SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2017] SC EDIN 80

PD71/17

JUDGMENT OF SHERIFF K J McGOWAN

In the cause

ABIE McCRACKEN

Pursuer

Against

PIOTR KAZANOWSKI

Defender

Pursuer: Swanney; Digby Brown LLP
Defender: Dyson; Brodies LLP

Edinburgh, November 2017

NOTE

Introduction

[1] This case came before me on the pursuer's opposed motion for decree in terms of a minute of tender and acceptance thereof. Opposition was restricted to the following grounds, namely (i) sanction of the cause as suitable for the employment of junior counsel and (ii) delay in acceptance.

Submissions for Pursuer

Sanction

[2] The case arose from a road traffic accident on 31 May 2016. A car being driven by the defender collided with the rear of a car in which the pursuer was a passenger. It was implicit

in the defender's position that impact had not been sufficient to cause any injury to the pursuer. The issues arising from that were not straightforward.

[3] Counsel's only involvement in the case was a consultation on the tender.

[4] (LIKELY) DIFFICULTY/COMPLEXITY The pursuer's position was that the vehicle in which he was a passenger had been sitting stationary. The defender's vehicle had run into the back of it, shunting it forward by about 1 m. The pursuer had suffered the onset of pain within about two hours which had subsisted for a period of several months. The defender's car had been coming at speed.

[5] By contrast, the defender's position was that his vehicle was travelling at low speed; that the pursuer had not been injured in the accident; and that his version of events was either not credible or there had been another reason for his injury.

[6] Production 6/2 of process contained photographs of the pursuer working out in a gym days after the accident. This supported the contention that the defender's position was that the pursuer was lying or exaggerating.

[7] Production 6/1 was an engineer's report. From that, it appeared that the defender's version of events was that his car had been stationary behind the car in which the pursuer was travelling; that he had thought that the way was clear for both vehicles; and that he had edged forward, thereby causing the collision.

[8] Thus, it was clear that the defender was going to mount an attack on the pursuer's credibility in relation to the circumstances of the accident and the consequences thereof.

[9] The pursuer had valued the case at £4000 and had made a pursuer's offer in that amount. That had been rejected and the defender had tendered £1200.

[10] In advising the pursuer on that tender, it was necessary for an assessment to be undertaken in relation to the risk that the evidence for the defender on quantum and causation might be preferred to that for the pursuer.

[11] There was expert engineering and medical evidence which was relevant to the foregoing issues and their assessment.

[12] The engineering evidence involved an assessment of the only objective evidence – the damage to the vehicles.

[13] The medical reports dealt with the issue of medical causation and had to be assessed along with the evidence of what might be proved from the engineering evidence about the nature of the collision.

[14] The result was that, in relation to both strands of the expert evidence, the assessment thereof required a good understanding of the issues raised and careful questioning of the approach of the experts.

[15] The key focus of the consultation was so that the pursuer could be given advice on the quality of the expert evidence. The pre-trial meeting was looming and arrangements were made for the consultation to be held before it. This was done at relatively short notice and there was no opportunity for a consultation with the experts.

[16] Before the consultation, counsel undertook an analysis of the expert evidence and the studies referred to in the medical report. Counsel's familiarity with the experts themselves and their fields of expertise was of assistance.

[17] So far as quantum was concerned, there were minor differences between the medical reports.

[18] A key issue was counsel's assessment of the credibility of the pursuer and how that might be viewed by the court.

IMPORTANCE OF CLAIM

[19] The position adopted on behalf of the defender meant that the focus of the challenge to the pursuer's account of the accident and its aftermath moved from "reliability" to "credibility". In particular, the defender's position was that the pursuer had either not been injured at all; or was exaggerating.

[20] In view of the foregoing factors, the decision to instruct counsel was reasonable, and sanction should be granted.

Timing of Acceptance

[21] The tender was intimated to the pursuer's agents at about 3 PM on Friday 6 October 2017 along with the defender's statement of valuation and medical report.

[22] The consultation was arranged for Wednesday 11 October and finished after 5 PM. The pursuer works full-time. Acceptance was intimated first thing the following morning. Three working days to consider and respond to a tender was not unreasonable.

Submissions for Defender

Sanction

[23] (LIKELY) DIFFICULTY/COMPLEXITY The sum craved was £7500. The defender admitted the collision prior to the action being raised.

[24] The approach to be taken to the question of sanction had been considered by the Sheriff Appeal Court: *Cumming* v *SSE* plc [2017] SAC (Civ) 17.

