SHERIFFDOM OF TAYSIDE, CENTRAL & FIFE AT PERTH

[2017] SC PER 10

PER-A143-16

NOTE OF SHERIFF W M WOOD

In the cause

A & B TAXIS

Pursuers

Against

THE CO-OPERATIVE INSURANCE

Defenders

Pursuer: Gildea
Defender: Harding

At Perth 10 February 2017
The Sheriff, having resumed consideration of the reponing note forming No 8 of process, Refuses same; Finds the defenders liable to the pursuers in the expenses occasioned by said reponing note and that on a solicitor/client basis as may be subsequently taxed; Allows an account thereof to be given in and Remits same, when lodged, with the Auditor of Court to tax and report.

NOTE

Introduction

[1] In this matter, the pursuer seeks recovery of damages sustained following a road traffic collision on 17 February 2016. The vehicle – a Skoda Superb (vehicle registration number AB04 TAX) – was a registered taxi, owned by the pursuers. The damages sought are vouched to the sum of £18,680.69. There is no element of personal injury. The defenders are the insurers of the other vehicle involved, registration number KC04 ZNF.

[2] The initial writ was warranted on 6 October 2016 and subsequently served by first class recorded delivery post on the defenders on 8 October 2016 (the day following dispatch by first class recorded delivery post). In the absence of any notice of intention to defend, the pursuers' agent sought and obtained decree in absence, with fixed expenses, on 4 November 2016. It is against that decree that the defenders now wish to repone; the pursuers oppose recall of the decree.

Submissions

[3] In submissions, Mr Gildea drew my attention to the terms of the initial writ and to all the vouching that had been supplied with it in support of the pursuers' claim. He stressed the importance of having a registered taxi available to the pursuers in order to enable them to continue to carry out their business and to avoid loss of revenue, thereby mitigating their loss. He pointed out that, when it became clear that the defenders intended to dispute matters, the pursuers had purchased a replacement vehicle thereby bringing the hire to an end. Meantime, significant storage charges had been incurred and their vehicle was subsequently written off.

[4] Mr Gildea was also kind enough to provide me with a time line of the significant events, in which the following are of note:

7 October 2016	Initial Writ served on defender.
11 October 2016	Initial Writ signed for by defender.
2 November 2016	Pursuers sought decree.
22 November 2016	Extract decree issued.
23 November 2016	Charge served by sheriff officers.
24 November 2016	Charge signed for by defenders.
25 November 2916	Telephone call between pursuers' agents and the defenders' English Agents. Defenders were advised that decree had been granted and a charge served.
6/7 December 2016	Voicemail messages exchanged between pursuers' agents and defenders English agents seeking to contact one another.
8 December 2016	Telephone contact between pursuers' agents and defenders' English agents, confirming decree obtained and supplying a copy of same.
13 December 2016	Arrestment posted by sheriff officers with The Co-operative Bank, Glasgow.
21 December 2016	Telephone call to pursuers' agents from Messrs Anderson Strathern on behalf of the defenders, in which they indicated they were aware of the decree, but not the arrestment.
10 January 2017	Reponing note intimated.

He submitted that the "track and trace" documentation proved that the initial writ had been properly served and signed for by the defenders and he submitted that it appeared that the defenders had no proper system in place for dealing with litigation. He referred me to the decision of Sheriff Principal Stephen in *Bialas-Krug* v *EUI Ltd* 2014 SC EDIN 38 (particularly paragraphs 25, 26, 31, 32 and 33), where she had found no error on the part of the sheriff at first instance in refusing a reponing note in similar circumstances. Although the defenders continue to dispute liability and had suggested that there was a potential fraud in the claim, there had been no specific allegations made and the defenders appeared to have a flawed system that did not permit them to process properly litigation claims. I was invited to find that this was tantamount to the "reckless indifference to, or a deliberate disregard of" the rules as referred to in *McPhail, Sheriff Court Practice* 3rd edition at paragraph 7.34, and to refuse the reponing note.

