SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2026] SC EDIN 22

PIC-PN906/25

JUDGMENT OF SHERIFF K J CAMPBELL KC

in the cause

GORDON DUNN

Pursuer

against

MENZIES DISTRIBUTION LIMITED

Defender

Pursuer: Absent
Defender: Clyde & Co LLP (solicitors, Glasgow)

EDINBURGH, 27 November 2025

Introductory

[1] This matter called as a continued peremptory diet and for the defender's motion 7/4 on 3 November 2025. The pursuer was not personally present nor represented at the hearing. The defender's motion is in the following terms:

1. Remove the ad interim anonymity order granted by Sheriff Anderson on 13 February 2025.
2. Find that an exception to QOCS has been met, in terms of the abandonment offered by the pursuer, and to then the pursuer liable to the defender in the expenses of the action and to allow an account thereof to be remitted to the auditor to tax and report thereon.

3. Find the pursuer liable to the defender in the expenses of the court action on a solicitor/ client - client paying basis.

4. Certify Dr Anupam Agnihotri, consultant psychiatrist, as a skilled person who prepared a report for the defender in the cause.

5. Sanction the cause as suitable for the employment of junior counsel.

6. Quoad ultra to assoilzie the defender from the craves of the initial writ.

I have decided to grant the defender's motion. This Note sets out my reasons.

[2] The case had previously called as a peremptory diet on 6 October 2025. The pursuer was not present or represented on that occasion. By email timed 1413 hours on 6 October 2025, the pursuer acknowledged an email from the sheriff clerk conveying the substance of proceedings that day, including information about the defender's stated intent to enrol a motion to disapply Qualified One-way Cost Shifting ("QOCS"), and that the pursuer would have the opportunity to oppose it if he wished. The defender thereafter enrolled the motion 7/4 set out above. The pursuer received intimation from the defender's agent of the continued hearing, the defender's motion and the defender's written submission by email on 24 October 2025. In accordance with the court's interlocutor of 6 October 2025, intimation was also given to the pursuer's former agents; they were not present at the hearing. On 31 October 2025, the sheriff clerk sent the pursuer the link for the online hearing by email. Having regard to the anonymity order, the hearing was scheduled to take place in a virtual court room separate from the remaining business of the court on 3 November 2025. I was satisfied the pursuer had due notice of the hearing and of the motion to be made at it, and the hearing proceeded in the pursuer's absence.

[3] Having regard to the terms of the motion, it is necessary to set out some background to the action. In the initial writ, the pursuer alleges that the personnel file held by his former

employer, the defender, contained "special category personal data" in accordance with Article 9(1) of the General Data Protection Regulation ("GDPR"). The GDPR continues to have direct effect through the concept of EU Retained Law contained within the EU (Withdrawal) Act 2018; it is also reflected in the provisions of the Data Protection Act 2018. The pursuer avers that his personnel file contained details of his medical history and details of a past abusive relationship. (It should be noted this is disputed by the defender). The pursuer submitted a subject access request for his personal data contained within the personnel file. The pursuer was informed by the defender that his file could not be located and received written confirmation of this on 12 August 2024. As a result, the pursuer alleged a breach of Article 5(1)(F) of the GDPR. The pursuer avers that as a result of the data breach he suffered a reoccurrence of a pre-existing depressive disorder. He avers he had experienced significant stress at the possibility of his colleagues becoming aware of the history allegedly contained in his personnel file. The pursuer avers that following the data breach that he suffered a deterioration of his mental health. The pursuer avers that he experienced a lowering of his mood and a heightening of his anxiety. He avers he experienced a loss of interest in his hobbies and interests. He avers he was suffering from sleep disruption and nightmares. The pursuer also claimed that he experienced negative thoughts about his past and future as a result of the data breach and had been prescribed with anti-depressant medication. The pursuer avers that following the data breach he had been referred for intensive support and monitoring through a community psychiatric nurse and psychological therapy at The University Hospital, Hairmyres, East Kilbride, Glasgow. The pursuer avers that he developed suicidal thoughts and took an overdose in February 2025. The pursuer avers that as a result of the impact of the data breach he had been deemed unfit for work. As a result of allegedly being unfit for work the pursuer

claimed for past and future loss of earnings. The pursuer avers that he required constant supervision and support from his parents (as a result of the psychiatric symptoms he attributed to the alleged GDPR breach). The pursuer avers that his parents required to administer his medication. The pursuer averred that his parents required to hide all medications within their home from the pursuer. The pursuer claimed he had suffered cognitive decline including forgetfulness and absent mindedness, for example resulting in incidents involving him leaving the gas on his cooker after finishing cooking. The pursuer resigned from his employment with the defender in March 2025.

