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

[2018] SC EDIN 9

PN1961/16

JUDGMENT OF SHERIFF R D M FIFE

In the cause

GILLIAN ROSE MCKENNA

Pursuer

Against

DR CHARLES DAVID CHAPMAN

Defender

Opposed Motion hearing on 8 January 2018

[1] A proof in this personal injury action is assigned for 20 February 2018.

[2] An opposed motion, 7/8 of process, called before the court on 8 January 2018. Mr Campbell, Advocate appeared for the defender. Mr Davidson, Advocate appeared for the pursuer. The motion was in the following terms:

> "On behalf of the defender to grant decree of dismissal in terms of Sheriff Court Rule 36.L1(2)(c) which failing to grant summary decree."

Submissions for defender

[3] Counsel for the defender referred to the case of *Maclay Murray & Spens* v *Orr* 2014 GWD 18-330 being a decision of Sheriff Principal Scott as providing useful guidance on motions for summary decree. Counsel referred in particular to paragraphs [22], [47], [48], [62] and [63].

[4] It was submitted on behalf of the defender that while it was accepted there were disputed issues of fact in the case, on the documents before the court the action should not proceed to proof as the pursuer had no real prospect of success.

[5] At paragraph [48] the Sheriff Principal states:

> "In applying the rule regarding summary decree, in my view, the court requires to undertake a qualitative assessment of the case which is claimed to have no real prospect of success. In most situations, that will involve scrutiny of the pleadings and analysis of any material said to be the foundation for a party's case".

[6] Applying that statement to the present case, it was submitted the court should scrutinise the pleadings and the two expert reports lodged on behalf of the pursuer.

[7] Counsel also relied on what was said by the Sheriff Principal at paragraph [63] where the Sheriff Principal quoted from observations of Lord Hope in Three Rivers [2001] 2 All ER 513 at 542:

> "… It may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be to take [*sic*] that view and resort to what is properly called summary judgement".

[8] The decision of the Sheriff Principal was approved by the Inner House, on appeal, reported at 2014 CSIH 107. Counsel referred to paragraphs [15], [16], [17] and [21].

[9] At paragraph [21] the court states:

> "As LJ Potter explained (*ED & F Man Liquid Products Ltd* v *Patel & Anr* [2003] EWCA Civ 472) the court does not have to accept, without analysis, everything said in the documents by, or on behalf of, the party whose case is being challenged as being without real prospects of success".

[10] In summary, counsel for the defender submitted the pursuer had no real prospect of proving causation and loss. There was no fair notice of causation and loss. The averments on causation and loss were irrelevant.

[11] Counsel then referred the court to the two expert reports for the pursuer:

5/1/1 - Reported by Dr David Ashcroft.

5/2/2 - Medical Report by Dr Michael Jones dated 7 September 2017.

Report by Dr Ashcroft

Dr Ashcroft was an experienced general practitioner and educational supervisor of doctors training in general practice. Dr Ashcroft had particular experience with Lyme disease.

It was submitted on behalf of the defender that the report was not helpful to the pursuer but that the report did assist the defender. At section 14 of the report under the heading Causation Dr Ashcroft had concluded with the following:

> "… but in my professional opinion there is no clear causation in this case".

Dr Ashcroft recommended an opinion be taken from an infectious diseases specialist. The pursuer had incorporated the report from Dr Ashcroft into the pleadings but, it was submitted, it was difficult to see how that could assist the pursuer when there was no clear causation in the case according to Dr Ashcroft.

