SHERIFF APPEAL COURT

[2022] SAC (Civ) 32
PIC-PN1333-21

Sheriff Principal N A Ross

OPINION

delivered by SHERIFF PRINCIPAL N A ROSS

in appeal by

MARY YOUNG

Pursuer and Appellant

against

AVIVA INSURANCE LIMITED

First Defender and Respondent

and

AXA INSURANCE UK PLC

Second Defender and Respondent

Pursuer and Appellant: Conway; The Conway Accident Law Practice
First Defender and Respondent: Gardiner, advocate; Keoghs Scotland LLP
Second Defender and Respondent: Miller; Clyde & Co (Scotland) LLP

3 November 2022

[1] The pursuer was injured while seated in the passenger seat of a parked car. The driver, her sister-in-law, opened the driver's door. As she did so, a passing van collided with the open door. The pursuer averred she suffered spinal and other injury caused by the resulting jolt. She initiated an action against the van driver, the first respondent's insured. The second respondent is the insurer of the sister-in-law who opened the door. The pursuer did not, at the commencement of the action, direct any claim against her sister-in-law.

[2] There is an established Personal Injury Pre-Action Protocol (the "Protocol") for actions in the All-Scotland Sheriff Personal Injury Court (Appendix 4 of the Ordinary Cause Rules 1993, "OCR"). It applied to the present claim. The aims of the Protocol are:

> "to assist parties to avoid the need for, or mitigate the length and complexity of, civil proceedings, by encouraging: the fair, just and timely settlement of disputes prior to the commencement of proceedings …"

[3] The Protocol sets out requirements and a timetable for, amongst other things, submission of a claim form to the defender, acknowledgement by the defender within 21 days, and three months for the defender to investigate the claim and admit or deny liability.

[4] The pursuer states that her former agents submitted a claim form dated 1 May 2020. There is no sufficient proof or acknowledgement of receipt, and the respondents do not admit receipt. This abortive process is not relevant for present purposes. The pursuer changed agents. The new agents submitted a claim form dated 14 October 2020 to the first respondents. In breach of the Protocol, no response was received, and an initial writ was served on 9 June 2021. The first respondent lodged a note of intention to defend on 19 August 2021, and defences on about 14 September 2021. These were skeletal defences which contained little more than a denial of liability. The court issued a timetable on 14 September 2021.

[5] The first defender lodged adjusted defences dated 22 December 2021. For the first time, fourteen months after receipt of the claim form, they blamed the pursuer's sister-in-law for opening the door.

[6] Following receipt of the adjusted defences, the pursuer's agents lodged a motion, granted on 28 January 2022, to vary the timetable to allow instructions to be taken on the new allegation of blame. By minute of amendment dated 8 February 2022, the pursuer

amended the claim to convene the second defender as insurer, alleging liability on a joint and several basis with the first defender.

[7] Following an unsuccessful Williamson tender procedure, a pre-trial meeting took place on 30 May 2022. Quantum was agreed. A record was subsequently intimated and a proof diet fixed. On 6 June 2022 the second defender made an offer to settle at the full agreed sum. Settlement was reached. A joint minute was lodged on 22 July 2022 agreeing decree of absolvitor in favour of both defenders, finding the second defender liable in the pursuer's expenses and reserving the question of the first defender's expenses.

[8] The action called before the sheriff to decide: who pays the first defender's expenses – the pursuer or the second defender?

The sheriff's decision

[9] At the expenses hearing, the pursuer submitted that the second defender should pay. The second defender had met the pursuer's assessment of damages, so the pursuer was bound to accept, and it was not competent to proceed further against the first defender. The pursuer had raised the action because there was no response by the first defender to the Protocol, and had convened the second defender only after the first defender attributed blame.

[10] The first defender submitted that the pursuer should pay. The issue was success in the action, and the pursuer had not succeeded to any extent against the first defender, who had not contributed to the settlement. While the first defender had not complied with the Protocol, the consequence was only to relieve the pursuer of her own duties under the Protocol.

[11] The second defender submitted that the pursuer should pay, because the second defender had not been aware of the action until March 2022 and had not done anything to cause the first defender to be involved in the action. It was the pursuer who caused the first defenders' expense.

