



SHERIFF APPEAL COURT

**2020 SAC (Civ) 12
[PIC-PN1432-17]**

Sheriff Principal M Stephen QC
Sheriff Principal D Pyle
Sheriff Principal C D Turnbull

NOTE

by

SHERIFF PRINCIPAL M STEPHEN QC

in appeal by

ANDREW WRIGHT

Pursuer and Appellant:

against

NATIONAL GALLERIES OF SCOTLAND

Defender and Respondent:

**Appellant: Galbraith, adv; Digby Brown
Respondent: Watt, sol adv; Brodies LLP**

27 August 2020

[1] The pursuer brought an action for damages in the All Scotland Sheriff Personal Injury Court ("ASSPIC") against the defender, National Galleries of Scotland. The pursuer was unsuccessful before the sheriff who granted decree of absolvitor. The pursuer appealed successfully to this court and by interlocutor of 3 July 2020 the Sheriff Appeal Court allowed the appeal, recalled the sheriff's interlocutor of 28 February 2019 and granted decree in

favour of the pursuer in the sum of £1,875 with interest from 5 February 2019 (see [2020] SAC (Civ) 6). Damages had been agreed at £2,500. Had he found in favour of the pursuer the sheriff would have reduced any damages by 25% to reflect contributory negligence.

[2] The pursuer has now lodged a motion for an uplift in terms of the Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 ("OCR") rules 27A.8 and 27A.9 in respect that the pursuer had lodged in process an offer to settle the action in the sum of £1,750 on 20 March 2018 prior to proof. The offer having been made was neither withdrawn nor accepted by the defender. The pursuer having succeeded on appeal in reversing the sheriff's decision on liability has obtained a decree which satisfies OCR 27A.8(d) in so far as it is *ex facie* in excess of the offer. The question is whether it is at least as favourable in money terms to the pursuer as the terms he had previously offered. The offer had been made in order to settle the action prior to proof. The motion is opposed.

[3] Counsel for the pursuer asked us to apply the terms of OCR 27A.8(3), namely, to decern against the defender for payment to the pursuer of a sum calculated in accordance with OCR 27A.9 which is in the following terms:

"The sum that may be decerned for under rule 27A.7(2)(b) or rule 27A.8(3) is a sum corresponding to half the fees allowed on taxation of the pursuer's account of expenses, in so far as those fees are attributable to the relevant period, or in so far as they can reasonably be attributed to that period."

The 'relevant period' and 'appropriate date' are terms which are defined in OCR 27A.1 in the following manner:

" 'Relevant period' means the period from the appropriate date to the date of acceptance of the pursuer's offer or, as the case may be, to the date on which judgment was given, or on which the verdict was applied."

The 'appropriate date' means the date by which a pursuer's offer could reasonably have been accepted. For the purpose of this motion it was suggested that seven days was a

reasonable period to allow for consideration of the offer. The solicitor advocate for the defender took no issue with that.

[4] Ms Galbraith had lodged an outline submission which she adopted. The pursuer's offer was properly and competently made by lodging it with the court on 20 March 2018. The decree or judgment is at least as favourable in money terms for the pursuer as the offer made pre-proof. A calculation is provided within the written submission.

[5] As a matter of general principle a party who is successful on appeal is entitled to the benefit of Chapter 27A procedure. The policy and principle behind both tenders and pursuers' offers is to encourage early settlement and avoid unnecessary delay and expense in litigation.

[6] It was submitted that this court had the inherent power to apply Chapter 27A. The judgment in this case was that made by this court on 3 July 2020 when it allowed the pursuer's appeal; recalled the sheriff's interlocutor and granted decree for £1875 in favour of the pursuer. There was no judgment of the sheriff at first instance which could engage Chapter 27A. This court awarded expenses against the defender including the expenses of the proof before the sheriff. There is no specific power to do so in the Act of Sederunt (Sheriff Appeal Court Rules) 2015 ("SAC Civil Rules") (see Chapter 19 of the SAC Civil Rules) but the Sheriff Appeal Court has the inherent power to make such an award. Section 47 of the Courts Reform (Scotland) Act 2014 makes provision for the court's jurisdiction and competence. SAC Civil Practice Note 1 of 2016 paragraph 2 states: "where no provision is made in the Rules or this practice note about any aspect of procedure in relation to civil appeals, practitioners may have regard to the practice of the Court of Session in relation to that type of business". The Inner House may award expenses and determine additional fee

motions without specific rules permitting this. It is part of the court's inherent power in determining appeals.

