SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2020] EDIN 33

PIC-PN724-19

JUDGMENT OF SHERIFF KENNETH J MCGOWAN

in the cause

USMAN AKMAL

Pursuer

against

AVIVA INSURANCE LIMITED

Defender

Pursuer: Hastie, advocate; Jones Whyte Law, Solicitors
Defender: Murray, advocate; Horwich Farrelly Scotland, Solicitors

Edinburgh, 28 July 2020

Introduction

[1] This case called before me in respect of the pursuer's motion for decree in terms of a minute of tender and acceptance. The motion was opposed insofar as the expenses of the action were concerned. It was agreed that it was convenient for me to hear the submissions for the defender first.

Submissions for defender

Summary

[2] The pursuer seeks decree in respect of a tender intimated and lodged on 16 June 2020 in the sum of £29,200. He also seeks expenses to the date of that tender, which is the part of the motion that is opposed.

[3] The defender opposes the award of those expenses and seeks modification of the pursuer's expenses and an award of expenses in its favour in respect of the unnecessary expense incurred as a result of the pursuer's unreasonable conduct of the action.

[4] Prior to proceedings being raised, the pursuer intimated a claim for solatium, services, inconvenience, miscellaneous expenses and one period of physiotherapy treatment in the sum of £12,095.

[5] The defender made a full and final offer of £10,000. The pursuer's agents advised that they had reconsidered the evidence and now sought £35,000. The defender rejected that offer. Proceedings were raised and a tender in the sum of £10,000 re-stating the final offer was lodged with defences.

[6] The matter was being prepared to proceed to a proof on quantum based upon the pleadings and productions presented. However, the pursuer's agents intimated an inventory of productions on 19 February 2020 indicating that they may be seeking further heads of claim amounting to £15,000 - £20,000 which had not been intimated previously and for which there were no pleadings.

[7] A Minute of Amendment was intimated on 3 March 2020 seeking to include two new heads of claim, namely the pre-accident value of the pursuer's vehicle and recovery costs. A further invoice was also lodged seeking to recover additional physiotherapy costs totalling £565.

[8] An engineer's report supporting the pre-accident value of the vehicle in the sum of £21,375 was intimated by the pursuer's agents on 1 April 2020. Minus the salvage value obtained of £5,500, the vehicle was valued at £16,235. The total sum of the additional heads of claim sought amounted to £17,486.23.

[9] The defender obtained an independent engineer's report which concluded that both the pre-accident value sought and salvage value obtained fell within the reasonable range which might have been expected to be achieved.

[10] The defender recovered the additional physiotherapy records referred to and had its medical expert review them. He confirmed his final opinion regarding the prognosis of the pursuer's thumb injury in particular.

[11] The defender's full evidence was received by 3 June. Instructions were sought and obtained to increase the tender to £29,200, allowing for the pre-accident value of the vehicle and the recovery costs plus interest. The tender was intimated and lodged on 16 June 2020 and accepted on 17 June 2020.

Submissions

[12] It is accepted by the defender that the party whose rights are vindicated will usually be awarded expenses. However, that general rule can be departed from where a party's unreasonable conduct has caused or contributed to unnecessary litigation. This is clear from *Shepherd* v *Elliot,* 1896 23 R 695, which states not that expenses follow success, but that "the cost of litigation should fall on him who has caused it."

[13] The defender restated its pre-litigation offer of £10,000 in respect of the heads of claim intimated before proceedings were raised in a tender lodged with defences, in

accordance with the requirement of the Compulsory Pre-Action Protocol for Personal Injuries Claims in Scotland ("CPAP").

[14] The original tender was only increased because two further heads of claim (and additional vouching for an existing head of claim) were introduced, these being first intimated in February 2020, almost a year after proceedings were served and eight weeks before a proof, which was not the first diet in the action.

[15] The defender investigated the new heads of claim as swiftly as possible in light of the difficulties faced during the lockdown period following the outbreak of Covid-19. Having satisfied itself that the heads of claim were recoverable and reasonably valued, an increased tender allowing for those two heads of claim plus interest was lodged. The tender did not allow for the additional physiotherapy costs incurred, which the defender's medical expert considered were not incurred as a result of accident-related injuries sustained.