[12] The sheriff decided that the pursuer should pay the first defender's expenses, founding on the general rule recognised in *Mitchell* v *Redpath Engineering Ltd* 1990 SLT 259, that:

> "if a person convenes two defenders and one is assoilzied, the pursuer, and not the unsuccessful defender, pays the expenses of the successful defender"

[13] He decided that it was clear that the second defender had done nothing to induce the convening of the first defender, and should not be liable. The fact that the pursuer considered it necessary to convene both defenders, or that both defenders might have been found liable, was not relevant. Liability for expenses is decided at the end of an action, and here the pursuer had not vindicated her claim against the first defender. The sheriff did, however, add a post script to his written decision, noting that it was unsatisfactory, at the least, that the first defender had not responded to the claim form dated 14 October 2020 under the Protocol.

Submissions on appeal

[14] The pursuer's agent properly recognised that appeals on expenses alone are severely discouraged and that the judge at first instance has a wide ambit of discretion. An appeal court will intervene only in limited circumstances. This action had been properly raised under the Protocol, and the first defender had not complied. An action was raised as a result. The first defender belatedly blamed the second defender. The sheriff had erred in

failing to recognise the importance of the Protocol, and the critical importance of early disclosure, exchange of information and expeditious consideration of resolution, all to avoid unnecessary litigation. The first defender's failure to respond to the claim form had rendered the Protocol useless.

[15] Had the first defender blamed the second defender from the outset, the action would not thereby have been avoided against the former, because the defenders blamed each other, and neither admitted fault. Once the full value of loss had been offered and accepted, there was no further claim against either (*Kidd* v *Lime Rock Management LLP* 2021 SLT 1499). In cases where one defender blames the other, and is found liable, the unsuccessful defender should be liable for the other defender's expenses, either directly or by right of relief.

[16] Counsel for the first defender agreed that appeals on expenses were severely discouraged, and that an appeal court should not interfere with an award of expenses, unless on one of the recognised grounds. An appeal, in any event, will not ordinarily be allowed on points not argued before the sheriff. Expenses would normally fall on the party who had caused them, subject to exceptions, none of which applied here.

[17] Before the sheriff, the pursuer had submitted that the second defender should pay the first defender's expenses, but had not sought modification under OCR 3.A.2. Such a motion should not be considered now, and the argument deemed waived. The sheriff had fully considered the history of the action, and had not misdirected himself. Even had the first defender observed the Protocol requirements, liability for the first defender's expenses would not have been avoided. The submission went on to address some hypothetical results had the Protocol been observed. The first defender would always have been entitled to an award of expenses.

[18] The sheriff did not err in finding that the second defender had not induced the pursuer to convene the first defender, or in finding that the pursuer ought to have intimated the action to the second defender at the outset. For that reason there was no basis for claiming relief from the second defender.

[19] For the second defender it was submitted that it could not have known or taken steps to avoid the litigation prior to service of the amended pleadings. It had not induced the convening of the first defender. Following the convening of the second defender in April 2020, the rule in *Mitchell* v *Redpath Engineering Limited* applied, and none of the exceptions did. The second defender was convened only on an *esto* basis. The pursuer had convened the first defender, who was successful, and therefore ought to pay the first defender's expenses. The sheriff correctly identified that had the matter proceeded to proof, there would have been no answer to an award against the pursuer.

Decision

[20] Appeals on expenses alone are generally severely discouraged. Expenses are a matter within the discretion of the judge at first instance. It is only in a limited number of circumstances that an appeal court will intervene (see Macphail; *Sheriff Court Practice* (4th ed) para 18.166).

[21] There are no fixed rules in making awards of expenses (Macphail; *ibid* at paragraph 19.10; *Howitt* v *Alexander & Sons* 1948 SC 154 per Lord President (Cooper) at 157). There is a body of recognised principles, sometimes described as rules. The general principle is that expenses would normally fall on the party which had caused them. If a pursuer convenes two defenders and one is assoilzied the general principle is that pursuer, and not the unsuccessful defender, pays the expenses of the successful defender (*Mitchell).*

That principle is not applicable if the successful defender caused or induced the pursuer to convene another party as an additional defender. The question is: through whose fault was it that the additional defender was brought into court?

[22] All arguments on expenses must be presented at the hearing before the first-instance judge. A party which does not present an argument that was open to them is deemed to have waived that argument (*Aird* v *School Board of Tarbert* 1907 SC 22 per Lord McLaren at p24), and it is not open for them to appeal on that point.