[4] At the same time as the initial writ was lodged for warranting in February 2025, the pursuer's then agents enrolled a motion (7/1) seeking that the pursuer's name be anonymised and his address be given as care of their business address. The reason given was "The personal injury arises out of a breach of personal data. The pursuer seeks to be anonymised to mitigate the risk of further psychological injury." The court made an interim anonymisation order on 13 February 2025, and a further order on 21 February 2025.

[5] The pursuer was examined by Dr Qureshi and Dr Agnihotri, both consultant psychiatrists, on behalf of the pursuer and defender respectively. Their reports are productions 5/1 and 6/1 respectively. In the course of May and June 2025, investigation agents instructed by the defender's solicitors carried out surveillance on the pursuer. I discuss the information that disclosed below, but an inventory of productions containing surveillance material was intimated and lodged on 21 August 2025, and the solicitors who had raised and conducted the action for the pursuer withdrew from agency on 8 September 2025. That in turn triggered the procedure under OCR 24 and the peremptory diet on 6 October 2025 referred to above. On 2 October 2025, the pursuer contacted the sheriff clerk by email in the following terms:

> "Dear Sheriff Clerk,
>
> I, Gordon Dunn, the pursuer in the above case, hereby give formal written notice that I am abandoning my action against the defenders, Menzies Distribution. Due to health and personal reasons, I can no longer pursue any further proceedings in this matter and respectfully request that the Court takes note of my decision to abandon the case. Yours faithfully,
>
> Gordon Dunn"

Defender's submissions

[6] For the defender, Mr Gillies adopted his written submission, 13 of process. In oral submissions, Mr Gillies made a number of further points. First, the pursuer has abandoned the action. On that basis alone, the court was entitled to disapply QOCS, and the court did not require to consider the further grounds set out. However, it was submitted that the fraudulent representations were relevant background, and bore on other matters raised. Secondly, it was submitted that the court should also consider the substantive grounds to disapply QOCS in terms of section 8(4)(a) - (c) of the Civil Litigation (Expenses and Group Proceedings)(Scotland) Act 2018, and OCR 31A.2 and 31A.3. In bringing an action founded on fraudulent representations, the pursuer's conduct was manifestly unreasonable. As narrated at paragraph 61 of the written submission, the pursuer had admitted the facts disclosed by the enquiry agents surveillance and set out in the written submission. He had admitted to lying to his agents. That was conveyed by the former agent in the telephone conversation on 28 August 2025. The pursuer's agent withdrew from acting shortly after. Further, it was an abuse of process to seek anonymity in an attempt to shield the pursuer's conduct from scrutiny, and separately to use the court's process for fraudulent purposes. In short, all of the grounds in section 8(4)(a) - (c) of the 2018 Act were established.

[7] After summarising the pursuer's case on record, the defender's written submission sets out a number of matters, which it is appropriate to summarise.

Submissions about factual background

[8] The pursuer was examined by Dr Qureshi, consultant psychiatrist, on 9 January 2025 for the purpose of a report in connection with this action. His report is 5/1. The pursuer told Dr Qureshi that he had a loss of interest in pleasurable activities. He advised he had struggled with insomnia and nightmares, and that he suffered a deterioration of his memory and concentration. The pursuer told Dr Qureshi that he struggled with panic attacks, and that he struggled to go into crowds. The pursuer described to Dr Qureshi that he kept "thinking that someone in the crowd might know what has happened to me - even though that is ridiculous - it is just how my mind works at the moment". He advised Dr Qureshi at that "I don't go out much just in case I have another panic attack". The pursuer described feeling especially agitated and anxious about his future employment prospects. The pursuer also described the alleged abusive relationship with his ex-partner and that she had been charged with domestic assault. The pursuer described not being in a relationship since his ex-partner Lara. The pursuer described getting very nervous about small things that happened; "that happens even if I have a passenger in my front seat because that is the way Lara punched me on a few occasions in the past." The pursuer described living with his parents as he "increasingly struggled to cope with things and felt like I needed more support."

