SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2018] SC EDIN 34

PIC-PN1597-17

NOTE BY SHERIFF PETER J BRAID

in the cause

GARY BROADLEY

Pursuer

against

UK INSURANCE LIMITED

Defender

Pursuer: Sellar;
Defender: Laing;

Edinburgh, 6 June 2018

The sheriff, having resumed consideration of the cause, refuses the defender's reponing note number 2 of process.

NOTE

Introduction

[1] The defender's reponing note in this personal injuries action called before me on 28 May 2018. The decree in absence reponed against, in the sum of £25,000, was granted on 22 September 2017.

Chronology

[2] The defender had helpfully prepared an agreed chronology of events. Like the reponing note itself, much of this related to the period before the action was raised. As such, I do not propose to go through it line by line, but the salient facts emerging from it are as follows. It was common ground that the road traffic accident giving rise to the claim occurred on 25 February 2016. The Kerr Brown Partnership intimated a claim for damages to the defender[1] on behalf of the pursuer on 26 February 2016 in respect of personal injury, miscellaneous costs and inconvenience. On 18 April 2016, Accident Exchange intimated (seemingly by telephone) a claim for the pursuer's credit hire charges. Thereafter, a claim was intimated on behalf of the defender's insured in respect of outlays which he had incurred as a result of the accident. That claim was settled by solicitors acting for the pursuer's insurance company in November 2016. On 27 September 2016, a letter was sent by the pursuer's present solicitors to the defender intimating a claim for personal injuries sustained by the pursuer. On 4 June 2017 the initial writ was warranted, seeking damages in respect of the pursuer's injuries, and hire costs of £19,867.80. It was served on the defender by recorded delivery on 6 June 2017. The last date for lodging a notice of intention to defend was therefore 28 June 2017[2]. On 12 September 2017 the pursuer minuted for decree in absence, which was pronounced on 22 September 2017. On 1 November 2017, and again on 29 November 2017, emails were sent by the pursuer's solicitors to the defender informing them that decree had been granted in absence. Having had no reply, an email was sent to the defender's solicitors, Plexus Law, advising of the decree in absence. They promptly

[1] The claim was intimated to Direct Line, who were the insurers; their policies are underwritten by the defender. It was not submitted that anything turned on the distinction, and so, for convenience, I simply refer to "the defender" throughout.
[2] Not 28 July 2017, as the chronology states.

sought instructions and were instructed by email on 17 January 2018. However, despite the fact that another email was sent to them on 9 February 2018 by the pursuer's solicitors, it was not until 22 March 2018 that they opened a file and began work on the case. The reponing note was intimated on 11 April 2018.

The test

[3] It was agreed that the test to be applied by the court in deciding whether or not to allow a reponing note was set out in *Forbes* v *Johnston* 1995 SC 220. Stated shortly, the matter is one for the sheriff's discretion, taking account of all the circumstances, including the proposed defence and the explanation for the non-appearance, balancing one consideration against another. As Sheriff Principal Stephen put it in *EUI Limited t/a Admiral* v *Bialas-Krug* 2014 SC Edin 38, at paragraph 18:

> "It is not a two stage test… The court must consider all material factors and in particular must consider whether there is a stateable defence along with any explanation tendered for lateness. In other words, the party seeking to be reponed need not cross the hurdle of providing a satisfactory explanation for his failure to appear before he addresses the court on the proposed defence. Accordingly, the sheriff requires to consider the note in its entirety before deciding whether or not to exercise his or her discretion in favour of the party seeking to be reponed."

[4] Sheriff Principal Stephen went on to cite with approval a dictum of Sheriff Principal Risk in *Ratty* v *Hughes* 1996 SCLR 160, that "… the defender must lay all his cards on the table at the outset".

