SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND SHERIFF COURT

[2017] SC EDIN 63

PN1011/17

NOTE

by

SHERIFF KENNETH J. MCGOWAN

in the cause

DOROTA TOMCZAK

Pursuer

against

NICHOLAS REID

Defender

Pursuer: Richards; Digby Brown
Defenders: Sheldon, QC; Clyde & Co

Edinburgh, 19 September 2017

NOTE

Introduction

[1] This case came before me on the pursuer's motion for (i) decree for payment in terms of a minute of tender and acceptance; (ii) an order that the defenders should be liable to the pursuer on an agent and client basis; and (iii) certification of skilled witnesses. This was opposed by the defender, who in turn sought an order that the pursuer be liable to the defender in the expenses of process; which failing, the pursuer's expenses should be modified to nil.

[2] I was referred to or considered the following authorities/sources:

a. *McKie* v *Scottish Ministers* 2006 S.C. 528;
b. *Akram* v *Ahmad* 2015 WL 640777;
c. *Sheriff Court Practice*, MacPhail, 3rd edition;
d. *Walker* v *McNeil* 1981 SLT (Notes) 21;
e. *Gunn* v *Hunter* (1886) 13R 573;
f. *Neilson* v *Motion* 1992 SLT 124;
g. *Charman v John Reilly (Civil Engineering) Limited*, Liverpool County Court, 22nd May 2013, unreported
h. *Rockware Glass* v *MacShannon* 1978 2 W.L.R. 362
i. *Meldrum* v *Michelson*, 10 August 2017, Sheriff Murray, Forfar, unreported
j. *Heggie* v *Stark* (1826) 4S. 518;
k. Act of Sederunt (Fees of Solicitors in the Sheriff Court) Amendment and Further Provisions) 1993, as amended.

[3] Both parties had helpfully lodged written notes of argument and timelines which I have taken account of and sought to summarise below.

Pursuer's submissions

[4] The case arose from a motor vehicle accident on 17 October 2015. Liability was admitted pre-litigation. The claim proceeded in terms of the Voluntary Pre-Action Protocol for Scotland ("VPAP").

[5] Proceedings were raised on 26 May 2017 due to the failure of the parties to reach agreement pre-litigation. That failure to reach agreement related almost entirely to the cost of a medical report prepared by Dr Colin Rodger, consultant psychiatrist.

[6] A letter intimating the valuation clearly set out the outlays incurred by the pursuer and stated:

> "Please note that our client's acceptance of any offer is subject to payment of our fees and disbursements under the Scottish Voluntary Pre-Action Protocol. These include

> the Abstract Police Report (£93), translation costs (£84), recovery of medical records (£30) and medical report (£960)."

[7] The insurers responded with an offer to pay reasonable expenses and reasonably incurred outlays. A counter-offer was made and rejected. The insurers repeated their previous offer.

[8] The pursuer's agents' response was to state that the sum of £4700 would be accepted "subject to payment of our fees and disbursements in full". That offer was repeated on 27 February 2017.

[9] The insurers responded on 1 March 2017 by seeking further information in respect of the abstract police report and Dr Rodger's fee, stating:

> "If we do not receive any response from you within 14 days with the requested information/documentation we will take it as tacitly agreed that the claims for the police report fee and psychiatric report fee are withdrawn."

[10] More information was provided to the insurers but ultimately an initial writ was warranted as agreement could not be reached between the parties pre-litigation. The pursuer's agents' final position was set out in their letter dated 12 May 2017, the relevant part of which said:

> "Our client agreed to the offer of £4700 net of CRU subject to payment of our fees and disbursements in full. You were already aware of our disbursements as we listed these in detail in our letter of 8 November 2016. Expenses under the voluntary pre-action protocol include outlays. You confirmed that you refuse to pay the outlays in full and therefore you have rejected our client's condition of settlement. Accordingly, settlement is not agreed."

[11] The pursuer also sought expenses on an agent and client, client paying basis.

