SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2018] SC EDIN 15

PN2101/17

NOTE BY SHERIFF K J MCGOWAN

in the causes

WILLIAM CULLEN

Pursuer

against

SCAN BUILDING SERVICES LTD

Defender

NOTE

Introduction

[1] This case settled by tender and acceptance. The pursuer's motion for decree was opposed in one respect only, namely, the certification of the cause as suitable for the employment of counsel.

Submissions for pursuer

[2] The test to be applied in terms of Section 108 of the 2014 Act had been discussed in *Cumming* v *SSE plc* 2017 Rep LR 82.

[3] The case settled on 10 January. Counsel had played a meaningful role in this case.

[4] The sum sued for had been £50,000. The claim arose from an accident at work. The pursuer had suffered an acute rotator cuff injury. He had been off work for 6 months.

[5] Liability had been denied and quantum was disputed. The action had been raised in August 2017. It had settled for £11,750.00 which was a significant sum and more than the former privative jurisdiction of the Court of Session. The sum tendered had reflected a degree of contributory negligence.

[6] The pursuer's valuation totalled just over £38,000 with a loss of employability claim valued at £14,000. That claim was based on the terms of the orthopaedic report.

[7] Acceptance of a particular sum tendered does not mean that the claim was not worth a lot more. Pursuers needed to take account of risk in deciding whether to accept or reject an offer. At nearly £12,000, this was not a low value case.

[8] There were complexities on liability. It was accepted that the factual matrix was not complex. There could have been difficulties on the evidence as the defenders said that the pursuer had been walking backwards.

[9] Liability had not been admitted. That gave rise to likely difficulty in the case.

[10] The legal basis of the case was an alleged breach of the defenders' common law duties. Cases of this type had been rendered more difficult by the change in the law brought about by section 69 of the Enterprise and Regulatory Reform Act 2013.

[11] Establishing foreseeability could have been problematic given the absence of information about earlier accidents. There was no information to suggest that the practice of leaving the pallet truck in the location in question was a practice which was regularly carried out. The onus was on the pursuer to establish foreseeability as a matter of probability.

[12] The case was of importance to the pursuer. He had worked for the defenders for some 37 years and was still employed by them. In these circumstances, the way the case was prepared and presented required skill and care. The pursuer was keen to obtain

compensation that was sensitive to the fact that this was a claim brought against his employers. Sensitive cross examination of witnesses was required and counsel was skilled in such. The pursuer's colleagues may have been called to give evidence and the pursuer would have benefited from counsel's skill in advocacy.

[13] It was accepted that there was a difference in the parties' valuations but this should not be taken into account.

[14] The work carried out by counsel had been the drafting of the initial writ and the specification of documents; a consultation during the adjustment period; preparation of adjustments; preparation of the statement of valuation; and consultation on the tender.

Submissions for defenders

[15] The test to be applied was one of "objective reasonableness": *Cumming*.

[16] The factual matrix was not complicated and much of the pursuer's factual case was admitted. There was a dispute about the direction in which the pursuer was walking.

[17] Liability was based on the common law which was not difficult. The statutory regulations were still relevant to inform the position.

[18] There was an issue about contributory negligence but this was not complicated.

[19] The defenders valued the case on a full liability basis at £15,000 and it settled for 75% of that figure. The pursuer had suffered an injury to his shoulder. The defenders had accepted the pursuer's medical report and had not put forward any competing medical evidence. The injury details were straightforward.

[20] Valuation of a case of this type was relatively straightforward by reference to the Judicial College Guidelines. The maximum award for solatium would have been about £15,000.

[21] The pursuer made a claim for loss of employability but he had remained in his pre-accident employment and was still so employed now. There was no competing medical evidence about ongoing symptoms. The pursuer did not offer to prove how he had been made less employable and there was no reason put forward to support such a claim, such as potential job loss. In the event, it was clear that the pursuer had not insisted on that head of claim and thus there was no true claim for loss of employability.

[22] Accordingly, the court should find that there was no actual or likely difficulty or complexity in the case justifying the employment of counsel.

[23] The case was not one of high value. The evidence showed that the pursuer had made a good recovery. It had not been suggested that the pursuer's credibility was under attack.

[24] In all the circumstances, it was not reasonable to instruct counsel.

[25] There was no reason why the writ or specification should have been drafted by counsel. The adjustments which had been prepared were neither detailed nor lengthy and did not materially alter the pursuer's position on record. It was no requirement for consultation during the adjustment period.

[26] The valuation of the case was straightforward. Although included in the statement of valuation, there were no averments about loss of employability.

[27] There was no need for a consultation on the tender.

Discussion and disposal

[28] A decision by the court on whether or not to sanction the employment of counsel by a party for the purpose of the proceedings is a discretionary one, by reference to the standard of "objective reasonableness": section 108(2), Courts Reform (Scotland) Act 2014 ("the Act"); *Cumming*.

[29] In exercising its discretion, the court must take into account certain specified factors: section 108(2); and may take into account any other factors it considers relevant: section 108(4).

[30] The mandatory factors to be taken into account are:

(a) whether the proceedings are such as to merit the employment of counsel, having particular regard to—
  (i) the difficulty or complexity, or likely difficulty or complexity, of the proceedings and/or
  (ii) the importance or value of any claim in the proceedings;
  and
(b) the desirability of ensuring that no party gains an unfair advantage by virtue of the employment of counsel.

[31] Where reliance is placed on a factor (mandatory or otherwise) the party seeking sanction must be in a position to (i) point to material or information which supports the factor relied on and (ii) show a link between the factor relied upon and the decision which the court is being invited to make.

Actual or potential difficulty or complexity

[32] Where reliance is placed on this factor, there should be clarity about the precise nature of the difficulty/complexity. Is it to do with the evidence? Is it to do with the facts? Is it to do with the applicable law? Is it to do with some aspect of valuation (e.g. numerous heads of claim or medical causation)?

[33] Once the actual or potential difficulty has been identified, it is necessary then, first, to show how it leads to the conclusion that the proceedings are such as to merit the

employment of counsel; and, second, how that informs the test of "objective reasonableness"?

[34] I did not find persuasive any of the points put forward in support of the argument that this case was actually or potentially difficult or complex. It was accepted that there were no evidential complications and that the factual matrix was not difficult or unusual. The case was essentially a tripping case in the workplace. The common law basis of such claims is well known and well understood. Even if I were to accept that the apparent lack of evidence to bolster the issue of foreseeability render the case difficult or complex, it was not explained to me how that showed that the case merited the employment of counsel. The valuation of the claim appeared to me to be straightforward.

Importance

[35] Ms Nicholson alluded to some sensitivity around the possibility of the pursuer's colleagues having to be examined in evidence. In my view, the submission was not developed to any meaningful extent. It was not explained to me why counsel might be capable of being more "sensitive" in their examination of witnesses; or indeed why that might matter.

[36] In the whole circumstances, I am not persuaded that any of the factors relied on by the pursuer in this case have been made out. In any event, it is not been demonstrated to my satisfaction that any such factors, if established, showed that the employment of counsel was reasonable.

Disposal

[37] I shall grant the pursuer's motion, other than insofar as sanction for the employment of counsel is sought, which is refused. It was agreed that "expenses should follow success". Accordingly I shall find the pursuer liable to the defenders in the expenses occasioned by the opposed motion.