Report by Dr Jones

Counsel took objection to the report from Dr Jones. The report did not meet the requirements for an expert report with reference to the Supreme Court case of *Kennedy* v *Cordia (Services) LLP* [2016] UKSC 6 at paragraphs [38], [39] and [48]. At paragraph [48] the court states:

> "An expert must explain the basis of his or her evidence when it is not personal observation or sensation; mere assertion or "bare *ipse dixit*" carries little weight, as the LP (Cooper) famously stated in *Davie* v *Magistrates of Edinburgh* (p40). If anything, the suggestion that an unsubstantiated *ipse dixit* carries little weight is understated; in our view such evidence is worthless…"

[12] Counsel submitted that an expert report required a reasoned conclusion as opposed to just a conclusion. In so far as there were any conclusions within the report from Dr Jones

there was, it was submitted, a complete absence of reasons for the conclusions. By way of example counsel referred to section 3 of the report where Dr Jones commented on a review in 2011 by the British Infection Association with expert recommendations on Lyme Disease diagnosis and management. Standing the pursuer's previous medical history counsel submitted Dr Jones would have to explain how the pursuer's symptoms fell within the category of 1 in 1000 cases of untreated Lyme borreliosis.

[13] In the conclusions at section 6 Dr Jones states at 6.3:

> "Mrs McKenna may have developed neuroborreliosis as a consequence of the delay in treatment. This cannot be, and was not confirmed, but in my view it is reasonable to conclude that some at least of her continued symptoms are a consequence of this complication of Lyme disease".

[14] Dr Jones used the term "may"; that was a possibility and not on the balance of probability. Dr Jones did not explain which of the pursuer's continued symptoms were as a consequence of the complication of Lyme disease.

[15] Counsel submitted:

> "At its highest the pursuer may have had some unspecified symptoms as a consequence of a complication which may have developed from a delay in treatment but Dr Jones could not confirm that".

[16] At 6.2 and 6.3 Dr Jones had made inappropriate conclusions on negligence where he was not a general practitioner and he had never been a general practitioner.

[17] The conclusions by Dr Jones at 6.3 were bare *ipse dixit* and, in accordance with *Kennedy*, were worthless. Even if the conclusions were not bare *ipse dixit* there was no reasonable prospect of the pursuer succeeding on causation as the opinion of Dr Jones went nowhere near what the pursuer would need to prove in order to satisfy the court there was any loss from any alleged negligence.

[18] On loss, it was submitted there had been no fair notice to the defender as to what would have been the condition of the pursuer but for the alleged negligence. There was no proper foundation for what losses were claimed in the pleadings (condescendence 7). The losses averred in the pleadings were entirely unsupported by the expert evidence. In fact, the losses were to a large extent, if not completely, contradicted by the evidence.

[19] The test for summary decree had been met and there existed no other compelling reason why summary decree should not be granted in terms of rule of court 17.2(2)(b). Counsel highlighted the substantial costs which would be incurred unnecessarily if the proof had to proceed when there was no real prospect of success. In any event looking at the pleadings the case against the defender was irrelevant: confused by incorporating the report from Dr Ashcroft, entirely lacking in fair notice what symptoms were attributable to the negligence and what would be the pursuer's condition but for the negligence, and why the delay had made any difference.

Note: While counsel indicated these would be preliminary points raised before any proof started, counsel accepted the court might hear the evidence under reservation.

[20] It was submitted the medical records contradicted the pursuer's position, all as detailed in the defences. Counsel noted there had been no adjustment to the pleadings by the pursuer in response to the detailed defences.

[21] Counsel accepted, however, that if the court were to accept the pursuer's account on record of the consultation with the defender on 25 September 2013 there would be liability on the part of the defender but it was submitted the pursuer had no real prospect of proving any loss. In conclusion, counsel submitted the test for summary decree had been satisfied, there was no real prospect of success and the court should either grant summary decree or dismiss the action as irrelevant.

Submissions for pursuer

[22] As a preliminary point counsel for the pursuer challenged the competency of the motion for summary decree as the defender could have raised points about specification or relevancy under rule of court 36.G1(5) and (7). The defender had not opposed the motion for a proof. What the defender was now seeking to do was to constitute a hearing in the form of a mini-trial with a detailed critique of the pleadings and productions for both parties. The defender was, in effect, usurping the role of the trial judge after hearing evidence. It was submitted by counsel that the motion for summary decree came too late with a proof assigned for 20 February 2018, a matter of weeks away.