Defender's submissions

[5] Counsel for the defender addressed me first on the stateability of the proposed defence. He told me that there was a defence on both liability and quantum. The essence of the defence on liability was that there was a factual dispute as to whether or not, at the time

of the collision between their respective cars, when the pursuer was overtaking the defender's insured, the latter had been indicating left (as the pursuer avers) or right (as the defender avers). It was significant that the pursuer's insurers had settled the defender's claim on a full liability basis. As regards quantum, 80% of the sum craved was credit hire charges. No vouching had yet been produced. On any view there was a stateable defence.

[6] Counsel then turned his attention to providing an explanation for the failure to appear. He pointed out that the defender had been dealing with different parties all acting for the pursuer – The Kerr Brown Partnership; Accident Exchange; Horwich Farrelly, who had been acting for the pursuer's insurers, Trinity Lane Insurance; Trinity Lane Insurance themselves, who had instructed BLM Solicitors to accept service of the defender's insured's claim; and, latterly, Thompsons who were now acting for the pursuer in his personal injury claim. When the initial writ was served it was scanned into the defender's system and then sent to the vehicle damage department, whereas it should have been sent to the personal injuries claims department. The file handler in the vehicle damage department opened the writ but did nothing with it for which no explanation could be provided other than the inexperience of the file handler. As the averment in the reponing note puts it: "The file handler who dealt with the case wasn't very experienced and failed to take any action of (*sic*) said writ".

[7] Subsequently, it was accepted that two emails, both of which were produced, were sent by the pursuer's solicitors to the defenders in November 2017. Both of these were sent to motorclaims@directline.com, which it was accepted was a valid email address. The content of both emails (which were in identical terms) referred to the pursuer's name; the defender's reference; and to the fact that a court action had been raised which the defender had failed to take steps to defend. Copies of the initial writ and decree in absence (described

as a "default judgment") were attached. A request was made for payment of the £25,000 for which decree had been granted. Counsel explained that the procedure at that time was that an email would be sent to a file handler only if the reference was contained in the subject box rather than in the text. The emails would initially have been looked at by the scanning team. That said, the defender had no record of ever having received the emails but counsel was not in a position to dispute that they were sent.

[8] Since then, the defender has instigated a new system whereby a computer scans all emails automatically to pick up key words. However, the explanation for the emails not having been acted upon was (as with the failure to respond to the initial writ when it was served) human error.

[9] Counsel then referred to the email sent to Plexus Law, by Thompsons, on 4 January 2018. Plexus Law sought instructions on that date. Instructions were sent on 17 January 2018 but they were sent to an administration inbox which was supposed to be monitored by Plexus Law. The email was sent to someone for a file to be opened but no file was opened, again down to human error. Again the system had subsequently been changed by Plexus Law so that an email now went to several inboxes, not just one, which were monitored daily and weekly checks were carried out to ensure that files had been opened. Counsel acknowledged that even after decree in absence had passed, steps should have been taken more quickly to lodge a reponing note. However, he invited me to accept that the failures all down the line were due to human error rather than a reckless disregard for the court procedures. He stressed that there was a stateable defence and submitted that, taking into account the fact that the pursuer would otherwise obtain a windfall benefit, I should exercise my discretion in favour of the defenders by allowing the reponing note to be received.

Pursuer's submissions

[10] The solicitor for the pursuer submitted that the reponing note provided a very detailed explanation as to what happened up to the time of service of the writ, which was irrelevant for present purposes, but then became very sketchy. He submitted that it was still unclear how the various failures had arisen. The defender had not put all its cards on the table. He referred to Macphail Sheriff Court Practice at page 261, para 7.29. There had not been, as desiderated in that paragraph, a full and clear explanation covering all factors in the defender's conduct likely to influence the sheriff's decision. In the *EUI* case, the sheriff had said that it was insufficient simply to say that there had been an administrative error. Similarly, it was insufficient to say, as the defender did here, that there had been human error. Further, the delay in the present case was considerably longer than that in the *EUI* case. A letter had been sent with the initial writ making it clear that Scottish solicitors should be instructed. It could not have been clearer to the defender that action ought to have been taken when the writ was received. As regards any windfall benefit to the pursuer, as the Sheriff Principal pointed out in *EUI*, this will always be present to some extent but cannot be the determining factor. No weight should be placed on the fact that the pursuer's insurers had settled the defender's insured's claim, which was done on a without prejudice basis and without the pursuer's instructions. There would be prejudice to the pursuer if the decree was reponed standing that the action was first raised almost a year ago. The reponing note should be refused.

