PD471/12 - Steven Tierney v Jack Tissington

GLASGOW 19 March 2013 Sheriff A R Mackenzie

Act: Callaghan

Alt: Scott

The Sheriff *ex proprio motu* enrols the cause, refuses the defender's opposed motion to ordain the pursuer to lodge a basic hire rate report; thereafter continues the cause to the case management conference in open court previously fixed for 22 March 2013 at 10 am.

A R Mackenzie

Sheriff

NOTE

Introduction

[1] This is a personal injuries action arising out of a road traffic accident. Following the institution of proceedings there was a joint motion to disapply the personal injury rules and allow the action to proceed on the Glasgow Sheriff Court personal injury pilot, a pilot which has since drawn to a close. In the circumstances presented to me, having regard to the terms of Rule of Court 36.F1I (3), I granted that motion.

[2] At a case management telephone conference parties indicated that they sought a direction from the court on the issue of whether or not, given that the pursuer claimed an award in respect of sums incurred in the hire of a replacement vehicle, the obligation to obtain a basic hire rate report rested upon the pursuer or upon the defender. I indicated that I would value submissions on the point and to this end the matter called before me in open court on 22 February 2013. I continued consideration of the matter to a further case management conference on 22 March, 2013 in order to reflect upon the competing arguments.

[3] I am indebted to both agents for preparing written outline submissions in advance of the hearing and providing copy authorities. I was referred to the following:

Cases referred to

1 *Dimond v Lovell* [2002] 1 AC 384

2 *Lagden* v *O'Connor* [2004] 1 AC 1067

3 *Russell* v *Brown*, Glasgow Sheriff Court, 29 July 2009

4 *Duncan* v *City of Edinburgh Council,* Edinburgh Sheriff Court, 6 November 2009

5 *Pattni* v *First Leicester Ltd; Darren Bent* v *Allianz Cornhill & Anr* [2011] EWCA Civ 1384

6 *Walker* v *Chesapeake Hillington Ltd* [2011] Rep LR 16

7 *Gee* v *AXA Corporate Solutions*, Edinburgh Sheriff Court, 27 August 2012; 2012 GWS 29-589

Textbook referred to

1 Walker & Walker, *The Law of Evidence,* 2nd Ed, Chap 2.

Defender's submission

[4] The contention of the defender, which ultimately translated into a motion to ordain the pursuer to lodge a basic hire rate report, was that , given that there was an averment that the pursuer had a replacement vehicle for just under a month and an averment that the loss was reasonably quantified in the sum of £5,960.76 and given that the pursuer had lodged a report which bore to be, as far as the defenders were concerned, a report from a credit hire company the pursuer would not succeed in obtaining any award under this head of claim without first obtaining evidence to differentiate between (a) that element of the charges which properly reflected the actual cost to hire a replacement vehicle and (b) that element which represented the additional benefits which the credit hire company built into their contractual arrangements with the pursuer, however, obliquely the package was presented in a standard form contract. While a pursuer's decision to use a credit hire company might be reasonable it did not necessarily follow that the cost incurred could be recouped. The foundation for such a submission was the decision of the House of Lords in *Dimond* v *Lovell* [2002] 1 AC 384 and the exception set out in *Lagden* v *O'Connor* [2004] 1 AC 1067, an exception which could not be said to apply in the present case as the pursuer had not averred impecuniosity or some other exceptional circumstance. Reference was also made to a number of cases which applied these authorities in practice, namely *Pattni* v *First Leicester Ltd; Darren Bent* v *Allianz Cornhill & Anr* [2011] EWCA Civ 1384, *Walker* v *Chesapeake Hillington Ltd* [2011] Rep LR 16 and *Gee* v *AXA Corporate Solutions*, Edinburgh Sheriff Court, 27 August 2012; 2012 GWS 29-589. I was invited not to follow *Russell* v *Brown*, Glasgow Sheriff Court, 29 July 2009 and *Duncan* v *City of Edinburgh Council,* Edinburgh Sheriff Court, 6 November 2009. I was also referred to Walker & Walker, *The Law of Evidence,* 2nd Ed, Chap 2 at 2.1.1 and 2.1.2, passages which essentially remain unaltered in successive editions.