[5] For the defenders, Mr Harding submitted that, although the matter was one for my discretion, the appropriate guidance was that contained in *McPhail* at paragraph 7.34. He pointed out that the guidance there was that systemic failures by a solicitor would be unlikely to be held against a party and that there is reference to a "benevolent" attitude by the courts to explanations proffered. He pointed out that no courtesy copy writ was served on the English solicitors involved on behalf of the defenders and, had that been the case, then it was unlikely that the matter would have proceeded as undefended. Those English solicitors had been aware from 25 November 2016 that decree had been taken, and they had asked the pursuers' agents to supply a copy (which they had done) on 8 December 2016; by 21 December 2016, Scottish solicitors had been instructed. I was invited to find that, in all the circumstances, the length of the delay was not material. In any event, the defenders had a stateable proposed defence and had raised the spectre of potential fraud.

Consideration

[6] The ability of a defender to repone is set out in OCR 8.1. Sub-paragraph (1) provides that an application to be reponed may be lodged with the sheriff clerk before implement in full of a decree in absence, provided it sets out the proposed defence and explaining the failure to appear. Sub-paragraph (3) provides a discretion to the sheriff to recall the decree insofar as not implemented, and subject to such order as to expenses as may be appropriate. Although I was not referred to it in terms, the binding authority is *Forbes* v *Johnston* 1995 SC 220, where a five judge bench of the Inner House determined that in the exercise of my discretion, I must consider and take into account all the circumstances and balance those in favour of reponing against other considerations which may indicate to the contrary. It is for the defender seeking to be reponed to provide all necessary material in support of his note.

[7] I note that paragraph 7.34 of *McPhail* contains this passage:

> "In modern practice, however, a failure caused by the defender's solicitor or some other person for whom he is responsible is unlikely to be held against him, and even his own carelessness will not necessarily prevent him from being reponed. The courts adopt a benevolent attitude to explanations, recognising that few of them justify the failure, and are prepared to be satisfied with something less than a good or sound explanation. While each falls to be regarded on its own merits, the defender must tender some explanation; and the courts will not accept an explanation which demonstrates that the failure was due to a reckless indifference to, or a deliberate disregard of, the rules of procedure. ... It is not a requirement of the rules that the sheriff must be satisfied that the explanation provides a reasonable explanation for the non-appearance, and it might result in an injustice if a defender who had a perfectly sound defence were to be denied the opportunity of entering the process simply because the explanation for his non-appearance was not a reasonable one."

[8] In this case, the reponing note indicates that the defenders' English solicitors had been in correspondence with the pursuers' credit hire company for some time in relation to the dispute on liability. The defenders had concerns that there was a fraud element to the claim and therefore had to carry out investigations. The defenders complain that there was no correspondence from the

pursuers' solicitors until after decree was obtained and that they had been unable to speak to either their own policyholder or to the independent witness said to have seen the accident by the pursuers' credit hire company. They further go on to complain that if the court proceedings were served directly on the defenders, they had no record of receiving it; and *esto* they did, it had not made its way to the relevant department. They further complain that their English solicitors received no intimation copy of the proceedings.

[9] Plainly, any allegation of fraud in an insurance claim is of concern to the court. I note that the reponing note was received at the court on 22 December 2016 and that, even at that stage, the defenders were no further forward in discussing matters with their insured or in tracing the "independent witness". One might have thought that, some 10 months after the incident date, some progress might have been made or some potential fraud properly identified, but the defenders appear to have been unable to do that. It is far from clear what steps the defenders have taken in order to carry out any investigations and they have provided no detail in relation to the potential for fraud. It certainly cannot be said that they have not had insufficient time to investigate.

[10] Further difficulties arise with the explanation provided for their failure to appear. While the defenders complain that their English solicitors received no advance warning that proceedings might be raised, there is plainly no requirement for the pursuers to do so and no doubt the lack of progress will have caused some frustration. What is more concerning, however, is that the initial writ – apparently appropriately served on the defenders at their place of business in the instance by first class recorded delivery post – should not have been subject immediately upon delivery to being registered or subject to some system for the proper receipt or action of such correspondence. While I do not doubt that the defenders will receive a large amount of correspondence on any given day, only a limited amount of that is likely to be by way of recorded delivery post; in any event, I have not been provided with any details regarding the system that the defenders had in place either in November, or have in place now, for the receipt of such mail. Even at this stage, the defenders do not admit having received the initial writ.