[9] On 26 July 2025, the pursuer was examined by the defender's medical expert Dr Agnihotri, consultant psychiatrist, for the purpose of a medical report in connection with this action. His report 6/1 is dated 6 August 2025. During the examination pursuer claimed

to be suffering from "extreme depression". The pursuit informed Dr Agnihotri that he suffered physical psychological and other abuse in a previous relationship from 2019 to 2021. The pursuer detailed some of the physical abuse to Dr Agnihotri which is reproduced in the report. The pursuer described having a lack of motivation to do "anything". He informed Dr Agnihotri that he was a keen runner and he used to run marathons but now hardly runs at all. The pursuer added that he does not want to go out and does not want to face the public. The pursuer informed Dr Agnihotri but he wakes up at 10.00am or 11.00am and does "absolutely nothing". He claims that he took his dog out for walks three times a day but otherwise "I just sit on my bed and think about past and future". The pursuer advised that he was living with his parents who did all the cleaning and shopping for him and that he had moved in with him in January 2025 as they were worried about his mental health. The pursuer advised Dr Agnihotri that his community mental health team psychiatrist could not diagnose him or treat him as he was constantly feeling suicidal. Dr Agnihotri concluded in his first report that the pursuer had not developed a mental illness as a direct or indirect result of a date breach which would prevent him working (6/1/20).

[10] Surveillance footage and surveillance logs are produced as 6/2, 6/3 and 6/4. Examination of the pursuit's social media is also produced as 6/5. The pursuer is noted to be in a relationship with a lady called Lynne Barber and living with her and her son at an address in Glasgow. The pursuer had been on holiday abroad on several occasions since the alleged data breach. The pursuer had visited busy tourist destinations, specifically Norway in September 2024; Paris in October 2024 (where he visited Disneyland Paris, the Louvre, the Eiffel Tower and the Arc de Triomphe); and Milan in April 2025 (where he visited the San Siro stadium). The pursuer also continued to work after the alleged data breach. The

pursuer works at an NHS procurement centre in Glasgow. The pursuer also operates his own business Max 10 Properties, which was established after the alleged data breach. The pursuer has repeatedly referred to an abusive relationship with an ex-partner in medical appointments, however online searching at reveals news reports confirming that the pursuer's ex-partner was found not guilty of assaulting the pursuer. News reports also disclosed that the pursuer was convicted of acting in a threatening and abusive manner with a sectarian aggravation towards her. Those criminal proceedings are both matters which the pursuer disclosed to Dr Agnihotri (6/1/18).

Submissions about applicable law

[11] The defender's submissions addressed a number of discrete issues: (a) the effect of abandonment of the action; (b) other grounds on which QOCS ought to be disapplied; (c) sanction for counsel; (d) the appropriate expenses scale; and (e) removing the anonymity order.

[12] In relation to abandonment, the pursuer informed the defender via his previous solicitors, Digby Brown, on 28 August 2025 that he was abandoning proceedings. Further, the pursuer advised the court in advance of the peremptory diet of 6 October 2025, that he intended to abandon the action. The pursuer has therefore abandoned the cause at common law. OCR 31A.2(d) provides that abandonment of the cause in terms of Rule 23.1(1) or at common law is an exception to qualified one-way cost-shifting, and would allow the court to award expenses. While the defender's submission is that there are multiple bases for the court to award expenses in favour of the defender in the circumstances of this case, the defender submitted that whatever other conclusions might be reached, the court can clearly award expenses on the basis of abandonment.

[13] However the defender also submitted that, in the circumstances, each of the grounds in section 8(4) of the Civil Litigation (Expenses and Group Proceedings)(Scotland) Act 2018 ("the 2018 Act") were made out in this case. Sections 8(4)(a) - (c) enable the court to award expenses against the pursuer where the pursuer or the pursuer's legal representative makes a fraudulent representation or otherwise acts fraudulently in connection with the claim or proceedings.

[14] It was submitted that the pursuer has made several fraudulent representations in relation to the claim. Specifically, the pursuer has made fraudulent representations about material facts relating to his claim including his capacity for work, his social and personal circumstances, including his relationship status, and his ability to socialise and travel. The defender submitted that the pursuer deliberately lied about his post-data breach personal circumstances and relationship status, his alleged suicidal tendences rendering him almost wholly reliant on his parents, the occurrence of psychiatric injuries stemming from the data breach and his capacity for work. The pursuer deliberately lied about these matters to his own psychiatric expert witness and to the defender's expert witness. He also misled his own solicitor, it would appear. The pursuer lied about symptoms and did so in order to secure financial gain. During a telephone conversation between the pursuer's and defender's solicitors on 28 August 2025 the pursuer admitted that he had indeed been working since the alleged data breach and had been away on holiday and had travelled to the destinations detailed in the defender's intel report. The pursuer admitted to deliberately lying. The pursuer's solicitor withdrew from acting shortly thereafter. It was submitted that the pursuer's actions amount to a fraudulent representation.