[23] Moving on to the merits of the motion for summary decree counsel referred to the Greens Sheriff Court Annotated Rules 2017-2018 ("Sheriff Court Annotated Rules") at pages 80-81. Counsel submitted the defender had over-emphasised what could be taken from the case of *Maclay Murray & Spens* v *Orr*. That case was fact specific and could be distinguished from the facts and circumstances in the present case. In order to obtain summary decree the defender or pursuer had to demonstrate some kind of abuse of process. The bar was set very, very high for that.

[24] Referring to cases at page 81 of the Sheriff Court Annotated Rules these were examples of an abuse of process. For example, in a personal injury action a conviction might be lodged but denied by the defenders. That could be seen as a delaying tactic and abuse of process.

[25] In the present case, the pursuer rightly or wrongly stood by what was said on record. The defender challenged almost every single aspect of what happened at the consultation between the pursuer and defender on 25 September 2013. It was submitted the court could

not form any view on that dispute in the absence of hearing evidence. The GP record by the defender of the consultation was not conclusive. The pursuer had had no opportunity to check what had been recorded. The pursuer's position was that she was challenging what the defender had recorded of the consultation. The pursuer was entitled "to her day in court".

[26] The defender's own experts had stated, in terms, that if the pursuer were to be believed about what happened at the consultation on 25 September 2013 over the defender then the duty of care on the defender would have fallen below the standard in *Hunter* v *Hanley*. The defender should not seek to usurp the function of the court.

[27] On causation counsel submitted the same submissions applied *mutatis mutandis*. Dr Jones had the appropriate qualifications as a consultant in infectious diseases. That had not been challenged by the defender. Counsel was confident Dr Jones would establish fault on the part of the defender by giving evidence.

[28] The case of *Maclay Murray & Spens* v *Orr* could be distinguished on the facts as the defender was not present at the critical meeting. The defender's wife was at the critical meeting but she did not speak to what happened at that meeting in her affidavit. In any event, the defender in that case was "putting off the evil day". There was a counterclaim based on a breach of confidentiality at a meeting but, as counsel had already stated, the defender's wife made no mention of the meeting in her affidavit in support of the counterclaim.

[29] Overall, it was submitted the present case involved a straightforward dispute on the facts. If the defender was preferred in evidence then the case would not succeed. Counsel recognised the case would have been hanging over the defender for many years but if decree

of absolvitor was granted the defender could seek expenses against the pursuer. The pursuer was not legally aided but she did have legal expenses insurance.

[30] On the question of legal expenses insurance counsel informed the court that the pursuer's legal team had to advise the insurers on the prospects of success. The prospects of success had to be more than 51% before the insurers would provide cover. That is what had happened. It was submitted it would be very difficult for the court to take the opposite view, namely, that there was no real prospect of success in the absence of hearing evidence. There was nothing approaching an abuse of process in the present case. As Lord Reed had said in a lecture "Lies, dammed lies: Abuse of Process and the dishonest litigant" from 26 October 2012 the court should not be dismissing actions unless it appears that the litigant "is determined to subvert the adjudicative process by fraudulent means" – a dishonest litigant preventing a fair trial.

[31] For all these reasons, it was submitted the motion for summary decree should be refused.

Supplementary submissions for defender

[32] In reply to the submissions for the pursuer counsel for the defender disagreed that a motion for summary decree in terms of rule of court 17.2 required there to be an abuse of power. The lecture by Lord Reed was about abuse of process and dishonest litigation. The lecture had nothing to do with summary decree. The pursuer's reliance on the Lord Reed lecture was wholly misconceived.

[33] The cases annotated at page 81 of the Sheriff Court Annotated Rules all pre-dated the 2012 rule 17.2. These cases were concerned with the previous rule which was for summary decree on the basis there was no defence. The test now was different.