[7] The solicitor advocate for the defender opposed the pursuer's motion and challenged whether this court had the power and therefore competence to determine a motion in respect of Chapter 27A. That Chapter sets out the procedure and the sheriff's powers in respect of a pursuer's offer together with the test or conditions to be met. There is no equivalent power in the SAC Civil Rules. The relevant rules refer to the "sheriff" rather than the Sheriff Appeal Court. Accordingly, this court is not entitled to consider the motion. It would be fundamentally incompetent for this court to adopt powers given specifically to sheriffs by the Ordinary Cause Rules. Furthermore, the sheriff who conducted proceedings at first instance was best placed to determine the matters set out in Chapter 27A. The Sheriff Appeal Court should refuse the motion as incompetent and remit to the sheriff or alternatively the motion should be renewed in ASSPIC by the pursuer lodging the appropriate motion there.

[8] The second proposition advanced in opposition was to the effect that pursuer's offers are not available on appeal. *Anderson v Imrie* 2019 SC 243 was cited as authority for that proposition. The pursuer's offer had no effect beyond proceedings at first instance in ASSPIC. The defender's *esto* argument is that the pursuer has not demonstrated that the judgment made following appeal is at least as favourable in money terms to the pursuer as the terms offered in the pursuer's offer as a matter of simple arithmetic. Mr Watt advanced the argument that allowing for interest from 16 March 2018 until 5 February 2019 the pursuer would have done at least marginally better in terms of the offer compared with judgment and decree issued on 3 July 2020. Furthermore, developing his argument that the appellate proceedings should not be taken into account the solicitor advocate for the

defender argued that the "relevant period" (as set out in OCR 27A.1) in the circumstances of this particular case is the period from seven days after the pursuer's offer was intimated (the 'appropriate date') until 5 February 2019 being the date of judgment in ASSPIC. The period between February 2019 and 3 July 2020 should not be taken into account as that represented the period when the case was at appeal before the Sheriff Appeal Court, repeating his proposition that pursuer's offers are not available or competent in appellate proceedings.

Decision

[9] We are satisfied that the requirements of OCR 27A.8(1) are met in this case. Where the term "sheriff" is used in that provision we substitute "Sheriff Appeal Court" given that this court has all powers inherently possessed by any court of law for the purpose of discharging its function and giving full effect to its decisions (section 47(3) of the Courts Reform (Scotland) Act 2014). In this case the Sheriff Appeal Court rather than the sheriff pronounced judgment and did so on 3 July 2020 when sustaining an appeal by the pursuer against the sheriff's interlocutor granting decree of absolvitor. On 3 July 2020 this court granted decree in favour of the pursuer in the sum of £1,875. That judgment is at least as favourable in money terms to the pursuer as the terms offered in the pursuer's own offer made on 20 March 2018. We are satisfied that the pursuer's offer was a genuine attempt to settle the proceedings prior to proof. The offer has not been withdrawn and has not been accepted by the defender.

[10] We now turn to the defender's argument that the pursuer's offer has no effect in appellate proceedings. We are of the view that the situation in this case is straightforward and quite distinct from that which arose in *Anderson v Imrie* where the pursuer's offer was lodged in the course of a reclaiming motion by the second defender against an award of damages made by a Lord Ordinary in the Outer House. In the event the reclaiming motion

was unsuccessful and the Inner House decided that the pursuer's motion for an award of expenses plus 50% uplift as provided for in RCS 34A.8 and 34A.9 was incompetent. Giving the court's opinion Lord Malcolm observed at paragraph [3], 'In our view the language of Ch 34A is redolent of proceedings in the Outer House. This is consistent with the purpose of encouraging early settlement of personal injury actions. We conclude that Ch 34A pursuers' offers are not available in respect of a challenge to a final decision taken in the Outer House.' The Pursuer's offer was directed only to the appellate proceedings where 'the sole question was whether the pursuer was entitled to retain the damages awarded by the Lord Ordinary' – see paragraph [8].