[15] Further, it was submitted the pursuer's claims for future loss of earnings have been grossly inflated as a result of his dishonest claims to have been unable to work following the

data breach. The pursuer has maintained throughout, on record and to the medical experts, that he was not fit for work as a result of his psychiatric symptoms related from the alleged data breach. The pursuer has now admitted that this was a lie. The pursuer has now admitted that he had in fact been working at a NHS Procurement Centre in Glasgow, since the data breach. The pursuer has also now admitted that he operates his own business, Max 10 Properties, from another address in Glasgow, which was established post the alleged data breach. The pursuer made these admissions only after being presented with evidence from the defender. It was submitted that it is highly likely that the pursuer would still be concealing these facts from the court had he not been presented with evidence to the contrary and forced to admit to making a fraudulent representation.

[16] A central component of the pursuer's claim and the information he provided to the medical experts was that he was suicidal and suffering from depression and anxiety to the point that he relied almost entirely upon his parents to survive on a daily basis. He attributed this to the data breach. The pursuer claimed he was unable to cope with crowds and socialising as a result. The pursuer has presented as an individual so badly affected by the data breach that he had essentially become a recluse, too scared to leave the house for more than short periods to walk his dog for fear of crowds. However, the pursuer and his partner, Lynne Barbour, travelled to Norway in September of 2024, travelled to Paris in October 2024 and to Milan in April 2025. During these trips he travelled with his partner and her son. During these trips he also visited numerous tourist attractions such as Disney Land, The Louvre, The Eiffel Tower, The Arc De Triomphe and the San Siro Football Stadium. The pursuer has now admitted to travelling to these destinations post data-breach. The pursuer deliberately concealed these facts from his solicitor, the court and the medical experts. It should also be noted that the defender's medical expert, Dr Agnihotri, ruled out

any psychiatric injury being caused as a result of the alleged data breach, after having examined the pursuer and considering all the relevant evidence.

[17] In short, it was submitted, the pursuer's conduct amounted to a series of fraudulent representations. He attempted to conceal material facts from the court and his medical experts in order to fabricate the basis of his claim for damages. He made a highly significant fraudulent representation in relation to his fitness for work. The pursuer described symptoms which were fundamentally misleading and grossly exaggerated to the medical experts. The defender referred to *James Nelson* v *John Lewis PLC* [2023] SC EDIN 44, where the court considered the approach to fraudulent representations at paragraph 34. The defender also referred to *Gilchrist* v *Chief Constable Police Scotland* 2023 SCLR 244, where the court considered the definition of a fraudulent misrepresentation with reference to McBryde C*ontract* (3rd edition) Chapter 14.

[18] It was submitted that in this case the court is dealing with what Professor McBryde referred to as the "straight lie" scenario. The defender acknowledged that the evidence has not been heard and the court has not yet had an opportunity to adjudicate on the merits of the case, in this case the court is dealing with the pursuer already conceding to making fraudulent representations. In this regard it can be distinguished from *Natalie Manley* v *Thomas Mcleese* [2024] SAC (Civ) 16 and *Gilchrist*. The court is therefore in a position to make a finding that the pursuer, on the balance of probabilities, has acted intentionally to mislead the court. It was submitted that the court can and should in these circumstances make a finding that the pursuer has made a fraudulent representation for the purposes of the 2018 Act, section 8(4)(a) and that expenses should be awarded against the pursuer in favour of the defender as a result.

[19] The defender further submitted that the pursuer's conduct amounts to manifestly unreasonable conduct in terms of section 8(4)(b) of the 2018 Act. It was accepted that turns on the facts and circumstances of each case. In *Lennox* v *Iceland Foods Ltd*, [2022] SC EDIN 42 Sheriff Fife held that "manifestly unreasonable" means "obviously unreasonable" (para [60]). It was submitted that proceeding with a claim based on allegations and evidence the pursuer knew to be false, up to the point at which the defenders lodged surveillance footage and intel showing the pursuer's claims to be false, was conduct which was obviously unreasonable. On this basis too, the court should award expenses against the pursuer.

