they would know if they had been instructed to include the cost of repairs. The cost of repairs was adjusted out on 26 January 2017. An agreement on liability as between the defender and third party was reached on 6 December 2016. The defender maintained that this agreement represented success on the part of the defender against the third party. Notwithstanding the terms of the letter of 6 December 2016 from the third party to the defender's solicitor, the third party's position was that they would not contribute anything towards the settlement.

[18] The defender argued that at the point of his proceeding with the third party notice it had been appropriate to do so. At that time, only the repairs element of the claim had been agreed between the defender and the third party, the remaining three elements of the claim had not. It had been appropriate for the third party to remain in the action until the agreement was reached on 6 December 2016. Answers having been lodged by the third party, it continued to be reasonable for the defender not to release the third party from the action until the repairs element was adjusted out on 26 January 2017. The defender contended that in circumstances where an agreement had been reached but not implemented, that constituted unreasonable behaviour on the part of the third party. The

defender's decision not to pursue recovery from the third party in these proceedings was a commercial one. Even if their behaviour was interpreted as success, the third party should not be found entitled to their expenses against the defender.

[19] The defender made no submissions in relation to a right of relief in their favour against the pursuer, should the court find the defender liable to the third party in expenses.

[20] The pursuer initially contended that the only prudent course of action had been for him to include the repair costs when raising the action, however, under questioning from the court as to what had, in fact, happened, counsel for the pursuer indicated that the repair costs had been included in error.

Discussion

[21] There being no opposition, in terms of the minute of tender number 12 of process and the minute of acceptance of tender number 17 of process, decree will be granted against the defender for payment to the pursuer of the sum of Ten Thousand Pounds (£10,000) Sterling. In so far as it is directed against the third party, the action will be dismissed. The defender will be found liable to the pursuer in the expenses of the cause down to the date of the tender. The subsequent expenses are dealt with in paragraph [26] below.

[22] Whilst there is little doubt that the pursuer's erroneous inclusion of the repair costs caused some degree of confusion (in light of the agreement between the defender and the third party), in the final analysis, that was of no consequence. Leaving aside the repair costs there were three further heads of claim, namely, credit hire charges; a policy excess; and a claim for inconvenience.

[23] The first issue for resolution is who, if anyone should meet the expenses of the third party. The pursuer did not introduce the third party to the process. The pursuer did not

direct a case against the third party. It is a matter for the pursuer as to when they chose to accept a tender. The expenses consequences of tenders are well understood. In accepting a tender, a pursuer knows that they will ordinarily be entitled to the expenses of the action up to the date of that tender, and that they will be liable to the defender in the expenses thereafter. Combining those consequences with the principles enunciated in *Albert Bartlett & Sons (Airdrie) Ltd* in relation to the liability of expenses for third parties, and absent any unreasonable behaviour on the part of the pursuer, the time taken by a pursuer to accept a tender cannot be a relevant consideration in adjudicating upon the expenses of a third party against whom they have no case. In the circumstances of this case, there is no basis upon which the pursuer should be found liable for the expenses of the third party. The third party's motion to that effect will be refused.

[24] Turning to the third party's motion for expenses against the defender, in the first instance, when one considers the terms of the e-mail from the defender's solicitors to the third party of 5 December 2016 (see paragraph [13] above) it is difficult to see why the third party lodged answers (which they did on 29 December 2016). The position is similar to that in *Albert Bartlett & Sons (Airdrie) Ltd* at paragraph [13]. In light of the agreement reached, there was no purpose in the third party lodging answers. It is not clear why they chose to do so. The defender did not require them to.

[25] The position subsequently adopted by the third party is without foundation. Having written in the terms they did, the third party adopted a position that they had no liability, whatsoever, for the three elements of claim that they knew were in issue at the time they wrote their letter. To argue that they have in some way been "successful" by refusing to implement the terms of an agreement they reached is an extraordinary proposition, entirely devoid of merit.

[26] In these circumstances, the third party's motion for expenses against the defender will also be refused. The course adopted by the third party in lodging answers when there was no necessity for them to do so; and then by refusing to honour the settlement terms reached with the defender, is on any analysis an unreasonable one. Service upon the third party was made only two days before the lodging of the tender which was accepted. In the whole circumstances, the pursuer and the third party will each be liable for one half of the defender's expenses from the date of tender onwards.

Expenses

[27] The pursuer and the defender were each successful in the appeal. The third party will be found liable to each of them in the expenses thereof, subject to one matter which is dealt with below at paragraph [33].

[28] The pursuer sought sanction for the employment of counsel for the hearing of the appeal only. The defender made no such motion, notwithstanding their representation at the appeal hearing by a solicitor-advocate. The third party opposed the motion for sanction, arguing that the difficulty or complexity of the proceedings did not merit the instruction of counsel.

[29] Having regard to the factors set out in s.108(3) of the Courts Reform (Scotland) Act 2014, and in all the particular circumstances of this case, it is not reasonable to sanction the employment of counsel. In essence, this was simply the re-hearing of a motion to resolve questions of expenses following the acceptance of a tender. No issue of difficulty or complexity arose. The claim could not properly be regarded as important and was of low value. The pursuer's motion to sanction the employment of counsel is refused.

[30] In opening his submissions in the appeal, counsel for the pursuer apologised for the bundle of authorities lodged with the court. That apology was properly made. As the appeal

developed, little reference was made to the bundle, however, having regard to the contents of that which was presented to the court in this appeal, it merits further comment.

[31] Whilst this appeal proceeds under the accelerated appeal procedure provided for by Chapter 27 of the Act of Sederunt (Sheriff Appeal Court Rules) 2015, and the quorum of the court is thus one Appeal Sheriff (see paragraphs 1(1) and 1(3)(g)), it is, nevertheless, a hearing of the Sheriff Appeal Court and, as such, the terms of the Sheriff Appeal Court (Civil) Practice Note No. 1 of 2016 apply.

[32] The issue of authorities is dealt with in paragraphs 49 to 55. Practitioners appearing before the Sheriff Appeal Court should be familiar with these requirements and should ensure compliance with them, having regard to the terms of paragraph 59(g) of the Practice Note.

[33] In this case, quite remarkably, virtually each and every requirement of the Practice Note in respect of authorities has not been followed. The bundle of authorities included authorities for propositions not in dispute; contained more than 10 authorities (there are 17) without the court's permission for the additional authorities to be included; and was not assembled in chronological (or indeed any form of logical) order. Whilst it does have an index page, the bundle is not paginated. None of the passages on which parties intended to rely were marked or highlighted. Whilst the authorities cited were from the approved sources or other recognised reports, regrettably the copies contained within the bundle were not – the compiler having elected to include Westlaw print outs in a remarkably small font size. Whilst the bundle might have been rejected by the court, in cases of this nature, that is often not an expedient course of action. The appropriate sanction where the bundle is not rejected is in expenses. Having regard to the condition of the bundle lodged, the finding of

expenses made in relation to the appeal will stipulate that no expenses are payable in relation to the bundle of authorities.