[12] The general rule was that expenses fall to be paid by those that have caused the litigation. The Sheriff has the power to modify expenses. The defender's refusal to meet the

fees of the medical report in a psychiatric injury only case together with the fee for an abstract police report in a road traffic accident were entirely unreasonable: *Walker.*

[13] The defender had no grounds for opposing payment of the psychiatric report and the police abstract fee. It was simply an attempt to reduce the amount payable to the pursuer.

[14] The court could take into account a party's pre-litigation conduct. Litigation in this matter should have been unnecessary but had been required due to the defender's conduct: *McKie; Akram.*

[15] The defender's position was untenable. The insurers had considered the medical report prepared by Dr Rodger; agreed to the instruction of Cognitive Behavioural Therapy ("CBT") as recommended by him; made offers in respect of a psychiatric injury as diagnosed by him; and for the provision of CBT.

[16] The defender misunderstood the reasons for obtaining a police abstract report. The report would usually contain the correct designation of the parties, the designation and contact details of any witnesses and the identity of the investigating police officers. It would also identify if any vehicle damage was sustained and whether or not any party was reporting injury at the scene of the accident. A pursuer's agents in a personal injury case did not simply intimate a claim and sit back and wait to see whether or not an admission of liability was forthcoming. Rather the opposite, they were duty bound to investigate as an admission of liability may not be forthcoming and litigation may be required.

[17] The defender misinterpreted the reasons for litigation in this matter. This case required to be litigated because parties could not reach agreement pre-litigation. All offers to settle made by the pursuer were subject to the pursuer's disbursements being paid. The

defender refused to pay those disbursements. If parties cannot reach agreement, litigation is the only possible result.

[18] If the defender's rationale were correct, insurers could seek to agree principal sums and refuse to pay any expenses on the basis that litigation was an attempt to increase expenses. Where expenses were not paid in whole or in part, the unrecovered sum may require to be deducted from whatever is to be paid to the pursuer in respect of their principal sum, thereby the amount received by way of damages.

[19] *Neilson* was not in point. It was an authority on modification of expenses where the pursuer had failed to engage pre-litigation. In this case, all the pursuer's cards had been laid on the table and the defender had taken an unsupportable position in the litigation.

[20] Dr Rodger was instructed directly. He was not instructed through an agency. The pursuer had not sought recovery of any agency fees. The defender's insurer had been advised of this on multiple occasions. There was nothing more that the pursuer could have done to advise the insurers of the position.

[21] The auditor of court had no locus in a dispute between two parties to a litigation where there was no order for taxation.

[22] The pursuer had been precognosced in December 2015. At that stage she did not know the name and address of the defender. The pursuer's agents did have the vehicle registration number which could be used to obtain insurance details. But intimation of a claim without the name and address of the insured could create difficulties. No writ could be framed without the identity of the defender being confirmed. At that stage, the pursuer's agents could not know if liability would be admitted.

[23] Medical evidence was received and disclosed and liability was admitted. It had been reasonable to obtain the police report and it was not clear what the pursuer's agents were supposed to do, faced with the refusal to pay this outlay.

[24] This was not a case where a medical agency was instructed for a report. It was clear from the letter of instruction that Dr Rodger was directly instructed. It was not unusual when experts were instructed to receive invoices in the name of a company for whom they worked.

[25] The insurers had asked to see the invoice for Dr Rodger's fee and this was exhibited to them. They then proceeded to ask for more information or documents which could not be provided.

[26] No agreement was reached in this case because acceptance of the principal sum was conditional on agreement that the outlays would be paid in full.

[27] The position being adopted by the insurers in this and other cases had brought about a change in the standard letter issued by the pursuer's agents to make the position clear. Accordingly, it was incorrect to say that there had been an agreement on the principal sum. Nothing was agreed prior to litigation.

[28] The information in the email from Dr Rodger dealt with the issue of agency. He had confirmed that the company, Insight Psychiatric Services, was not established as an agency company nor was it in any part associated with an agency. The existence of terms and conditions for those engaged to provide reports did not support the defender's position.

[29] If the pursuer was to be criticised for not suggesting a remit to the auditor, the same criticism could be levelled at the defender.

[30] In relation to the police report, a third party company dealt with the hire claim and accordingly the details available to it were not necessarily known to the pursuer.