[20] Abuse of process in this case was related in particular to an anonymity order granted on 13 February 2025 *ad interim*. In the motion lodged 7 February 2025, which was not intimated on the defender, the pursuer moved the court to dispense with intimation and withhold from the public the pursuer's name and address from the initial writ. The pursuer provided submissions in support of his motion which were that he wished to "mitigate the risk of further psychological injury". It was submitted that the pursuer persuaded the court to grant the anonymity order on the basis of information which he knew to be false and misleading. It was submitted that the pursuer believed that taking the unusual step of anonymising these proceedings would help to delay or prevent scrutiny over his claims and help him to facilitate a fraud.

[21] In *Bruff* v *Royal & Sun Alliance* [2024] SC EDIN 31, the court made a finding of an abuse of process in different circumstances which involved a pursuer seeking to rely on a witness statement the pursuer knew to be untrue. It was submitted that the present pursuer's actions amount to an abuse of process, in both his motion to anonymise the proceedings for what were, on the balance of probabilities, tactical reasons to help him

perpetuate a fraud, and also in proceeding with a claim based on false claims about the injuries sustained.

Submissions about sanction for counsel

[22] Turning to the application for sanction for junior counsel. The defender instructed Greg McDougall, solicitor advocate, to carry out work in relation to this claim. The test is set out in section 108 of the Courts Reform (Scotland) Act 2014, which provides as follows:

> "(1) This section applies in civil proceedings in the sheriff court or the Sheriff Appeal Court where the court is deciding, for the purposes of any relevant expenses rule, whether to sanction the employment of counsel by a party for the purposes of the proceedings.
> (2) The court must sanction the employment of counsel if the court considers, in all the circumstances of the case, that it is reasonable to do so.
> (3) In considering that matter, the court must have regard to –
> (a) whether the proceedings are such as to merit the employment of counsel, having particular regard to—
> (i) the difficulty or complexity, or likely difficulty or complexity, of the proceedings,
> (ii) the importance or value of any claim in the proceedings, and
> (b) the desirability of ensuring that no party gains an unfair advantage by virtue of the employment of counsel.
> (4) The court may have regard to such other matters as it considers appropriate.
> …"

[23] It was submitted that the issues of fraudulent misrepresentation, manifestly unreasonable conduct and abuse of process are of sufficient difficulty and complexity to merit the employment of counsel. Further, the issues of fraudulent misrepresentation and abuse of process are in this context matters of importance to the defender. The pursuer claimed for a significant amount of damages which far exceeds the typical data protection damages claim. The pursuer sought to prove that psychiatric injury of a serious a debilitating nature had been suffered by him by the defender's data breach. The importance

of this for the defender as an employer was hugely significant, and sanction for the employment of junior counsel ought to be given.

Submissions about the basis of expenses

[24] Mr Gillies also submitted that any expenses awarded should be on the agent-client, client paying basis. It was accepted that such an award should only be made where the court wished to mark its disapproval of the pursuer's conduct of proceedings to some significant extent; however, that was appropriate here, where the proceedings had been conducted on a significant fraudulent premise. The action had been raised and run to the point where the court timetable had been issued, pleadings framed and medical investigations undertaken. The action had been abandoned when the pursuer was confronted with the surveillance evidence; and it was submitted but for that, he would have persisted in a fraudulent claim.

[25] If the court granted the part of the motion seeking dis-application of QOCS, the defender would be entitled to recover expenses from the pursuer. The defender seeks to do so on an agent-client basis rather than the more usual party-party basis. The defender has incurred significant expense defending this claim to date. The defender has instructed solicitors, a solicitor advocate, as well as expert medical opinion, surveillance and intel, amongst other associated costs. It was submitted that this fraudulent claim has caused the defender unnecessary expense for which they would not be adequately compensated by an award of party-party expenses. Further, it was submitted that the court should award expenses on an agent/client, client paying basis to mark its disapproval of the pursuer's conduct. It was submitted that there is an important policy consideration of the court discouraging such claims being made in the future.

Submissions about removal of anonymity

[26] Finally, for the purposes of final disposal and for the purposes of the defender enforcing the final decree against the pursuer, it is submitted that the anonymity order should be removed. The anonymity order was granted by the court on 13 February 2025 *ad interim*. The grounds on which this anonymity order was granted merits reconsideration in light of the developments in this case since then. The defender submitted that the basis on which the anonymity order was initially granted is no longer valid. The proceedings should no longer be anonymised. The pursuer should be accurately designed in the instance with his up to date address.

