

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

[2023] SC EDIN 28

PIC-PN2195-22

NOTE BY SHERIFF ROBERT D M FIFE

in the cause

ALAN MCRAE

Pursuer

against

(FIRST) SCREWFIX DIRECT LIMITED

and

(SECOND) ROYAL MAIL GROUP LIMITED

Defenders

Pursuer: Markie, adv; Digby Brown LLP
First Defender: Hennessey, sol adv; Keoghs Scotland LLP
Second Defender: Keay; Morton Fraser LLP

EDINBURGH, 1 September 2023

Introduction

[1] The pursuer claimed damages as a result of an accident at his home on 19 September 2019. The pursuer raised proceedings against both defenders. On 31 March 2023, the second defender accepted the pursuer's Minute of Offer to Settle. On 4 May 2023, the pursuer lodged a Minute of Abandonment in respect of the first defender in terms of OCR 23.1(a).

[2] The action called before the court on 21 August 2023 for two opposed motions:

1. The first defender moves the court, in terms of OCR 31A.2(2)(d) for an order by the sheriff of an award of expenses of process against the pursuer in favour of the first defender, number 7/6 of process.

2. The pursuer moves the court...(iv) to find the second defender liable to the first defender in the expenses of the action as occasioned by the first defender, number 7/5 of process.

[3] Parties lodged written submissions which were adopted and supplemented at the hearing; a chronology, various productions and authorities. I have taken all of these into consideration.

First Defender's motion 7/6 of process

Statutory framework

[4] Section 8(2) of the Civil Litigation (Expenses and Group Proceedings (Scotland) Act 2018 ("the Act") states that the court must not make an award of expenses against a pursuer except where the pursuer (for present purposes) has failed to conduct the proceedings in an appropriate manner, section 8(4) (a) to (c).

[5] Section 8(6) provides that subsection (2) is subject to any exceptions that may be specified in an Act of Sederunt under section 103(1) or 104(1) of the Court Reform (Scotland) Act 2014.

[6] The Act of Sederunt (Rules of the Court of Session 1994, Sheriff Appeal Court Rules and Sheriff Court Rules Amendment) (Qualified One-Way Costs Shifting) 2021 effective 30 June 2021, amended the Ordinary Cause Rules by inserting Chapter 31A Qualified One-Way Cost Shifting.

[7] Chapter 31A applies in civil proceedings, being civil proceedings to which section 8 of the Act (restriction on pursuer's liability for expenses in personal injury claims) applies, rule 31A.1(3).

[8] Rule 31A.2(1) provides a party to the action may make an application for an award of expenses to be made against the pursuer, on one or more of the grounds specified in either or both:

- (a) Section 8(4)(a) to (c) of the Act;
- (b) paragraph (2) of this rule.

[9] Rule 31A.2.(2) provides:

(2) The grounds specified in this paragraph, which are exceptions to section 8(2) of the Act, are as follows –

....

- (d) abandonment of the cause in terms of rule 23.1(1), or at common law.

[10] Rule 31A.1(2)(a) provides that rules 23.1(2) and (3) (abandonment of causes) are disappplied.

Discussion

[11] On a plain reading, the primary legislation and rule 31A.2.(2) is clear and unambiguous. If it was intended that abandonment required to be in circumstances analogous to the other exceptions to QOCS, section 8(4)(a) to (c), as contended by the pursuer, then that would have been expressly stated. Such an interpretation cannot reasonably be inferred and is inconsistent with Chapter 31A.

[12] As examples, rule 31A.2(1) distinguishes between the grounds specified in section 8(4)(a) to (c) and the grounds specified in rule 31A.2(2). The grounds specified in

rule 31A.2(2) are exceptions to section 8(2) of the Act. The pursuer's submission fails as unsound.

Discretion and Decision

[13] Rule 31A.3(1) provides that the determination of an application under rule 31A.2(1) is at the discretion of the sheriff. The first defender adopted a consistent position from an early denial of liability pre-litigation, as evidenced by the timeline.

[14] As the pursuer's principal submission has been unsuccessful, the subsidiary submission is that the exercise of discretion should be consistent with the principles of QOCS.

[15] The discretion of the sheriff under rule 31A.3(1) is not qualified in any way. The sheriff has an unfettered discretion. The pursuer's submission that the exercise of discretion should be consistent with the principles of QOCS fails as unsound.

[16] The pursuer's final submission is that on a simple exercise of discretion the court should find in favour of the pursuer and refuse the motion. In the exercise of that unfettered discretion and in all the circumstances I am persuaded that the pursuer having abandoned the action against the first defender under rule 23.1(1), to find the pursuer liable to the first defender in the expenses of the action as taxed.

Expenses of first defender's motion 7/6

[17] While it was reasonable for liability of a pursuer in expenses following upon abandonment post QOCS to be determined by the court, the first defender's opposed motion was successful without any restriction. I find the pursuer liable to the first defender in expenses as taxed in respect of the opposed motion 7/6, including all hearings.

Pursuer's motion number 7/5 of process, part (iv)

[18] As I have granted the first defender's motion 7/6, it is necessary to go on to consider part (iv) of the pursuer's motion 7/5. I have reviewed the written submissions for the pursuer and the oral submissions. The written submissions focus entirely on opposing the first defender's motion, 7/6. There are no specific written submissions in support of part (iv).

[19] The pursuer's oral submission to support part (iv) appears to be confined to the following:

"If the first defender's motion succeeds, there remains an inherent discretion open to the court to determine the question of expenses as set out in the motion."

[20] There are no supporting submissions accompanying the written motion 7/5.

[21] The basis for the motion appears to be that the second defender caused or induced the pursuer to convene the first defender.

[22] The pursuer's written submissions state at paragraph 7.18:

"The reason for the abandonment of the action against the first defender was the acceptance of the Pursuer's Offer by the second defender, which satisfied the pursuer's claim. The pursuer makes no concession that the case against the first defender was irrelevant or lacked specification."

[23] That submission is inconsistent with any argument the second defender caused or induced the pursuer to convene the first defender.

[24] The pursuer chose to raise proceedings against both defenders. In the written opposition to the first defender's motion 7/6 the pursuer stated: "...The pursuer was prepared to run to proof against both defenders in order to establish who was liable."

[25] The second defender's pleadings make no reference to the first defender. The second defender disclosed the Carrier Agreement between the first and second defender many

months prior to the raising of proceedings. The pursuer asserts there was a refusal by both defenders to disclose the Service Schedules of the Carrier Agreement, but the pursuer took no formal steps to recover the documents.

[26] In the event, I am not satisfied on all the information available to the court the pursuer has demonstrated the second defender caused or induced the pursuer to convene the first defender and part (iv) of the motion falls to be refused.

[27] I shall make a finding of no expenses due to or by any party in respect of the pursuer's motion 7/5.

Sanction for the employment of counsel

[28] On the first defender's unopposed motion, I sanction the proceedings as suitable for the employment of counsel.