SHERIFFDOM OF LOTHIAN AND BORDERS

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2018] SC EDIN 26

PN636/17

NOTE BY SHERIFF KENNETH J McGOWAN

in the cause

NEIL ROBERTSON

Pursuer

against

ESURE INSURANCE LTD

Defender

Pursuer: Sellar; Thompsons
Defender: Harvey; Clyde & Co

Edinburgh, 26 April 2018

Introduction

[1] This case came before me on the pursuer's motion for decree, opposed only insofar as sanction for the employment of junior counsel was sought.

Pursuer's submissions

[2] Sanction in respect of the whole case was sought. It was not suggested that there was any difficulty or complexity on the facts. The pursuer was not founding on value. The case had settled at the pre-trial meeting for £5,000 plus expenses on the ordinary cause scale.

Importance

[3] This factor alone was sufficient to justify sanction. It arose from the potential impact of a possible adverse finding on credibility on the pursuer's chosen career as a solicitor. At the time, the pursuer was a trainee solicitor.

[4] Reliance was placed on the decisions in *Brown* v *Aviva Insurance* [2016] LIV 84; *Brown* v *Aviva Insurance* [2017] SAC (Civ) 34; and *McCracken* v *Kazanowski* [2017] SC EDIN 80. The decision in *Brown* was on all fours with the present case.

[5] The pursuer had made a late career change. The import of the defences was that the pursuer was lying. The pursuer had not consulted his doctor and the absence of contemporaneous medical information put him in a more difficult position evidentially.

[6] The defender's position was that this was a low impact collision.

[7] The result was that the pursuer, if the case went ahead, was at risk of the court making adverse comments about his credibility. Counsel was instructed at the stage of adjustment for a consultation.

[8] In the case of *Brown*, the pursuer was a serving police officer and that had been treated as a relevant factor.

[9] It was an inherent part of the structure of the profession in this jurisdiction that there was a potential advantage to be gained by employing counsel. Counsel were specialist pleaders and able to focus more easily on cases due to the lack of distraction from matters required by solicitors in the running of a practice such as phone calls in connection with other cases.

[10] In due course, the question as to whether the pursuer was a "fit and proper person" to be admitted as a solicitor was going to be crucial to him.

[11] In *Brown*, the court had specifically considered the importance of the risk to the pursuer of a finding that he was not a credible witness.

[12] In the profession nowadays, there was a lot of competition for post-training places.

[13] The result was that in this case, the stakes were higher than for other pursuers not similarly affected.

[14] It was also possible that there may have been allegations of attempted fraud in the sense that it may have been suggested that the pursuer was making an exaggerated claim for repairs to his vehicle.

Difficulty

Conflict in authorities

[15] There were conflicting authorities in Scotland on where the evidential burden lay in respect of "spot rates": *Gee* v *AXA* 2012 WL 349 2440 (a decision of the Sheriff Principal in this Sheriffdom); cf *Allan* v *Amlin UK Ltd* 2014 SLT 75 (a decision of the Outer House).

[16] This made it difficult to advise credit hire companies and pursuers.

[17] The basis for the decision in *Gee* was not obvious.

[18] In addition, the approach in Scotland seems to have been to utilise an average rate, which went against the English authorities from the Court of Appeal which said that the lowest rate and not the average should be used.

[19] None of the English authorities had been mentioned in the Scottish decisions. All of this led to a difficulty in giving advice.

Potential conflict of interest

[20] The pursuer's solicitors in this case were instructed not only by him but also by the credit hire company to whom certain rights to control the conduct of the claim in respect of the hire charges were contractually subrogated.

[21] It was clear that only one action could be raised in respect of all claims: *Giles* v *Thompson* [1994] 1 AC 142.

[22] Accordingly, there were evidential difficulties in advising on settlement when a global settlement figure was put forward and not broken down in any respect into constituent elements.

[23] The pursuer's solicitors received instructions on a regular basis from the credit hire companies. In order to avoid any appearance of conflict of interest, it was appropriate to instruct counsel to provide advice to the pursuer. Counsel would be seen as independent.