[11] The situation in this case is quite different. It is effectively the converse of the situation in *Anderson v Imrie*. The pursuer's offer was made prior to proof in ASSPIC. The sheriff following proof granted decree of absolvitor which was successfully appealed. The pursuer had lodged a pursuer's offer at an appropriate time seeking to settle the action prior to proof. The Pursuer's offer was not withdrawn nor was a subsequent offer made in the appellate proceedings. Chapter 27A of the Ordinary Cause Rules, and its equivalent in the Rules of the Court of Session (RCS 34A) makes provision for pursuers' offers. Chapter 27A of the Ordinary Cause Rules was added by the Act of Sederunt (Rules of the Court of Session 1994 and Ordinary Cause Rules 1993 Amendment) (Pursuers' Offers) 2017. As the Inner House observed in *Anderson v Imrie* earlier rules designed to introduce pursuers' offers floundered due to the court having no explicit power to impose the uplift in expenses or penalty if the defender failed to beat the pursuer's offer. That was put right by the Courts Reform (Scotland) Act 2014. The obvious purpose of the pursuer's offer is to provide another mechanism to facilitate settlement and in particular early settlement of the action. That purpose would be undermined if a pursuer who had lodged an offer to settle prior to

proof cannot avail himself of the rule which requires the court to decern against the defender for payment of a specific sum or liability as specified in OCR 27A.9 provided the judgment is at least as favourable in money terms to the pursuer as the terms offered. In our opinion it does not matter whether the judgment which is at least as favourable in money terms to the pursuer is the sheriff's judgment following proof or the judgment of this court following an appeal against the sheriff's decision on liability and/or quantum. The purpose and provisions of Chapter 27A can be put into effect by this court on appeal.

[12] The defenders' *esto* position is that the pursuer has not demonstrated that the judgment is at least as favourable in money terms to him as the terms offered in the pursuer's offer. The defender's initial submission was to the effect that the damages awarded were in real terms less than the pursuer had offered to accept taking into account interest, the pursuer's offer having been e-mailed to their solicitors on 16 March 2018. However, when presented with irrefutable confirmation that the pursuer's offer was lodged with the court on 20 March 2018, being the date advanced in submissions by counsel for the pursuer, the solicitor advocate for the defender conceded that the award of damages was marginally more favourable in monetary terms to the pursuer than the sum in the pursuer's offer.

[13] We now turn to our duty in terms of OCR 27A.8(3) to determine the extent of the defender's liability. That sum is to be calculated in accordance with Rule 27A.9 which we set out in full in para [3] above. We reject without hesitation the defender's proposition that the relevant period should be restricted to the period from 27 March 2018 until the date of the sheriff's interlocutor of 28 February 2019. We do so because the proposition is both illogical and contrary to justice. The interlocutor of 28 February 2019 disposed of the action by assoilzing the defender. The pursuer did not obtain judgment in his favour until 3 July 2020

when this court recalled the sheriff's interlocutor. If the pursuer makes an offer which is not accepted the rules provide that if the pursuer obtains an outcome more favourable to him than his offer the defender should be liable to pay an uplift of 50% on the fee element allowed on taxation of the pursuer's account of expenses, insofar as these expenses are attributable to the relevant period or insofar as they can reasonably be attributed to that period. The relevant period simply means the period running from the date by which a pursuer's offer could reasonably have been accepted (known as the 'appropriate date') until judgment. In this case the pursuer did not obtain judgment in his favour until this court sustained the appeal. The relevant period is therefore that between 27 March 2018 and 3 July 2020 being the date of the interlocutor granting decree in favour of the pursuer.

[14] We will accordingly grant the pursuer's motion and decern against the defender for payment of a sum corresponding to half the fees allowed on taxation of the pursuer's account of expenses in so far as they can be attributed or reasonably attributed to the relevant period.