[31] It was surprising that the Court was not made aware of the decision in *Meldrum* by the defender when the insurers and agents were the same in that case as in this.

[32] The pursuer moved the Court to grant decree in terms of the minutes of tender and acceptance; to award the expenses of the action on the ordinary cause scale on an agent and client, client paying basis; and to certify Dr Rodger as a skilled witness.

Defender's submissions

[33] The case had settled by way of tender in the sum of £4,700 and minute of acceptance thereof. It initially proceeded under VPAP. It could and should have been resolved on that basis without recourse to litigation. The principal sum of £4,700 had been agreed and a cheque tendered prior to the action being raised. The bulk of the expenses and outlays had also been agreed and a cheque tendered. The only matters remaining in dispute when proceedings were raised were the expenses properly payable in respect of a police report and a psychiatric report. The substance of the action had been settled. The present litigation was accordingly concerned only with a question of expenses. The action raised by the pursuer's agents was unnecessary. It was raised unreasonably and the Court should reflect that in any award of expenses.

[34] The pursuer's motion should accordingly be refused in so far as it seeks the expenses of the action. Certification of Dr Rodger as an expert should be refused until such time as proper clarification is provided as to the issues raised below in relation to his report.

[35] The pursuer was entitled only to those expenses reasonably incurred under the VPAP prior to litigation. The present litigation was unnecessary and the expenses thereof should be awarded to the defender, which failing they should be modified to nil; which failing they should be restricted to those payable under the VPAP: *Gunn*; *Neilson*.

[36] The outlays sought by the pursuer's agents included £93 in respect of a police report identifying Direct Line as the defenders' insurers. This was unnecessary. A credit hire claim had already been intimated to Direct Line by the pursuer in or around October 2015. The pursuer's claims handlers, Accident Exchange, were aware of the identity of the defender's insurers. The necessary information was already readily available to the pursuer's agents when the police report was sought. If there was any dispute about that, the defender's insurers could have been easily identified by a Motor Insurance Database (MID) search without recourse to the police.

[37] A psychiatric report had been intimated in support of the pursuer's claim for solatium. This was prepared by Dr Colin Rodger, a Consultant Psychiatrist, but issued by "Insight Psychiatric Services" (Insight). The pursuer's agents had sought payment of a fee of £800 plus VAT, £960 in total. Agency fees were not payable under the VPAP. The defender's insurers accordingly queried the fee. In particular they sought confirmation that the whole amount of the fee was payable to Dr Rodger, and that there was no agency element to the fee subject to retention by Insight. No satisfactory confirmation had been forthcoming.

[38] The pursuer's agents' position was that Insight is purely a vehicle through which Dr Rodger "provides medical reports". However, the information provided to the defender's insurers (contained in an email from Dr Rodger dated 21st March 2017) indicated that a number of other clinicians issued reports under the umbrella of Insight. Insight appeared to

provide consulting rooms and issues medical reports and invoices. Insight took primary responsibility for any negligence by consultants in the performance of their duties. They presumably carried insurance for that purpose. These were the hallmarks of an agency.

[39] Further, Insight appeared to be a trading name of a limited company, Rondan Limited. The directors and shareholders of that company were Dr Rodger and his wife. Through its trading name of Insight Psychiatric Services the company charged VAT. However, it was unclear on present information whether the turnover of clinicians such as Dr Rodger in respect of their forensic medical practice would exceed the VAT threshold. It was unclear whether those clinicians as individuals would require to charge and account for VAT.

[40] It was not the case that the insurers had refused to pay the fee for the psychiatric report. They had simply queried it and sought confirmation of the basis on which it was issued. Standing the terms of the VPAP and the principles of economy in litigation they were entitled to be provided with a breakdown of the fee. They were entitled to clarification of the role of Insight in issuing such fees and the proportion of the fee (if any) which was payable to them: *Charman.* The insurers sought further details about this arrangement on 21st April and 8th May 2017. These queries were ignored and the present proceedings raised. At the time proceedings were raised, the fees for the police and medical reports were the only issues outstanding between the parties.