Submissions for defender

[24] This was a straightforward claim arising from a road traffic accident. The sum sued for was £17,000 and the case settled for £5,000.

[25] The pursuer's solicitors were a firm of specialists with expertise in road traffic and hire cases.

[26] The fact that there was a credit hire claim did not make the case complex: *McDonald* v *Zurich Insurance* [2012] CSOH 65, paragraph 27.

[27] A claim of this type was well within the capabilities of the pursuer's agents.

[28] Global settlement figures were put forward in nearly every case of this type. If that were a ground justifying the employment of counsel, that would affect every case. That should not be necessary.

[29] The presence of a factual dispute in a case and the importance of a case to the particular pursuer were not necessarily factors which justified the employment of counsel: *MacKenzie*, paragraphs [11], [13] and [16]; *Queen* v *Enjoy East Lothian Ltd*, Sheriff Mackie 10 July 2017, unreported.

[30] The pursuer's motion for sanction should be refused.

[31] In the alternative, if the pursuer's motion was to be granted to any extent, it was unreasonable to instruct counsel at the adjustment stage. Counsel's fees in this case exceeded £2,500. That was disproportionate. If it was appropriate to use counsel at all, sanction should be restricted to conducting the pre-trial meeting.

[32] All pursuers potentially faced challenges to their credibility. The fact that the pursuer was a first year trainee did not alter the position. His future career prospects would have been more likely to depend on his performance during his traineeship rather than anything arising from the result of this case.

Reply for pursuer

[33] It was not open to the court to restrict the sanction of counsel to particular pieces of work such as the pre-trial meeting, which did not involve drawing papers or appearances: Act of Sederunt (Sanction for the Employment of Counsel in the Sheriff Court) 2011/404. Timeous instruction of counsel was appropriate: *Sheriff Court Practice*, MacPhail, third edition, paragraph 12.22.

Discussion

[34] The task before me is to decide whether to grant sanction for the employment of counsel if I consider, in all the circumstances of the case, that it is reasonable to do so:

section 108(2), Courts Reform (Scotland) Act, 2014 (" 2014 Act"). In carrying out that exercise I must approach it from the point of view of "objective reasonableness": *Cumming* v *SSE plc* [2017] SAC (Civ) 22.

[35] As part of the foregoing exercise, I must have regard to whether the proceedings are such as to merit the employment of counsel, having particular regard to certain specified factors: section 108(3)(a), 2014 Act.

Importance

[36] The proposition here was that the case was of particular importance to the pursuer because of the potential impact on him of a possible adverse finding as to his credibility, if the matter were to proceed to proof and judgement.

[37] I accept that in principle that is a factor which could demonstrate that the proceedings were such as to merit the employment of counsel and hence be relevant in satisfying the test of "objective reasonableness".

[38] But there are two points to be made at the outset. First, whether such a circumstance will lead to the test of "objective reasonableness" being satisfied will depend on (i) the particulars of the case in relation to the nature of the decision that might be made by the court as to credibility and its potential impact on the party affected; and (ii) the weight to be afforded to that factor, taking account of all the other circumstances of the case: sections 108(2) and (4).

[39] In the present case, according to the pleadings in the Record, the fact of a collision is not disputed. The 'weight' of the collision is not specifically averred by the pursuer. The defender's position is that it was extremely light.

[40] The pursuer goes on to aver that as a result of the collision, he was jolted and thereafter suffered certain soft tissue injuries to his neck and back; and developed an adjustment disorder. The defender's averments in answer to that head of claim do not make a positive case that the pursuer is lying or indeed exaggerating. Instead, the focus appears to me to be on the issue of causation, relying in particular on the pursuer's pre-accident medical problems. I observe, in passing, that these are alluded to or covered in the pursuer's own medical reports.