Discussion and decision

The QOCS regime

[27] As is now well known, the Qualified One-way Cost Shifting ("QOCS") regime introduced by the Civil Litigation (Expenses and Group Proceedings)(Scotland) Act 2018, section 8, together with OCR 31A, makes important changes to the expenses regime in personal injuries litigation. It is intended to provide claimants with a substantial measure of protection against awards of expenses, except in specific circumstances. Section 8 is in the following terms:

> "**8 Restriction on pursuer's liability for expenses in personal injury claims**
> (1) This section applies in civil proceedings where—
> (a) the person bringing the proceedings makes a claim for damages for—
> (i) personal injuries, or
> (ii) the death of a person from personal injuries, and
> (b) the person conducts the proceedings in an appropriate manner.
> (2) The court must not make an award of expenses against the person in respect of any expenses which relate to—
> (a) the claim, or

(b) any appeal in respect of the claim.

(3) Subsection (2) does not prevent the court from making an award in respect of expenses which relate to any other type of claim in the proceedings.

(4) For the purposes of subsection (1)(b), a person conducts civil proceedings in an appropriate manner unless the person or the person's legal representative—

(a) makes a fraudulent representation or otherwise acts fraudulently in connection with the claim or proceedings,

(b) behaves in a manner which is manifestly unreasonable in connection with the claim or proceedings, or

(c) otherwise, conducts the proceedings in a manner that the court considers amounts to an abuse of process.

(5) For the purpose of subsection (4)(a), the standard of proof is the balance of probabilities.

…"

[28] It will be evident that the defender's motion for the disapplication of QOCS and for the recall of the anonymity order raises a number of serious questions about the pursuer's conduct. While I am mindful that the pursuer was not present at the hearing on 3 November 2025, I consider that I can proceed to consider the motion and determine it in the pursuer's absence. I have set out the procedural history above, and I would note first that the pursuer had intimation of the hearing and the very detailed written submission for the defender. Secondly, he had indicated in clear terms his wish to abandon the action. Thirdly, the surveillance material is before the court, and bears out the summary in the defender's written submission. Finally, his former agents put the surveillance evidence to the pursuer, and he was reported to have acknowledged that it was all true. That was conveyed in a phone call between agents on 28 August 2025, to which Mr Gillies appearing for the defender was a party. It is reasonable to infer that was the reason the pursuer's agents, quite properly, withdrew from acting shortly thereafter.

Abandonment of the action and QOCS

[29] In his email to the court dated 2 October 2025, the pursuer clearly and unambiguously indicates he is abandoning the action. I consider that the defender is correct in submitting that for that reason by itself, the court would be entitled to entertain and grant the application to disapply QOCS (see OCR 31A.2(2)(d)). However, having regard to the serious matters raised in submissions, which inform the application to recall the anonymity order, and the part of the motion seeking expenses on an agent-client basis, it is necessary to consider the further points raised.

Fraudulent representations

[30] In my judgment in *Gilchrist* v *Chief Constable (No2)*, 2023 SLT (Sh Ct) 119; 2023 SCLR 244, I made the following observations about fraudulent representations in the context of QOCS:

> "24. As counsel observed, the formulation in section 8(4)(a) 'makes a fraudulent representation or otherwise acts fraudulently' is not further defined or characterised. However, these are not new legal concepts, and in my view it therefore follows that Parliament intended the established definition of those concepts to apply. In this context, it should be borne in mind the court is dealing with a civil matter, rather than the crime of fraud. As counsel for the defender submitted, there is discussion of the notion of fraudulent representation going back to the earliest sources in our law. Those older sources are conveniently gathered in Professor McBryde's discussion of fraudulent representations in the context of the law of contract, see W McBryde *Contract* (3d ed), Ch14, particularly paragraphs 14-02 and 14-03. Professor McBryde analyses the law in this way:
>
> 'The simplest form of fraud is the straight lie. Examples are the production, prior to contract, of a false statement of affairs which enlarges assets and diminishes liabilities, or lying about a rate of foreign exchange or pretending to be an heir or misrepresenting the circumstances surrounding an agreement on splitting an inheritance, or misrepresenting the nature of a sub-lease, or the acreage of a farm, or the number of sheep a farm would maintain…' (para 14-10)
>
> 'The law has not had much difficulty with the distinction between the straight lie, knowing that the statement is false, and a false statement made with the honest belief

> that the statement is true. The latter is not fraud; it may be innocent or negligent misrepresentation…' (para 14-12)
>
> 25. I did not understand either party to dispute this as an accurate statement of the law. In my opinion, it is clear from the range of instances cited, that this formulation describes the notion of fraudulent representation or misrepresentation across the body of civil law, and not only in relation to the law of contract. It is therefore a helpful source of reference in approaching section 8(4)(a). In the practical application of section 8(4)(a), that will require the court to consider the whole facts and circumstances of the litigation. However, it is clear from these authorities that the threshold for fraudulent representation is a high one. In my opinion, senior counsel for the pursuer was correct that in order for a case to fall within section 8(4)(a), the court would require to make a finding that a pursuer or his or her legal representative had acted intentionally to mislead the court."