[34] The Sheriff Principal in *Maclay Murray & Spens* v *Orr* was right to look at the case of *ED and F* as the rule in England was similar to the rule in Scotland.

[35] A motion for summary decree at this stage of the action was not incompetent. Rule 17.2 provided that a motion for summary decree could be made "at any time after defences have been lodged".

[36] Even if there was a stark dispute on the facts that did not cure any of the difficulties on causation and loss for the pursuer, none of which had been addressed by the pursuer in his submissions. The pursuer had ignored the content of the experts' opinions. The motion for summary decree should be granted.

Discussion and decision

[37] I am not persuaded that the court should consider granting a motion for dismissal on the grounds of relevancy with a proof in the action assigned to take place on 20 February 2018, within a matter of weeks. On the question of relevancy there was, in my view, force in the submissions for the pursuer that any concerns the defender may have had about relevancy could have been addressed under rule of court 36.G1(5) and (7) when a motion was lodged for a proof to be allowed. The defender could have sought a debate. The defender chose not to take that course of action. I have concluded the motion to dismiss the action on the grounds of relevancy comes too late and is refused.

[38] Rule of court 17.2 is in the following terms

> (1) Subject to paragraphs (2) to (4), a party to an action may, at any time after defences have been lodged, apply by motion for summary decree in accordance with rule 15.1(1)(b) (lodging of motions) or rule 15A.7 (lodging unopposed motions by email) or rule 15A.8 (lodging opposed motions by email) as the case may be.
>
> (2) An application may only be made on the grounds that—

(a) an opposing party's case (or any part of it) has no real prospect of success; and

(b) there exists no other compelling reason why summary decree should not be granted at that stage.

(3) The party enrolling the motion may request the sheriff—

(a) to grant decree in terms of all or any of the craves of the initial writ or counterclaim;

(b) to dismiss a cause or to absolve any party from any crave directed against him or her;

(c) to pronounce an interlocutor sustaining or repelling any plea-in-law; or

(d) to dispose of the whole or part of the subject-matter of the cause.

(4) The sheriff may—

(a) grant the motion in whole or in part, if satisfied that the conditions in subparagraph (2) are met,

(b) ordain any party, or a partner, director, officer or office-bearer of any party—

(i) to produce any relevant document or article; or

(ii) to lodge an affidavit in support of any assertion of fact made in the pleadings or at the hearing of the motion.

(5) Notwithstanding the refusal of all or part of a motion for summary decree, a subsequent motion may be made where there has been a change in circumstances.

[39] Each case must be considered on its own facts and circumstances. It is accepted on behalf of the defender that there is a dispute on the facts, namely, what happened at the consultation with the defender on 25 September 2013. Indeed, the defender goes further than that. It is accepted on behalf of the defender that if the pursuer's account on record of what happened at the consultation on 25 September 2013 is accepted by the court then there would be a liability on the part of the defender. It is stated, however, that even if liability is established the pursuer has no real prospect of success in that the pursuer will not prove any loss.

[40] I am not persuaded the submission that the pursuer will not prove any loss is sound. At condescendence 7 the pursuer sets out a number of heads of claim. The pursuer has a claim for travel and subsistence expenses. The pursuer has a claim for inconvenience. The pursuer claims she has had to undergo various tests and treatments which have been distressing for her. The pursuer claims she has suffered from anxiety. The pursuer offers to prove she has suffered a variety of symptoms. The pursuer then proceeds to list those symptoms. The defender may raise objections at proof on relevancy and lack of specification, but the pursuer has given fair notice of a series of claims which the pursuer offers to prove. The onus is on the pursuer to prove the losses she claims. On the productions before the court and a consideration of the case generally it may be the pursuer will have difficulty in proving losses but I have concluded it could not be said the pursuer cannot or will not prove any loss.

[41] The present case can be distinguished on the facts from *Maclay Murray & Spens* v *Orr*. As Sheriff Principal Scott stated at para [64]:

> "It is clear the counterclaim is, in effect, contradicted by all the documentation in the case with one exception, viz. Mrs Orr's affidavit which, in itself, does not support the counterclaim."

