

**SHERIFFDOM OF LoTHIAN AND BORDERS**  
**IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT**

[2023] SC EDIN 19

PIC-PN3311/22

JUDGMENT OF SHERIFF K J CAMPBELL KC

in the cause

CATRIONA McINNES

Pursuer

against

EUI LIMITED

Defender

**Pursuer: Agnew (Carpenters, solicitors, Glasgow)**  
**Defender: Walsh (DAC Beachcroft, solicitors, Glasgow)**

Edinburgh, 21 July 2023

**Introduction**

[1] This action was settled in terms of a Minute of Tender and Minute of Acceptance (10 & 11 of process). The matter came before me on 10 July 2023 for a hearing on the pursuer's motion to grant decree in terms of the tender and acceptance, for certification of a number of skilled witnesses, and for the expenses of the action. The motion was opposed only in respect of the part of the motion dealing with expenses, which is in the following terms:

“[to] find the defender liable to the pursuer for the expenses of the action and to allow an account to be lodged for taxation.”

[2] Both parties lodged helpful written submissions ahead of the hearing, along with a chronology. It is convenient to set out the chronology, in order to put the submissions into context.

- 10 Nov 2022 Warrant of Citation.
- 11 Nov 2022 Writ and warrant served on defender's nominated solicitors.
- 14 Nov 2022 Defender's solicitors endorse Initial Writ.
- 23 Nov 2022 Triennium.
- 24 Nov 2022 Notice of Intention to Defend lodged by defender.
- 12 Jan 2023 Interlocutor – action sisted to allow parties to proceed under CPAP.
- 17 Jan 2023 Pursuer intimates Statement of Valuation of Claim and supporting medical evidence.
- 21 Feb 2023 Defender's agents make an offer (£7,200.00).
- 22 Feb 2023 Pursuer rejects defender's offer.
- 9 Mar 2023 Pursuer's agents chases defender's agents for a response. Defender's solicitors request a reasoned response for the pursuer's rejection of their offer.
- 27 Mar 2023 Defender makes a second offer (£8,800.00).
- 26 Apr 2023 Pursuer rejects defender's offer and makes a counter-offer. Defender lodges Defences.
- 2 May 2023 Timetable issued.
- 16 May 2023 Defender rejects pursuer's counter-offer and maintain their original offer of £8,800.00.
- 18 May 2023 Defender lodges Tender (£8,800.00).
- 30 May 2023 Pursuer accepted defender's Tender.

**Defender's submissions**

[3] For the defender, Ms Walsh adopted her written submission. As that written submission indicated, the defender accepts liability to pay expenses, but submitted these should be modified to the level set out in the Compulsory Pre-Action Protocol for Personal Injury Actions ("CPAP"). The action had been raised close to the triennium, and had been sisted for parties to engage with CPAP. On 21 February 2023, the defender had made an offer, which the pursuer rejected the following day. The defender maintained the pursuer had not given a reasoned response as required by CPAP (see para 27 of CPAP); that was disputed. The defender had made a further offer, which was subsequently tendered, and the pursuer had thereafter accepted the Tender. The defender's position was that the action should have settled while the action was sisted, and that the expenses awarded should therefore be on the CPAP scale.

[4] A "reasoned" response or a "reasoned" rejection had to be meaningful. Parties had to be able to enter into dialogue. The head or heads of claim should be identified and discussed. Here the pursuer's agent had simply referred to the Judicial College Guidelines; that was unhelpful, because there was no basis for meaningful dialogue. There was no discussion of duration of symptoms, of the effects on the pursuer's daily living, or of the other heads of claim. The pursuer needed to set out her stall. That, it was submitted, was evident from the change in formulation from the pre-2016 voluntary pre-action protocol, which required a pursuer to state whether an offer was accepted or rejected (see paragraph 4.3), whereas CPAP requires a reasoned response. In short, parties need to give an explanation of their position, and this the pursuer had not done, despite being asked to do so by the defender's agents, resulting in needless court procedure. Expenses should therefore be on the CPAP scale.

**Pursuer's submissions**

[5] For the pursuer, Mr Agnew adopted his written submission and observed that the previous pre-action protocol was a private agreement amongst major firms and insurers, whereas CPAP formed part of the rules of court. The change of wording was, he submitted, not significant, and the explanatory notes were silent on the matter of "reasoned" explanation. It was of relevance that CPAP did not call for a reasoned offer.