[31] In *James Nelson* v *John Lewis PLC* [2023] SC EDIN 44, Sheriff Primrose KC, sitting in this court, considered the question of disapplication of QOCS on the basis of an allegation of a fraudulent representation by the pursuer. After agreeing with my analysis in paragraph 24 of *Gilchrist*, at paragraph 34 of his judgment, his Lordship observed:

> "[34] Whilst it is correct to say that the language of section 8(4)(a) does not contain a specific requirement that, before it can become operational, there must have been a finding by the court that the pursuer was either not credible or guilty of a fraudulent representation, it appears to me that a finding that there had been such conduct is a necessary ingredient in any situation where the court considers that a pursuer in any given set of proceedings should to lose the protection of QOCS. The court must ask itself, using the language of Lord Herschell in *Derry v Peek*, whether there has been either: (i) a false representation made knowingly or without belief in its truth (the 'straight lie' as referred to by Professor McBryde), or (ii) a statement made recklessly, without regard to whether it was true or false."

[32] I am satisfied on the material before me that the pursuer has made a series of false representations without belief in their truth to medical practitioners, to his agents and thereby to the court about the effect of the alleged data breach on his mental health, and on his capacity for work and social activities. I have to be satisfied on the balance of probabilities (see section 8(5) of the 2018 Act), and I am so satisfied. The accounts recorded as being given by the pursuer to Drs Qureshi and Agnihotri are impossible to reconcile with

the surveillance evidence. Dr Agnihotri produced a supplementary report having had sight of the surveillance material. He concluded:

> "Taking account of all of the above, the only conclusion I can draw is that Mr. Dunn has not given a true picture of his psychological presentation and social circumstances to either Dr. Qureshi or to me. The discrepancy in reporting of psychological symptoms, employment status and social circumstances cannot be explained with a diagnosable mental illness. Unless there is an alternative explanation to these apparent discrepancies, there is a serious doubt on Mr Dunn's credibility." (6/1/27)

Further, the pursuer has accepted the accounts given are untrue. In my opinion, that falls squarely in Professor McBryde's category of the straight lie. Accordingly, even if the action had not been abandoned, entitling the court to disapply QOCS, I would grant the defender's motion to do so under section 8(4)(a) of the 2018 Act. That being so, I do not consider it necessary to deal with whether the pursuer's conduct is also manifestly unreasonable in terms of section 8(4)(b) of the 2018 Act.

Abuse of process

[33] It is necessary to say something further about abuse of process and section 8(4)(c) of the 2018 Act. On one view, a fraudulent misrepresentation made in the course of proceedings is itself an abuse of process, since the process of the court depends on candour on the part of parties and their representatives, no matter how hotly contested a litigation may be on the merits. That would be sufficient to deal with departing from QOCS under section 8(4)(c). However, a particular issue arises in this case, namely the pursuer's application for anonymity, granted in February 2025. It is now clear that application was made on the basis of a fraudulent representation. It would also appear that as recently 6 October 2025, the pursuer was persisting in that. I have already mentioned that he emailed the sheriff clerk's office on that date. It is appropriate to set out the text of his email:

> "Thank you very much for the update following today's hearing. For clarity, my current correspondence address is [address stated], and I would be grateful if this could be updated accordingly. However, I do not wish to receive any written correspondence at my home address. I would prefer that all future correspondence be sent by email only, to avoid any further concerns regarding the handling of my personal data.
>
> Could you please confirm whether the defenders have advised if the letter sent by special delivery on Friday was received at my former address? This matter has been causing me significant stress and anxiety, and I would appreciate confirmation as soon as possible.
>
> I would also prefer that the expenses hearing be conducted as a closed court, and I will provide you and the Sheriff with an update on my financial and health circumstances in the coming weeks. Thank you again for your assistance and continued support.
>
> Kind regards,"

[34] An order for anonymisation of parties' identity in court proceedings is not lightly made. Anonymisation is granted to protect parties who are able to demonstrate vulnerability which is likely to be adversely affected by the possibility of publicity relating to their involvement as a party to court proceedings, usually with an associated concern about the impact of that on the fairness and expeditious progress of the court proceedings. The court requires to balance that against the weighty public interest in open justice which, the appellate courts have repeatedly reminded us, is a central principle of our courts' operation.