[16] In order for the tender to be effective and offer protection on expenses, the defender required to lodge it worded in the usual manner offering expenses to the date of the tender; *Mckenzie* v *HD Fraser & Sons*, 1990 SC 311. However, the court still has discretion to modify the pursuer's expenses.

[17] The defender's primary submission is that the pursuer's expenses ought to be modified to those incurred up until the date of the first tender, to be assessed on the CPAP scale; and that the pursuer ought to be found liable to the defender for the expenses of process incurred by it since the date of the first tender, to include certification of Mr Pete Cheng, Consultant Orthopaedic Surgeon and Mr Alan Bathgate, Consultant Engineer as skilled witnesses.

[18] The pursuer acted unreasonably both in respect of the approach to negotiations prior to proceedings being raised and subsequently during the course of the litigation, when

further heads of claim which had existed since the date of the action and were clearly within the pursuer's knowledge were introduced late in the action. Had those heads of claim been properly and reasonably intimated prior to proceedings being raised, the defender would have taken them into account and made an increased offer, as they did when the heads of claim were eventually intimated.

[19] The pursuer seeks to rely upon the case of *Martin* v *Had-Fab Ltd*, 2004 SLT 1192 in arguing that the court is precluded from doing so. The defender respectfully submits that decision is incorrect in light of *Mckenzie*. It is clearly open to the court to determine what expenses to the date of the tender consist of, including what modification ought to apply. There is nothing in either case which states that when considering modification of what reasonable expenses to the date of a tender ought to be, the court is precluded from making reference to a period up to which it considers reasonable expenses were incurred, with any further expenses thereafter modified to nil. Reference is made to the case of *Thomson* v *Aviva*, Sheriff M S Mactaggart, unreported, 10 June 2010, which it is submitted ought to be preferred. The reasonable expenses to be awarded are entirely at the discretion of the court.

[20] It is similarly submitted that the authorities do not preclude the defender from being awarded expenses from the date of the first tender. The litigation and significant expense the defender has incurred since that date has been caused by the unreasonable conduct of the pursuer. There is no other method by which the defender could have sought protection on expenses. It is again respectfully submitted that the learned Lord Clarke's opinion in *Martin* is incorrect on this point in light of the decision in *Mckenzie.* To seek to negotiate the motion moved for by the defender would provide no protection on expenses. The law is clear and explicit on how a tender must be worded to provide protection.

[21] *Esto* the defender's primary submission is not granted, their secondary motion is that expenses ought to be dealt with on a no expenses due to or by basis: *Neilson* v *Motion* 1992 SLT 124. In exercising its discretion, the court requires to consider which party caused a litigation and reach an outcome that delivers justice to the parties. The pursuer's conduct throughout has resulted in the defender incurring significant unnecessary expense, which by this stage likely far outweighs the expenses the pursuer would have been entitled to had the claim been prepared and intimated properly, and settled in early course as it ought to and would have been.

Submissions for pursuer

[22] The claim was originally intimated was for the heads of claim identified by the defender (above). After the defender's first offer, the value of the claim for solatium was reviewed and it was concluded that the valuation put forward on behalf of the pursuer was understated. Accordingly, the offer in settlement which had been made was rejected and the action was progressed.

[23] It was accepted that new heads of claim were added later. The background was that the pursuer was a passenger in his own vehicle which was being driven by his brother. The pursuer was insured with Admiral Insurance. They declined to meet the pursuer's claim because his brother was not a named driver under the policy. The pursuer then spoke to his brother's insurers, Aviva (the present defender) who declined to meet the claim because the policy was third party only.

[24] The pursuer had instructed agents to pursue the claim on his behalf but he had not volunteered to them information about losses which he had incurred in respect of damage to his vehicle and storage costs in relation thereto. The new potential heads of claim came to

light when they were identified by counsel previously instructed in the case. They were introduced by way of a minute of amendment.