[5] In the light of the various *dicta* in certain of sheriff court cases to which I was referred, at the conclusion of the defender's submission I enquired of the agent whether or not the defender could, without recourse to information peculiarly within the knowledge of the pursuer, ascertain what the basic hire rate would have been be for an Audio A3, the type of vehicle referred to in the report lodged, between 22 December 2011 and 21 January 2012. In answer the agent candidly acknowledged that while it might take the defender somewhat longer than it would the pursuer such information could be obtained.

Pursuer's submission

[6] The position of the pursuer was that in the event that the defender wished to put in issue that the sum incurred by the pursuer in obtaining a replacement vehicle under this head of claim was in some way inflated or excessive it was for the defender to take the appropriate steps to raise that by averment and thereafter by evidence and to that end it was for the defender to lodge an appropriate report setting out the basis for such a challenge. Unless the defender chose to put this in issue there was no reason in principle why, in restoring the pursuer to the position he would have been in but for the accident, the appropriate measure of his loss should be anything other than the actual cost incurred.

Discussion

[7] In the speeches in *Dimond* and *Lagden* it is evident that their Lordships regarded it as notorious that credit hire companies charge an additional element beyond the actual cost of vehicle hire. The report lodged by the pursuer is, according to the defender's contention, evidently that of a credit hire company. The name "Helphire" is perhaps something of a clue and for present purposes I am prepared to proceed upon the basis that the defender's contention is correct.

[8] Given that it was made clear in *Dimond* and *Lagden* that a pursuer cannot recover a sum beyond the actual cost of vehicle hire unless he is impecunious or there is some other exceptional circumstance there is clearly an argument that it follows by necessary implication that it is for the pursuer to identify the actual cost of hire. It is my impression that many agents in this jurisdiction draw such an implication from *Dimond* and *Lagden* fortified by subsequent judicial *obiter dicta*. However, having reflected upon the matter I am not persuaded that on present averments the pursuer is bound to fail completely in relation to the hire charge

head of claim unless he lodges a report disclosing the basic hire rates which, in due course, is spoken to in evidence.

[9] I consider that on any view the pursuer could, on present averments, secure a nominal award. In any event, how a court approaches the task of restoring a pursuer to the position he would have been in but for an accident may well involve, at various points, an exercise of judgment and discretion as opposed to being an exact science. In personal injury actions this is often seen in the assessment of claims for loss of mobility on the job market and, from time to time, in the quantification of claims arising under sections 8 and 9 of the Administration of Justice Act 1982. I do not consider that a court is precluded from adopting such a general approach in quantifying hire charges even if a more precise approach may conceivably exist. As Lord Nicholls of Birkenhead observed in *Lagden* (para 2) the reasonable cost of providing a replacement vehicle crystallizes the amount of loss and is thus in practice a convenient yardstick by which to measure the damages payable; but a convenient yardstick is all that his Lordship characterised it as being. Even if a detailed calculation could not be made on the basis of the general information available, both by way of averment and supporting documentation , if it is notorious that credit hire companies charge an additional sum beyond actual hire cost, by definition it is equally notorious that a portion of the charge is not additional. It is evident, for example, from the speech of Lord Saville of Newdgate in *Dimond* that in that case the proportion of genuine hire charges to overall cost was of the order of 58%. That being so a court could make some, albeit less than ideal or mathematically precise, award under this head of claim by wielding that oft used implement in damages assessment, the "broad axe".

[10] Beyond that, as I see it, the reality and substance of the situation in this case, as indeed in most, is that it is the defender who is challenging as excessive the actual sum expended by the pursuer and that being so, provided it is not beyond his power to quantify that excess, it is for the defender to aver and prove such excess; the means of doing this is by obtaining a basic hire rate report. I find support for viewing the matter in this way in *dicta* of Lord Hope of Craighead in *Lagden* (para 27):

"If the defendant can show that the cost that was incurred was more that was reasonable....the amount expended on the hire must be reduced to the amount that would have been needed to hire the equivalent."

In *Liddle* v *Brit Insurance Limited* [2011] CSOH145, to which I was not referred, Lord McEwan, having make some detailed reference to *Lagden* in paras (21) and (22) of his Opinion summarized the position at para (23) as follows: "Ultimately it comes to what real choice was open to a plaintiff and that is for the defendant to show on proper evidence."

Decision

[11] In the circumstances I consider that it is for the defender to obtain and lodge a basic hire rate report if this is a live issue in the case and the defender's motion to ordain the pursuer to lodge such a report is accordingly refused. I have issued this interlocutor and note at this stage in order to allow parties an opportunity to digest my decision in advance of the next scheduled calling later this week.