[41] The VPAP provided that outlays are payable in addition to the protocol fee for the solicitor. Medical agency fees are explicitly stated *not* to be a recoverable outlay (Division D, Fees etc). VPAP does not in specific terms say that only reasonably incurred outlays were recoverable but that was how parties – and the Court – had interpreted VPAP to date. That

approach accords with the principles of due economy in litigation and with common sense. Such economy could only be ensured in the present case if there was proper disclosure of the arrangements between Insight and the doctors working for it so that the defenders had a fair opportunity to determine whether there was an agency element to the fee. No such opportunity had been afforded to date.

[42] It should be stressed that the issues rehearsed here were not confined to the present case. The Court need not wear blinkers as to the wider implications of an apparently narrow point: *Rockware Glass*. The sums disputed here were small. However, the "bigger picture" was that much larger sums are at stake. Police reports were routinely sought by pursuers' solicitors regardless of whether they were necessary. If pursuers' solicitors obtained a police report in each case, the cost to this insurer alone would be over £400k per annum. The same point arose on agency fees. The average agency fee was around £100. If there was an agency fee for every medical report submitted, then the annual additional cost to this insurer would be around £450k.

[43] The conduct of the defenders could not be impugned. Liability was accepted immediately. Protocol timetables were followed. Most of the outlays were accepted. Settlement cheques for the principal sum and expenses were issued, but later returned by the pursuer's agents. With regard to the other items, the defender's insurers acted perfectly properly in order to avoid unnecessary or unjustifiable costs. They were entitled to query the business model apparently adopted to provide the medical report, and the necessity of obtaining the police report. In relation to the medical report, the defenders and the Court had an interest in achieving fair disclosure of the financial arrangements by which the

reporting clinician was paid. Neither the Court nor the defenders could do so without proper disclosure.

[44] It had been unnecessary to litigate this matter. It was a litigation brought purely with a view to obtaining expenses to which the pursuer was not entitled (at least on the basis of present information). The pursuer's criticisms of the defender's conduct were unfounded. Those factors should be reflected in the Court's order.

[45] The pursuer was litigating for expenses and this verged on being an abuse of process. The raising of the action was both unreasonable and unnecessary. It was not correct to say that nothing had been agreed. The argument to that effect was disingenuous. There was clear agreement over the appropriate principal sum.

[46] There had been an attempt to make settlement conditional on payment of particular outlays. That could not be an appropriate condition.

[47] The overriding principle was that the expenses should be reasonable having regard to due economy. The ethos underpinning VPAP was one of reasonableness.

[48] In any event, it was necessary that the principal sum would be negotiated first because only then could expenses be agreed, the fee element having been calculated by reference to the principal sum.

[49] Accordingly, this action had been unnecessary and the raising of it was unreasonable. The pursuer should be found liable to the defender in the expenses of process; which failing the pursuer's expenses should be modified to nil.

[50] The situation here was similar to that in *Gunn*, where the pursuer had "gained nothing at all": Lord Adam, page 575.

[51] In *Neilson* the defenders had been successful on a particular point and that case was an example of how the court might exercise its powers.

[52] It was not suggested that Dr Rodger was not a skilled or appropriate witness. Nor was it disputed that *a* fee was payable to him. The dispute here concerned the basis on which the fee was calculated. In short, the defender was entitled to know the breakdown of the fee. Some information was provided, but the difficulty for the pursuer was that the information which was provided raised more questions than answers.

[53] The key document was production 6/4 which was a letter to the insurers to which an email from Dr Rodger was attached. Dr Rodger said that Insight was "not an agency company". Nevertheless, it was clear that Insight was the principal and the question then was – what were the terms and conditions upon which Dr Rodger was engaged? That certainly suggested some kind of agency arrangement. It was clear that Insight were providing some kind of services. While it was true that the letter of instruction went direct to Dr Rodger, there had been no confirmation from him that no part of the fee went to Insight. The defender was entitled to know if that was the case so that the reasonableness of the fee could be appropriately judged.

[54] Some parts of agency fees are recoverable in England but that is not the case in Scotland under VPAP. But even in England, it was still necessary to know the breakdown of the elements of the overall fee.