[23] In considering questions of expenses, it is recognised that cases are highly fact-specific. In the present case, the sole issue is liability for the first defender's expenses. All other questions of liability and expenses were settled by parties' agreement.

[24] The material events affecting liability for the first defender's expenses appear to be: first, the pursuer intimating a claim in terms of the Protocol upon the first defenders; second, the pursuer thereafter, in the absence of a response, raising an action against the first defenders; third, the first defenders eventually lodging adjusted pleadings blaming the second defenders, and; fourth, the pursuer thereafter convening the second defenders. In my view the action can be considered in two parts, namely before and after the convening of the second defender.

Events prior to convening the second defender

[25] On a plain understanding of events, this action was raised because the first defender did not engage with the Protocol. Had they engaged with the Protocol, the parties would have engaged in meaningful communication. The first defender would have investigated the incident. It would have sent a reply within three months, stating whether liability was admitted or denied, and giving reasons, including any alternative version of facts relied

upon. It would have disclosed any relevant documents. Valuations would have been discussed, and settlement considered. There is an express stocktaking period for the pursuer to consider the position. All of these matters are set out in the Protocol (OCR, Appendix 4). It is difficult, if not impossible, to see that this process would ended without the second defenders being convened, with consequences for the rest of this action.

[26] Non-engagement meant an action was raised. Expense started to be incurred. The aims of the Protocol were completely defeated by the first defender. There is no principled reason the first defender should receive any form of contribution towards their expenses for this part of the action.

[27] The pursuer, in submission to the sheriff, did not seek to distinguish this part of the action from the later parts. The motion was presented by all parties in absolute terms, for an award of the first defender's entire expenses, either against the pursuer or against the second defender. The sheriff considered the motion as presented. He was not given submissions relating to this early stage of the action, despite the first defender's stark shortcomings. Only on appeal did the pursuer submit that any award should be modified, because of failure to follow the Protocol.

[28] Founding on this, as a preliminary point, counsel for the first defender relied on *Aird* (above), and submitted that it was in effect too late for the pursuer to make submissions on modification when none were before the sheriff.

[29] On general principles, had the modification of expenses been merely one of discretion, this may have been an effective point. In my view, however, because of the particular context of the OCR Chapter 3A Personal Injury rules, that submission is misconceived.

[30] The submission on modification is capable of arising under two separate bases. The first basis is the exercise of general common law discretion of the sheriff to modify expenses to reflect the conduct of the litigation. That would be precluded in the present case, on the basis of *Aird* (above), because no motion was made to the sheriff.

[31] The second basis, however, is reliance on the scheme under the OCR. In cases which are raised in terms of Chapter 3A and which are subject to the Protocol, certain duties arise. There are consequences for failure to observe the Protocol. Rule 3A.3 imposes certain duties upon the sheriff to consider parties' conduct, where the sheriff "considers that a party … failed, without just cause, to comply with the requirements of the Protocol". Modification is available as a discretionary remedy, or step (Rule 3A.3(2)(c)).

[32] The sheriff plainly did consider that the first defender failed, without just cause, to comply with the requirements of the Protocol. He narrated this in a post script to his judgment. The terms of Rule 3A.3(1) therefore applied. While any remedy was discretionary, he was in the circumstances obliged by Rule 3A.3(4), to 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". In terms of Rule 3A.3(5), the conduct must be assessed by regard to the extent to which that conduct was consistent with the aims of the Protocol.

[33] The sheriff correctly identified that the conduct of the first defender in failing to engage with the Protocol, was "unsatisfactory, to put it no higher", and noted that the court expected compliance by parties. The sheriff did not, however, carry this reasoning forward in order to consider the consequences of failure to observe the Protocol. Whether to impose sanctions, and their nature, are matters of discretion under Rule 3A.3. However,

consideration of these matters, prior to making that decision, is compulsory (Rule 3A.3(4) and (5)). The obligation arises independently of the submissions of parties.

[34] Once the sheriff was satisfied that Rule 3A.3(1)(a) applied (as the post script made plain that he was), he was obliged to consider the remainder of the Rule. The sheriff did not carry out this exercise, but rather noted the parties' failures without considering consequential sanction, or the Rule 3A.3 procedure. In omitting to do so, he erred. This was an error of law, rather than in exercise of a discretion.