[35] In *Bruff*, (*cit supra*) to which the defender referred, I observed at paragraph 14 that:

> "knowingly seeking to rely on a witness whose statement is entirely untrue amounts to an abuse of process. In my view, there can be few more egregious examples of abuse of process than knowingly relying on a witness for a material part of a case whose evidence is subsequently accepted to be completely untrue"

As in *Bruff*, the falsehood in this case goes to the heart of the court process. I consider that making an application for anonymity which is founded on a fraudulent representation, and persisting in that, is an abuse of process. I am therefore satisfied that it is appropriate not

only to find that the court ought to disapply QOCS on the basis of abuse of process, but to recall the anonymity orders made on 13 and 21 February 2025. That is an exceptional step, but it is now clear that the basis on which it was represented to the court that the orders should be made was false. There is no basis for the order to continue. Further, I consider there is force in the defender's submission that enforcement of the award of expenses which I have made requires the information to appear on the face of the record. I will therefore recall the orders and require that the pursuer's name and address appear in the instance of the action.

Certification of Dr Agnihotri

[36] The defender seeks certification of Dr Agnihotri, consultant psychiatrist, as a skilled witness. The action seeks damages for alleged injuries to the pursuer's mental health. Accordingly, in my view, it was entirely appropriate for the defender to instruct a psychiatrist. The pursuer's agents had done so, and the defender's agents were entitled to instruct their own expert. Dr Agnihotri has provided reports in many actions before this court, and is appropriately qualified in this case. I will therefore certify Dr Agnihotri.

The appropriate scale for expenses

[37] The defender moves the court to award expenses on a solicitor-client, client-paying basis, rather than the more usual party-party basis. Expenses are a matter within the judicial discretion of the court. The principles are conveniently summarised by Lord Hodge in *McKie* v *Scottish Ministers* 2006 SC 528, at 530 paragraph 3:

> "The law on this issue is well settled and may be summarised in the following five propositions. First, the court has discretion as to the scale of expenses which should be awarded. Secondly, in the normal case expenses are awarded on a party and

party scale; that scale applies in the absence of any specification to the contrary. But, thirdly, where one of the parties has conducted the litigation incompetently or unreasonably, and thereby caused the other party unnecessary expense, the court can impose, as a sanction against such conduct, an award of expenses on the solicitor and client scale. Fourthly, in its consideration of the reasonableness of a party's conduct of an action, the court can take into account all relevant circumstances. Those circumstances include the party's behaviour before the action commenced, the adequacy of a party's preparation for the action, the strengths or otherwise of a party's position on the substantive merits of the action, the use of a court action for an improper purpose, and the way in which a party has used court procedure, for example to progress or delay the resolution of the dispute. Fifthly, where the court has awarded expenses at an earlier stage in the proceedings without reserving for later determination the scale of such expenses, any award of expenses on the solicitor and client scale may cover only those matters not already covered by the earlier awards."

[38] Given the conclusions I have reached about the conduct of the pursuer in connection with this litigation, I am satisfied that, the third and fourth points mentioned by Lord Hodge are very much in issue in this case. I have held that the pursuer has made fraudulent representations and that his conduct has amounted to an abuse of process. In those circumstances, I am satisfied that it is appropriate to award expenses on the solicitor-client, client-paying basis.

Conclusion

[39] In summary, I will therefore make an order to do the following:

(a) disapply QOCS on the bases of OCR 31A.2(2)(d) and sections 8(a) and 8(c) of the Civil Litigation (Expenses and Group Proceedings)(Scotland) Act 2018;

(b) find the pursuer liable to the defender in the expenses of the action, on the solicitor-client, client-paying scale, as the same made be agreed or taxed;

(c) certify Dr Anupam Agnihotri as a skilled person;

(d) find the cause suitable for the employment of junior counsel;

(e) recall the orders made under the Contempt of Court Act 1981 on 13 February 2025 and 21 February 2025, and direct that the pursuer's name and address be reinstated in the instance of the initial writ;

(f) quoad ultra, to assoilzie the defender from the craves of the action.