Discussion

[11] The first factor to take into account is whether or not the defender has a stateable defence, since, if not, it is unlikely to be appropriate for the reponing note to be allowed.

Clearly there is a stateable defence on the merits, the parties giving competing factual accounts of how the accident occurred. That said, even if the defender's insured was indicating right, as the defender avers, there is at least an argument that he ought nonetheless to have been aware of the pursuer's presence since the pursuer cannot literally have appeared from nowhere albeit that appears to be the defender's position as stated in the proposed defence. As regards quantum, there is perhaps some merit in the pursuer's solicitor's submission that the bulk of the claim is for a liquidate sum which has already been paid (£19,867.80) and that the balance of the sum sued for represents a relatively modest figure for solatium. This is not a case, in other words, where a wildly excessive sum has been sued for. However, subject to those caveats, I do accept that there is a stateable defence on both liability and quantum.

[12] Turning, then, to consider the other relevant factors, the first of these is the explanation provided for the action not having been defended. In my view, no real explanation has been provided. The defender is a major motor insurer which ought to have had a system in place for adequately dealing with court proceedings properly served upon it, but did not. The fact that various different firms had at different times represented the pursuer is a red herring since the defender's failure did not stem from the fact that the claim had been raised by Thompsons as opposed to another firm, but from the fact that, for no apparent reason, the writ and accompanying paperwork were merely scanned into their system and sent to the vehicle damage department rather than the personal injury claims department (and that despite the fact that there was a covering letter which stated in terms "If you intend defending the action now raised, please instruct your Scottish solicitors immediately" and the initial writ was clearly headed: "Initial Writ (Personal Injuries Action) Sheriffdom of Lothian and Borders, In The All Scotland Sheriff Personal Injury Court at

Edinburgh"). The error cannot entirely be laid at the door of the file handler, since it should not have been sent to that person's department in the first place, but in any event he or she similarly failed to attach any significance to the paperwork despite apparently having opened it. One is inexorably driven to the conclusion, on the information provided, that the defender simply did not have a proper system for identifying and dealing with initial writs in Scottish actions. There ought to have been such a system in place which did not simply rely on routinely scanning the writ and thereafter forwarding it to someone who might or might not be qualified and trained to deal with it; but there was not.

[13] The initial error was compounded by the fact that there was apparently no checking system in operation and the mistake therefore lay undetected. The defender then had the opportunity to take remedial action when they received the emails from the pursuer's solicitor in November 2017 (as they must have done since it is acknowledged that the emails were sent to a valid email inbox). However, despite the fact that the name of one of the attachments was "extract decree for payment" it appears that that did not serve as a warning that the email should be opened and read by a human, and acted upon. If that had been done, the defender would have appreciated that decree had passed against it and that urgent action required to be taken. This did not happen.

[14] The final error, as if to prove that mishaps like buses, often come in threes, was that even when the defender did appreciate in January 2018 that something had gone amiss, the instruction to their solicitors, rather than being addressed to a specific person with a request to take urgent action, was simply sent to an administrative inbox. Given its own failures, the defender can hardly complain that its solicitors did not act properly on that email but for whatever reason the solicitors did not, resulting in a further two months delay.