[55] Accordingly in the present case, parties had never got to the stage of pursuing that information. A joint remit to the auditor of court would have been a practical solution.

[56] So far as the police report was concerned, the pursuer did have information about the identity of the insured. A claim had been made through a credit hire company in 2015.

Accordingly, the pursuer's agents should have had no difficulty in identifying the right defender.

[57] Liability was admitted quickly by the insurers. There was nothing in this case which would justify expenses on an agent and client basis. Indeed, the boot was on the other foot.

[58] Even under the Compulsory Protocol, agency fees were still not recoverable.

[59] In *Meldrum*, those dealing with the present case in the principal agent's absence on sick leave had been unaware of this decision. It was emailed to the principal agent by the Sheriff Clerk's office at Forfar which would have received his out of office reply. The decision was not emailed to anyone else. No hard copy had been received and hence the agents were not in a position to consider drawing the case to the Court's attention

[60] In any event, in that case there was no issue of possible medical agency. It was a dispute about the appropriateness of the pursuer instructing a consultant rather than a GP.

[61] It was not accepted that in *Meldrum* the pursuer only had two choices. A pre-litigation referral to the auditor on a question of VPAP expenses was possible and should be encouraged where the real dispute was expenses. It achieved the aim and ethos of VPAP of facilitating settlement of lower value claims without the necessity of proceedings.

[62] There was nothing in VPAP which said all outlays (however unreasonable) had to be agreed before there was a settlement agreement. It was a breach of VPAP to make settlement conditional on outlays being met in full. VPAP anticipates a negotiation and it would be expected that a pursuer in any given case would put forward their highest possible valuation with a view to ultimate settlement at a lower figure. Nothing in *Meldrum* detracted from the defender's position that parties should not litigate over expenses only. The logical conclusion of the Sheriff's approach in *Meldrum* would be that it would always

be reasonable to litigate if outlays could not be agreed, no matter how unreasonable those outlays were.

[63] An extra judicial offer to settle would normally be accompanied by an offer to pay reasonable expenses. If reasonable expenses were not offered – all relevant information being available as to the reasonableness of those expenses – then that *might* be a basis on which to litigate. However, in this case, that stage was never reached. The pursuer's agents litigated before it could properly be determined that Dr Rodger's fee was or was not reasonable.

[64] The present case was not in the same category as *Meldrum*. No element of judgement was involved as it was agreed that the choice of expert was reasonable. The question was simply the binary one: was there an agency element to Dr Rodger's fee or was there not?

[65] Whatever view one took about the contractual nature of VPAP, any such contract could not supplant the right of the parties to agree a joint reference to the auditor. It was always open to the parties to a contract to alter its terms by novation, or enter into a new, collateral agreement. A joint referral to the auditor on a pre-litigation question of expenses had always been competent and in turn is possible under VPAP.

[66] There was no question in *Meldrum* of seeking to penalise the defenders for their approach by seeking agent/client expenses.

Grounds of decision

Discussion

[67] While the parties provided a comprehensive timeline, in my opinion the overall position can be summarised quite simply – the parties entered into negotiations; a principal sum was offered and accepted in principle; parties were unable to agree expenses; and

litigation ensued; a tender in the same sum as had been offered pre-litigation had been intimated and accepted.

[68] Moving to another level of detail in respect of the crucial period – namely the period leading up to the breakdown of negotiations – it is evident that there was no dispute over the fees element to be paid to the pursuer's agents and outlays in respect of a translation fee and the cost of recovery of medical records were also agreed. The two disputed items were the cost of a police abstract report (£93.00) and the fee for Dr Rodger's psychiatric report (£960).

[69] In relation to the former, the issue was whether it was reasonably necessary to obtain that, given other information about the identity of the defender already available.

[70] In relation to the latter, the issue was not whether a psychiatric report was appropriately commissioned; or whether Dr Rodger was an appropriate person to provide it; but rather the level of the fee and in particular what the various elements of it were, given that a third party, Insight, was involved: production 6/1/11.

[71] The subsequent correspondence revolved around these issues. The insurers' position was that they would pay "reasonably incurred outlays": production 6/1/10. The pursuer's agents' position was that the outlays had all been reasonably incurred and that settlement could only be achieved if they were paid in full: production 6/1/10.