[25] The circumstances giving rise to this case were straightforward. It was a rear end shunt resulting in minor injuries. Even on the pursuer's valuation, the claim was not of high value.

[26] The only issue was causation. The date, time, place and parties were all agreed.

[27] Both parties had engineering experts to provide opinions on the speed of the vehicle, based on the damage to each of them.

[28] Both parties had instructed orthopaedic experts. The medical experts were in agreement that the pursuer had suffered a whiplash injury with no long term sequelae. There was a dispute as to the duration of the symptoms attributable to the pursuer's injury.

[29] Accordingly, the factual issues which were in contention were (i) the speed of the defender's vehicle immediately prior to the collision; and (ii) was the duration of the pursuer's symptoms consistent with the injury complained of?

[30] There was no issue of particular legal difficulty on causation. It would be a matter for the court to decide which expert's evidence was to be preferred.

[31] The pursuer was represented by a firm specialising in personal injuries work.

Importance of Claim

[32] There were no special circumstances in this case.

[33] There were no factors such as fear of loss of job or the like: *Dow* v *M&D Crolla Ltd* [2016] SC EDIN 21; or anxiety about future health: *Cumming*.

[34] There were no long term effects on the pursuer's health or career.

[35] The mere incidence of a factual dispute about the circumstances of an accident was not sufficient: *McKenzie* v *McCormack* [2017] SC EDIN 67, paragraph [13].

[36] It was true that photographs of the pursuer at the gym had been lodged but a challenge to the pursuer's credibility did not necessarily make a case more than ordinarily important: c.f. *Brown* v *Aviva Insurance* [2016] SC LIV 84

[37] This was not a high-value claim. The instruction of counsel was not necessary. According to an email from the pursuer's agents dated 5 October, counsel was to be instructed for the pre-trial meeting. That was before the tender had been intimated.

[38] There had been no change or development in the case which justified the instruction of counsel.

[39] The requirements of section 108 (3)(a)(i) and/or (ii) of the 2014 Act were not satisfied.

Delay in Acceptance

[40] If counsel had not been instructed, there could perhaps have been an earlier response to the tender. The pursuer's agents had not said that they were consulting on the tender and the defender's agents had continued with their preparations for that.

Reply for Pursuer

[41] The issue was one of reasonableness. The decisions in other cases were not necessarily helpful where the circumstances were different. There was a live issue about the engineering opinions in this case c.f *McKenzie*.

[42] A party was entitled to reasonable time to consider a tender: 'Sheriff Court Practice', *MacPhail*, 3rd edition, paragraph 14:45.

Discussion

Sanction

(LIKELY) DIFFICULTY/COMPLEXITY

[43] In assessing the parties' respective positions on the issue of (likely) difficulty/complexity of the case, I found it useful to try and envisage what questions the court would ultimately have to decide; what evidence it would be likely to have to assess; and how that evidence might have been presented.

[44] It appears to me that had this matter proceeded to proof, the court would have been more likely to focus on whether the (admitted) collision had been sufficiently heavy to be likely to have caused the pursuer's injury, rather than the precise speed of the defender's vehicle on approach.

[45] The direct sources of evidence about the 'weight' of the collision would have been the pursuer; the driver of the vehicle in which he was travelling; and the defender. No doubt that direct evidence could have been supplemented or challenged (as the case may be) on the basis of the opinions of the respective engineering experts, but it seems to me that the court would have been more likely to have reached a view on this issue primarily on the basis of the direct evidence. In my opinion, the eliciting of such evidence would not (or at least should not) have presented any difficulty whatsoever for a reasonably competent solicitor versed in basic sheriff court practice.

[46] As to challenges to the sources of evidence by cross examination, again this does not appear to me to have been an area requiring any special skill. There would be some obvious lines of cross examination. For example, the pursuer could be challenged on the basis on which he was asserting that the defender's car was approaching at speed. The defender's engineering expert could be challenged on the basis that his inspection of the defender's car

had not taken place until long after the accident; and he could be asked for his explanation for the apparent differential damage between the two vehicles, if not attributable to speed. These are not complicated issues.

[47] In other words, it appears to me that on this issue, the decision would be likely to turn on the court's assessment of the credibility and reliability of the pursuer on the one hand and the defender on the other, albeit against the backdrop of the other sources of evidence, direct and indirect. The resolution of the issue does not appear to me to give rise to matters which are evidentially, factually or legally difficult or complex.