[11] Be that as it may, in due course decree was sought and obtained and the extract was subsequently issued on 22 November 2016. A charge for payment was served by sheriff officers the following day. Yet again, the defenders appear to have done nothing on receipt of that document. Although they were not obliged to do so, the pursuers' agents seem to have telephoned the English solicitors on 25 November 2016, yet it took a further 11 days for any further telephone communication from them. When invited to provide a copy of the decree, the pursuers' agent supplied that (on 8 December 2016) and the pursuers subsequently instructed arrestment of the defenders' funds in the hands of The Co-operative Bank, Glasgow. It would appear that, once aware that decree had been granted and a charge served, it still took the defenders – through their English agents – almost another month to instruct a Scottish solicitor to act on their behalf.

[12] On any reasonable view, it would appear that the defenders do not have a proper system in place to deal with litigation or the diligence that might flow from that. While the defenders have provided "an explanation", it is far from satisfactory: there is an absence of detail about their investigations into the missing witnesses (one of whom is their own insured); there is no explanation for the apparent systemic failures within their own organisation; there is no explanation for the delay in the instruction of Scottish solicitors; and the proposed defence is

lacking in detail. In this, there are some echoes with the findings of Sheriff Principal Stephen in the *EUI Ltd* case (paragraph 25):

> "The sheriff recognises that the explanation need not be a reasonable one but nevertheless it needs to be one that the sheriff is satisfied as to. If there was an explanation it amounts to this –that a major motor insurer had no system at all to deal with and ensure that important procedural time limits are met. The information provided at the appeal hearing that the appellants did take steps in December 2013 to contact their Scottish solicitors does not assist them at all. This is simply a repetition of a failure. A flawed method of communication which only serves to emphasise the lack of a system and a lack of care as to the litigation process. ... If a solicitor or repeat litigant fails to have a system they must take the consequences of that failure. If the respondent's solicitor had no system for ensuring that personal injury proceedings are raised timeously time-bar will apply and the client would lose the right to sue the wrong doer for damages. Accordingly, the lack of a system is an important issue. The sheriff did not require to conclude that the appellants had recklessly disregarded the rules of court and time limits however it would not be difficult to conclude that there had been reckless indifference to the litigation process." *(sic)*

[13] Clearly, the views of Sheriff Principal Stephen are not binding on me, but they are persuasive. Although the *EUI Ltd* case was a case involving personal injury, the issue of reponing is the same (or nearly so) as here and it was not suggested for the defenders that it could or should be distinguished on the facts or issues involved.

Decision

[14] In this case, it is far from clear that there is any form of "windfall" accruing to the pursuers as a result of decree being obtained in their favour. On the contrary, the sums sought in the crave of the Initial Writ and for which decree has been obtained all appear to be properly vouched. In my view, it is not a proper explanation to blame the pursuers' agents for failing to provide advance notice of proceedings being raised; the obligation is on the defenders to have a system in place by which they can properly manage litigation raised against them. It would appear that they do not have that and therefore their failure to appear may well be correctly categorised as a "reckless indifference" to litigation in general. Standing the lack of substance to the proposed defence – more than 11 months post-incident – I am not satisfied that either the explanation provided for the failure to appear is a reasonable one or that the proposed defence is stateable. Accordingly, I refuse to allow the defenders to be reponed.

[15] In the event that I had determined this matter in favour of the defenders, there was some discussion over what the effect on diligence might be, standing the terms of section 73A of the Debtors (Scotland) Act 1987; in light of the decision I have reached, I need not consider that.

Expenses

[16] Mr Gildea moved me to find the pursuers entitled to the expenses on the solicitor/client scale, third party paying. While Mr Harding suggested that any award of expenses should be on a party/party basis, it seems to me that given the defenders' persistent systemic failures to act or

react in this matter appropriately and the additional expense to which the pursuers will have necessarily been put as a direct result of the reponing process as a result of the defenders' failure to engage, an award of expenses at the more favourable rate will be appropriate.