[35] It follows that the matter is at large for this court to consider. The first defender's conduct fell below that required by the Protocol. It is necessary to consider, as Rule 3A.3 provides, the consequences of failing to comply with the Protocol.

[36] That failure commenced with the non-engagement with the Protocol. That non-engagement meant that the pursuer had little choice but to serve an initial writ on 9 June 2021. The first defender served a notice of intention to defend, and thereafter defences. If confirmation were needed of the first defenders' failure to engage with the Protocol, this appears to be confirmed by the skeletal nature of the defences. The court issued a timetable. For the first time, the first defender introduced blame directed towards the second defender's insured, by adjusted defences dated 22 December 2021. The pursuer's agents lodged a motion to vary the timetable, granted 28 January 2022. By minute of amendment dated 8 February 2022, the pursuer amended the claim to convene the second defender. All of this procedure was wasted, and served to defeat the aims of the Protocol.

[37] The first defender was the sole or main cause of this waste. There is no principled reason for any award of expenses up to and including the amendment procedure itself. It was only as a result of that procedure that the action was placed back to where it should have been prior to the raising of the initial writ. The award of expenses will be varied to

remove the entitlement to expenses prior to the end of the amendment procedure introducing the second defender.

[38] For the purposes of Rule 3A.3, the foregoing is, in my view, the extent of the consequences of the first defender's failure to comply with the Protocol, and exhausts the proper remedy under that Rule.

[39] I would add that, even if the terms of Rule 3A did not permit or require this intervention, it remains open to this court to address:

> "not only unnecessary and precipitate commencement of litigation but also the mischief which arises when a pursuer is forced to litigate by defenders who decline to engage in any meaningful pre-litigation negotiation" (*Burns* v *Royal Mail Group Ltd* 2014 SLT (Sh Ct) 73 per Sheriff Principal Stephen at para [26]).

I would have allowed this aspect of the present appeal on this basis also. The court retains a discretion on expenses, independent of the submissions of the parties, and therefore unaffected by the principle in *Aird*.

Events after convening the second defender

[40] Thereafter, the action proceeded against both defenders. The sheriff made his findings in relation to the action as a whole. In relation to that part of the action, these findings do not lose their validity as a result of the foregoing. The pursuer submitted that the sheriff erred in law in considering that the pursuer should have convened the second defender from the outset. The pursuer also submitted that the sheriff did not consider the correct chronology.

[41] In my view that submission does not meet the high test for reducing a discretionary decision. The sheriff carried out a full consideration of written and oral submissions, and explained his reasons. He noted the pursuer's acceptance that it may have been prudent to

serve a claim against the second defender. His reasoning is persuasive and logical, and there is nothing to support a submission that it was "plainly wrong" (see Macphail, *ibid* at para 18.159). It follows that there is no further basis on which to interfere with the sheriff's decision.

[42] I note also that the submissions in the pursuer's appeal differ from the motion made to the sheriff in one further respect, in claiming a right of relief against the second defender. On appeal, it was submitted that even if an award were made finding the pursuer liable for the first defender's expenses, the pursuer should have a right to be indemnified by the second defender. This motion, however, was not made at first instance. I will not consider it further, on the principle in *Aird* discussed above, as the pursuer is deemed to have waived this point on appeal.

[43] Accordingly, in relation to the award of expenses for the period following the amendment procedure which convened the second defender, I will adhere to the sheriff's decision.

Disposal

[44] I will therefore recall the sheriff's interlocutor only to the extent of reducing the award of expenses in favour of the first defender in respect of the period up to, and including, the minute of amendment procedure initiated in February 2022, and a short period thereafter to allow for a period equivalent to the stocktaking period which the pursuer was denied under the Protocol, and which I will identify as ending on 1 March 2022. The result will be to recall the interlocutor dated 16 February 2022 to the extent of quashing the award of expenses occasioned by the amendment procedure in favour of the first defender (part (b)v.); to recall the interlocutor dated 17 August 2022 to the extent of

quashing the award of expenses of the cause in favour of the first defender; to make no award of expenses in favour of the first defender prior to 1 March 2022, and to find of new that the pursuer is liable to the first defender in the expenses of process for the period from 1 March 2022 onwards, save as already dealt with.

[45] In relation to the expenses of the motion before the sheriff for expenses, and the present appeal, parties should please attempt to agree these, failing which they should contact the clerk to arrange a hearing, whether on written or oral submissions.