[41] The next head of claim is the cost of repairs, said to be £1,428.65. Beyond the standard averment that the sum sued for is excessive, the defender does not challenge that figure but seeks vouching in respect of it. The next head of claim is the higher cost for a replacement car said to be £4,938. Again the amount of that claim was not challenged but rather vouching is sought in respect of it. The nature of the challenge is whether it was necessary and reasonable for the pursuer to obtain access to a replacement car *via* a credit hire agreement.

[42] Pausing there, I am unable to detect any suggestion that the defender's position is that the pursuer was lying or exaggerating.

[43] There are cases where one party makes a root and branch of attack on the credibility of another party. Based on my reading of the matters in dispute in this case, taken from the Record, this case does not fall into that category.

[44] In the case of *Brown*, the matter proceeded to proof and thus the Sheriff at first instance was in a good position to assess the actual nature of the defenders' approach to the case. Having done so, he categorised the approach as being or encompassing an attack on his credibility.

[45] In my opinion, the present case is distinguishable. It appears to me that it is in fact unlikely that a particularly acute decision about the pursuer's credibility would have arisen for determination if the matter proceeded to proof. And even if such a decision on credibility had been required, I am not satisfied that it is likely that the court would have been in the position of having to adjudicate on the binary question "honest" or "a liar".

[46] Even if I am incorrect in my view that the issue of credibility would not arise sharply in this case, in my opinion, the question as to how important that made the case, and whether that level of importance was sufficient to merit the employment of counsel depends on the other circumstances. By that I mean that the issue of credibility does not arise in a vacuum. It depends on, for example, what other evidence is available. In this case, it appears that the pursuer had an eye witness. The pursuer's solicitors had access to medical reports which they had commissioned. Presumably, they were party to financial information pertaining to the pursuer which enabled them to make an assessment about the issues arising around the credit hire arrangement.

[47] In the circumstances, I am not satisfied that, taking account of importance, the proceedings were such as to merit the employment of counsel. Accordingly, it cannot be a circumstance which goes to satisfy the test of "objective reasonableness".

Difficulty

Conflict in authorities

[48] In my opinion, this can be dealt with shortly. Firstly, on the basis that there is what is accepted to be a decision of the Sheriff Principal in the Sheriffdom which is binding, then there is not truly a conflict in authorities at all. Secondly, it is not at all clear to me that there

is a conflict in these authorities. I do not agree that the basis for the decision in *Gee* is not clear. In any event, the issues arising were not the same: *Allan*, paragraph [20].

[49] Thirdly, a conflict between the Scottish and English authorities, if such exists, is nothing to the point. The law is Scotland is tolerably clear.

[50] In any event, assuming that there is a conflict in authorities, it was not explained to me how any link between any difficulty in the case thereby created in turn led to an affirmative answer to the question "was it reasonable to instruct counsel?"

[51] This was particularly so when it was evident that Mr Sellar was very familiar with the jurisprudence, both English and Scottish, on this issue; the potential evidential consequences of that jurisprudence; and the tactical choices that might have to be made as a result of it.

Potential conflict of interest

[52] If there is a conflict of interest, the introduction of counsel into the equation does not resolve that issue – though I can see that it may do so from the point of view of appearances in advising the pursuer. But that consideration cannot, in my opinion, be one which is part of the "difficulty of the proceedings".

[53] I say that because it arises from the pursuer's agents electing to act for the pursuer and for the credit hire company. That choice and any difficulties it may create in relation to conflict appears to me to be external to the proceedings and not part of them.

Conclusion

[54] In conclusion, none of the factors relied on by the pursuer in this case, either individually or collectively, are of sufficient weight to satisfy me that the proceedings were such as to merit the employment of counsel.

[55] It was a matter of agreement that no other circumstance merited the employment of counsel. The case was relatively low value and the facts giving rise to it were not complex. Accordingly, I do not consider that it would be reasonable to sanction the employment of counsel in this case and that part of the motion is refused.

[56] I was not addressed on the expenses of the motion. If parties can resolve that between them, good and well. If they cannot, my clerk should be contacted with a view to a hearing on expenses being arranged.