[72] I was addressed in some detail on the parties' respective positions on the disputed outlays. For reasons which I seek to explain below, I have not engaged with that exercise and offer no view on it.

[73] It is clear that but for the failure in negotiations about these disputed outlays, this action would have not have been raised (because it would have settled). Turning that

around, it means that this litigation, although ostensibly about a personal injuries claim, was in fact about disputed pre-litigation expenses.

[74] To be clear: the *de facto* 'cause of action' was disputed pre-litigation expenses; and what I was asked to decide (with a view to determining the broader questions of liability for the expenses of the action) was which party was 'right' in the stance that they took about whether certain pre-litigation outlays had been properly incurred.

[75] I have a number of (overlapping) observations on that.

[76] First, it appears to me that the real question which I was being asked to determine is not one which is apt for determination by the court at all. Expenses are "…a mere accident of the process…": *Heggie* per Lord Robertson at 519. That is not to say that they are unimportant, but they are secondary to and arise out of the litigation. They give rise to no justiciable question of substantive law in themselves.

[77] Second, the question of whether a particular outlay was properly incurred in the context of a litigation is one for the auditor of court: *McPhail*, paragraphs 19:32 and 19.36; paragraphs 6 and 8, Schedule 1, Act of Sederunt (Fees of Solicitors in the Sheriff Court) (Amendment and Further Provisions) 1993, as amended.

[78] Third, this claim was being negotiated under VPAP. VPAP is silent as to the question of expenses, other than stating that the agreed expenses must be paid within 5 weeks: paragraph 4.4.

[79] As VPAP is silent, it appears to me that the existing common law about what a pre-litigation offer in settlement should say regarding expenses (if the offering party intends to place reliance on it if the offer is rejected and litigation ensues) must be held to apply. In my view, to be effective in that respect, a pre-litigation offer need only offer 'reasonable

expenses' – and that is what the insurers offered here. In other words, it cannot be the case that a party faced with a claim and wishing to make an offer in settlement on which reliance may be placed later in relation to the expenses of a subsequent litigation has to make an open ended offer to a claimant to pay all outlays irrespective of what these are for or how the level of the figure claimed in respect of them is arrived at.

[80] Fourth, the pursuer's agents should have known that if an action was raised, it was likely – as in fact happened – that they would be faced with a tender for the same amount which would almost certainly have to be accepted as the value of the claim had been agreed in principle and had not changed. The result of that is twofold. The pursuer has not 'beaten' the pre-litigation offer; and the pursuer has finished up back where she started, in the sense that even if I were to grant the pursuer's motion for decree for expenses and certification, that does not advance the matter in dispute, because the decree would find the pursuer entitled to expenses as taxed. Thus, the question which I am being invited to determine – were the disputed outlays properly incurred? – would simply be remitted to the auditor for determination.

[81] For all these reasons, I have come to the view that the defender's submissions are for the most part to be preferred and that this litigation was misconceived from the outset.

[82] Mr Richards argued that faced with this *impasse*, there was nothing else he could do. I do not agree. In my opinion, a joint remit to the auditor was feasible. While I agree with Sheriff Murray's view in *Meldrum* that VPAP neither expressly nor impliedly provides for a route to taxation, and hence that neither party could <u>insist</u> on it, it appears to me that the parties could nevertheless have <u>agreed</u> to take the remaining issue in dispute to the auditor on the basis of a joint remit. In other words, while VPAP does not provide for taxation, it

does not prohibit it. Regrettably, it appears that neither party thought of or suggested that at the time in this case.

[83] In summary, the position is that the pursuer has failed to beat the pre-litigation offer; and the basis for the action is highly questionable. It follows that the pursuer's motion for expenses falls to be refused.

[84] Turning to the defender's contra-motion for expenses, I do not think that the insurers are free from blame. No alternative method of resolution was proposed.

[85] More broadly, I consider that actions concerning this type of dispute fall to be strongly discouraged. In the circumstances, I shall grant decree for the principal sum, but otherwise find no expenses due to or by either party.