[48] Furthermore and in any event, given the apparent acceptance by the defender's medical expert that the pursuer did suffer an injury, the issue about the weight of the collision may well have become secondary if not altogether redundant.

[49] In relation to the medical evidence, the dispute appears to have focused not on whether there was an injury, but on the duration of the pursuer's symptoms. In that respect also, the issue is likely to have turned substantially on the court's assessment of the pursuer's evidence, once again against the backdrop of other evidence such as the photographs of him exercising in the gym shortly after the accident date.

[50] Despite Mr Swanney's best efforts, I am not persuaded that any of the factors relied on by him actually are indicative of difficulty and/or complexity.

[51] I was told that the key focus of the consultation was so that the pursuer could be given advice on the quality of the expert evidence. But my view is that the expert evidence on both issues was likely to have been of secondary importance. In any event, the evaluation of which opinion(s) might be more likely to find favour with the court is part of the preparation for any proof. The nature of the issues in this case were such that, in my

opinion, the evaluation of them did not give rise to difficulty or complexity meriting the employment of counsel.

[52] The same applies to the issue of assessing the credibility of the pursuer and how that might be viewed by the court. Challenges to credibility are an intrinsic part of many cases. Such challenges are rarely complex or difficult in themselves.

[53] While it is clear that the question of sanction involves the exercise of discretion and that accordingly each case must be viewed on its own facts, it is helpful as a crosscheck to look at this case in comparison to those cited by Ms Dyson.

[54] In *Cumming*, the pursuer had been exposed to asbestos and developed pleural plaques. In refusing an appeal against the Sheriff's decision to grant sanction, the Sheriff Appeal Court specifically noted not only the nature of the proceedings but also the particular evidential difficulties and the need for advice on whether the case should be settled on a provisional or final basis: paragraphs [17] – [18]. I observe that the type of factors present in that case appear to me to be entirely absent in the present case, which arose from a single incident occurring within the relatively recent past and for which there was, it appears, at least one other direct witness. The pursuer's case did not involve numerous or complex heads of claim.

[55] In *Brown*¸ a case which involved a road traffic accident, I note that it was accepted by counsel for the pursuer in that case that it could not be said, on any view, that the proceedings had been difficult or complex: paragraph [5].

[56] By contrast, the circumstances of the present case appear to me to be far closer to those in *McKenzie,* where sanction was refused. I respectfully agree with the approach taken by Sheriff Mackie in that case and note, in particular, the remarks at paragraphs [13] – [15].

IMPORTANCE OF CLAIM

[57] I have already noted that challenges to credibility are a common feature of court actions. Though circumstances will vary, I doubt whether such a feature, of itself, makes a case difficult or complex. I can see that in certain cases, an adverse finding about a party's credibility might have wider ramifications: *Brown,* paragraph [14]. But that is not the position here.

Late Acceptance

[58] In my opinion, there is no merit in the suggestion that the delay in acceptance of the tender was unreasonable. The first point to be made is that the notional 'date of acceptance' is, other than in unusual circumstances, a matter for the auditor, not the court: *MacPhail*, paragraph 14:51.

[59] In any event, a pursuer is entitled to a reasonable time to have a meeting with his advisers when a tender is lodged to obtain advice on it and to take time to consider it. In the present case, the consultation was arranged swiftly and took place within a few days. There was a suggestion that the tender might have been lodged earlier – and hence the case might have settled earlier – if the pursuer had not missed his appointment with the defender's medical expert. But ultimately that issue was not pressed by Ms Dyson. Accordingly, it appears to me that on any objective view, there was no unreasonable delay in responding to the tender.

Disposal

[60] I shall pronounce an interlocutor granting decree against the defender for payment to the pursuer of the sum tendered (£1200); certifying the pursuer's skilled witnesses as

such; and finding the defender liable to the pursuer in the expenses of process, as taxed, to the date of tender. I shall refuse the motion to sanction the cause as suitable for the employment of counsel.

[61] Parties agreed that I should deal with the expenses of the opposed motion on the basis of "substantial success", so as to avoid the need for another hearing. Had the opposition been restricted to the single issue of sanction, the pursuer would not have been in a position to resist a contra-award of expenses for the motion hearing. But the defender was unsuccessful on the separate argument about late acceptance of the tender. Accordingly, there has been divided success. As a result, I shall find no expenses due to or by either party in respect of the hearing before me on 6 November 2017.