[6] The pursuer's email was not a blanket reference to the Judicial College Guidelines, but was a reference to a specific chapter. Mr Agnew submitted that allowed the defender to know where the pursuer's expectations were pitched. The defender's offer had been rejected within the CPAP timeframe. The absence of response to the pursuer's rejection during the 2 week stock-taking period meant the defender was deemed not to be relying on CPAP. There had been no response within 2 weeks, and there was a chasing email on 9 March 2023. In the absence of a response to that, the pursuer was entitled to recall the sist and proceed. The second offer made after Defences were lodged and the timetable issued, was outwith CPAP too. If the defender wanted to preserve CPAP, agents should have made the pursuer aware within 2 weeks that they did not consider the pursuer's response to the first offer satisfactory. They did not do that, and thus the defender was in breach of CPAP. The pursuer should be awarded expenses on the Ordinary Cause scale.

**Discussion and decision**

[7] Paragraphs 27-29 of CPAP are in the following terms:

27. If a settlement offer is made, the claimant must either accept the offer or issue a reasoned response within 14 days of receipt of the offer. Alternatively, if the

claimant considers that additional information is required to allow full and proper consideration of the settlement offer, the claimant may make a request for additional information from the defender within 14 days of the receipt of the offer.

28. Where additional information or documentation is requested to allow the claimant to give full and proper consideration to the settlement offer, the claimant must accept the offer or issue a reasoned response within 21 days of receipt of the additional information or documentation.

29. In any reasoned response issued, the claimant must:

- reject the offer outright, giving reasons for the rejection; or
- reject the offer and make a counter-offer, giving reasons.

[8] The pursuer's agents' email rejecting the defender's offer is in the following terms:

"Good afternoon,

I have instructions to reject your offer.

I would refer you to the Judicial College Guidelines Chapter 7(B)(c)(i) and (i) together with our Statement of Valuation of Claim.

This email is sent entirely without prejudice and is not to be founded upon in these or any other proceeding without express prior consent.

Kind regards"

As the correspondence is produced by the pursuer's agents, they must be deemed to have waived any privilege which may remain in the correspondence.

[9] The short question is whether this is a reasoned response as called for in paragraph 27. In my view, it is not.

[10] While it is true, as the pursuer submitted, that the former pre-action protocol was a voluntary agreement amongst some regular users of this court, and that CPAP is compulsory, and forms part of the Ordinary Cause Rules, I do not consider that fact throws

any light on construction. Nor can I accept the pursuer's submission that it means there is no significant difference between paragraph 4.3 of the former protocol and paragraph 29 of CPAP. Paragraph 4.3 says:

“The pursuer's Agent will advise Insurers whether or not their offer is to be accepted or rejected, prior to the raising of proceedings, and in any event within 5 weeks of receipt.”

I have set out paragraph 29 of CPAP above, and that is clear and unambiguous in its terms, and requires a claimant/pursuer to “giv[e] reasons for rejection”. That is plainly a different form of words, and, critically, a more exacting obligation for pursuers and their agents.

[11] Returning to this case, I do not consider that baldly stating “I would refer you to the Judicial College Guidelines Chapter 7(B)(c)(i) and (i) together with our Statement of Valuation of Claim.” amounts to giving reasons. No doubt, as Mr Agnew submitted, the pursuer was relying on the Judicial College Guidelines, Chapter 7B(c), but that is simply a starting point. The pursuer's valuation is not before the court, but I note from the Initial Writ there are several heads of claim. Reference to the Judicial College Guidelines, or indeed any other source, requires to be supplemented by some indication *why* that provides a basis for a higher valuation than the defender's offer. As in this case, compliance with CPAP means the pursuer will have produced and intimated a valuation. “Reasons for rejection” means some commentary is required. The process of negotiation, whether under CPAP or otherwise, usually involves either some engagement with parties' approach to valuation of individual heads of claim, or a clear indication of a global figure which might be acceptable. The purpose is obvious: clarity of parties' respective positions, and facilitating a response from the other party. CPAP is, in my view, premised on that approach. Neither is present in the email rejecting the defender's offer.

[12] I will accordingly: (a) discharge the diet of proof allocated for 23 January 2024; (b) grant decree in terms of the defender's Minute of Tender and the pursuer's Minute of Acceptance thereof, numbers 10 and 11 of process; (c) find the pursuer entitled to expenses, modified to the CPAP scale; and (d) certify Dr Ben Coyle, general practitioner; Mr James Childs, consultant trauma and orthopaedic surgeon, and Dr Anupam Agnihotri, consultant psychiatrist, as skilled persons.