[15] The next factor is the prejudice to the pursuer arising from the delay in having his claim determined. Of course, on one view, if there is a complete defence to his claim, he will not suffer any prejudice in a true sense since, on this hypothesis, he is not entitled to receive anything. On the other hand he is entitled to a judicial determination one way or the other within a reasonable period of time and if the decree is reponed, that will be delayed by something approaching a year. Further, there may turn out to be only a partial defence, in which event the pursuer will suffer delay in recovering the sum to which he is entitled.

[16] On a similar theme is the question whether the pursuer will receive a windfall benefit if the decree is not reponed. As submitted by the solicitor for the pursuer, this will be present to some extent in every case. In the present case, it is perhaps less of a factor than in some others, since on no view is the sum sued for grossly excessive. On the contrary, the bulk of it is made up of a liquid sum for which the pursuer has incurred liability (albeit not vouched), and the balance represents damages for *solatium.* If the reponing note is refused, the pursuer undoubtedly will receive a benefit in that he will retain the decree and may receive slightly more in *solatium* than he would have received on a full liability basis; but he is not receiving a substantial windfall in the sense of something to which he could never be entitled even were he to succeed. Since we cannot know how liability would ultimately be determined, it cannot be said that the pursuer is necessarily receiving a windfall benefit and, therefore, it cannot be said that refusing the reponing note would necessarily result in injustice. This falls to be contrasted with a hypothetical example in which, say, a pursuer obtained decree for £100,000 in a claim worth only £10,000 at most. The effect of refusing the reponing note in reality is simply that the defender will be denied the opportunity to advance a stateable defence which it would otherwise have been able to do and which might have been successful in whole, in part or not at all. However, that is the

inevitable result of any case in which a party with a stateable defence is not allowed to repone, and this factor does not really advance the defender's position at all.

[17] The next factor relied upon by the defender is the fact that the defender's insured's own claim has been settled in full. Ultimately, I consider this to be a neutral consideration, pointing neither one way nor the other. There are many reasons why insurers might decide to settle a claim on a without prejudice basis and it does not follow, because that was done, that the defender is any more or less likely to succeed in this action than it would otherwise have been. In other words, having accepted, as I have, that the defence is stateable, this additional "factor" takes us no further.

[18] The final factor, in my view, is the interests of justice in a wider sense. This court has an interest in ensuring that actions raised in it are progressed speedily and efficiently. That entails defenders, particularly insurance companies, having a proper system for dealing with actions when they are served so that a notice of intention to defend is lodged timeously and the action dealt with in accordance with the court's procedures thereafter. Pursuers are also entitled to expect that their claims for personal injuries are dealt with promptly and without undue delay. It is not conducive to the efficient administration of justice to foster a sense of complacency that the court will allow an action to be defended late, or a decree reponed, as a matter of course, if the proper procedures are not followed.

[19] In the present case, the defender cannot escape the fact that it had no system for dealing with the service of Scottish writs (or at least none that was explained to me). Similarly, it had no system for reading emails which might have alerted them to the fact that there had been an earlier mishap. There appears to have been no qualitative assessment even of the heading of the emails sent by Thompsons alerting the defender to the fact that decree in absence had passed. Finally, when the passing of decree did come to the

defender's attention, it took inadequate steps to effectively instruct its Scottish solicitors to take prompt action to repone the decree. When it did so, the solicitors themselves neglected to handle the matter promptly and efficiently (in respect of the failure to open a file until March: I make no criticism of the way the matter has been dealt with since then). In other words, even when the original mistake was discovered, no urgency was shown in having it rectified. All of this has resulted in considerable delay to the pursuer, much of which could have been avoided even after the initial mistake was made. Indeed, his solicitors took steps to try to bring the matter to the defender's attention. More than a year has now elapsed since the initial writ was lodged. I consider that these factors outweigh the prejudice to the defender in not now being able to advance a complete or partial defence to the writ. The interests of justice in this particular instance, having regard to the passage of time and the other factors referred to, favour the pursuer rather than the defender.

[20] Accordingly, the reponing note is refused.