[42] Counsel for the defender submitted that all the documentation contradicted the pursuer. Is that correct?

[43] Some of the documentation may require an explanation from the pursuer as being potentially at odds with the pursuer's account on record. The pursuer challenges the GP record of the consultation on 25 September 2013. For all I know the pursuer may be able to explain what is contained within other documents that may be contradictory to the pursuer's account of what happened on 25 September 2013.

[44] It is in my view incorrect for counsel for the defender to submit that all the documentation contradicts the pursuer. The two medical reports for the pursuer do not contradict the pursuer. As might be anticipated, what Dr Ashcroft states in his report is dependant on the pursuer's account of what happened at the consultation with the defender on 25 September 2013 being accepted by the court and preferred to the account of the defender. That is why Dr Ashcroft phrases his views on liability in the following terms at page 11 of his report under the heading Liability:

> "*If* Dr Chapman was aware of a recent tick bite during the consultation on 25 September 2013, *and if* the rash presented that day had an appearance of Erythema Migrans, then Dr Chapman's care of the pursuer has been negligent".

[45] Similarly, the conclusion of Dr Jones at para 6.2 of his report that the defender was negligent is dependant on the pursuer's account of what happened at the consultation with the defender on 25 September 2013 being accepted by the court and preferred to the account of the defender.

[46] Whether or not the reports from Dr Ashcroft and Dr Jones satisfy the requirements for an expert report in terms of *Kennedy* are for the Sheriff to determine after proof.

[47] The medical report from Dr Gourlay for the defender concludes at para 5.3:

> "If a court were to fully accept Ms McKenna's recollection of events then there would be a clear Breach of Duty on the part of Dr Chapman, but not in regard to any other practitioner."

[48] Dr Gourlay summarises the position at para 1.4:

> "There is clearly a major factual dispute inherent in this case in regard to the presentation of Ms McKenna to Dr Chapman on the 25th September 2013. Such disputes are essentially in the gift of a Court and not capable of final settlement within a Liability Report."

[49] Counsel for the pursuer sought assistance from what Lord Reed had said in a lecture "Lies, dammed lies: Abuse of Process and the dishonest litigant" from 26 October 2012. I do

not consider that lecture relevant to the motion for summary decree. The lecture was focused entirely on abuse of process and the dishonest litigant. As counsel for the defender submitted the lecture makes no mention of summary decree.

[50] Counsel for the pursuer submitted that in order to obtain summary decree the defender or pursuer had to demonstrate some kind of abuse of process. I reject that submission. There may be circumstances where in support of a motion for summary decree it is submitted there has been an abuse of process but that is only one possibility in seeking to persuade a court that the relevant party has no real prospect of success. That is not the situation in the present case. The terms of rule of court 17.2 are clear. An application for summary decree may only be made on the following grounds (a) that the opposing party has no real prospect of success **and** (b) that there exists no other compelling reason why summary decree should not be granted. There is no mention of abuse of process within the rule.

[51] After considering the pleadings, all the productions now before the court and the submissions for both parties, I agree with what was said by Dr Gourlay at para 1.4 of his report that there is "a major factual dispute inherent in this case in regard to the presentation of Ms McKenna to Dr Chapman on the 25th September 2013" which can only be determined at proof. I reject the proposition that the pursuer has no real prospect of success **and** that there exists no other compelling reason why summary decree should not be granted. That is a twofold test. That is a high test to overcome. I have concluded that test has not been met. The motion for summary decree is refused.

[52] As I indicated at the conclusion of the hearing on 8 January 2018 I sanction the employment of junior counsel for preparing for and conducting the hearing. As I was asked, I reserve otherwise all questions of expenses. If parties agree on expenses in relation to the

motion the matter can be dealt with administratively. If not, parties should contact the Sheriff Clerk to set up a hearing on expenses.