[25] The enquiry made by the pursuer of the defender was by way of a telephone call during which the pursuer had asked the insurer to meet his claim. On their refusal to do so, he assumed that there was no claim.

[26] The claim in respect of the vehicle was the pre-accident value of the vehicle (£21,375) less the salvage value (£5,500). It was accepted that that constituted a large element of the claim as finally formulated.

[27] It could not be said that it had been unnecessary or unreasonable to raise the action and the expenses of doing so were properly recoverable. If any modification was appropriate in relation to the later part of the proceedings, no contra-award should be made and making no award of expenses due to or by either party might be apt.

Reply for defender

[28] Both the circumstances of the accident and liability therefor had been admitted. The defender's valuation of solatium had not changed between the offer made in respect of the claim as originally formulated and the making of the second tender, which was accepted. It was reasonable to infer that had the heads of claim introduced late been made at the outset an appropriate offer would have been made at that time and the action would have settled.

Reply for pursuer

[29] There had been two proof diets in this case, the first of which was discharged on the defender's unopposed motion. Information in support of the new heads of claim was disclosed in February 2020 and it took the defender four months to carry out investigations

and lodge a new tender. Thus, it was not necessarily reasonable to infer that the case would have settled around the time that the first tender was made.

Grounds of decision

Martin v *Had-Fab Ltd*

[30] A decision of the Outer House of the Court of Session is not binding on this court, but can, in appropriate circumstances, be treated as persuasive unless otherwise distinguishable.

[31] In my opinion, even if the facts in that case were indistinguishable from the present one, I would not have been inclined to follow it. In my respectful opinion, the decision of the Lord Ordinary is not consistent with the principles articulated by the Inner House.

[32] In *McKenzie*, the pursuer argued that the formulation "the expenses of process to date" in a minute of tender in action in the Court of Session meant expenses as between party and party on the Court of Session scale and that it was not open to the Lord Ordinary to modify the expenses.

[33] As to the form of a tender, the Lord President (Hope) said:

> "The rules as regards the form and characteristics of a judicial tender are well-settled, and had it not been for a number of recent cases to which the Lord Ordinary was referred in the course of the argument, there would have been no need for the matter to be reconsidered now by us. As Maclaren on *Expenses* states at p. 81, a tender must be explicit and free of qualifications and conditions and it must be accompanied by an offer of expenses. The offer which was made in this case was of "the expenses of process" to the date of the tender. This is the ordinary form of a tender as to expenses and its meaning is not in doubt. In *Clegg v McKirdy and MacMillan* 1932 S.C. 442, Lord Justice-Clerk Alness said at pp. 446/7 : 'These terms are not merely ordinary; they have been sanctioned by immemorial usage. I have never known of a judicial tender couched in any other terms…'".

[34] As to the meaning of those words, the Lord President continued:

"[Lord Alness] went on to say this as to the meaning of the phrase: "'Expenses of process' is an elastic, a flexible, phrase, and is always subject to interpretation by the Court. It differs in its content in different cases. It is not, as the capital sum tendered is, an offer of a fixed sum. The Court determines what the phrase connotes and what expenses are covered by it' [1932 S.C. at p. 447]. Lord Hunter, at p. 446, was to the same effect: 'The pursuer is offered a specific sum along with the expenses of process. That expression appears to me to cover the expenses in the process which the pursuer has incurred in consequence of the action of the defender. He is to be placed in the same position as if, at the date of the tender, he had obtained a decree for the amount tendered.' In *Malcolm v. Moore (1901) 4 F. 369* , at p. 370 , Lord Adam said that when a party tenders a sum of money together with expenses up to date, 'that means the legitimate and proper expenses to which the pursuer would be entitled if he succeeded in the action.' In *Fleming Brothers (Structural Engineers) Ltd. v. Ford Motor Co. Ltd.* 1969 S.L.T. (Notes) 54, Lord Avonside echoed these words when he said that 'when expenses are tendered it is my opinion that the expenses which are offered as part of the settlement of the case must be the expenses which are appropriate to the case'. His opinion to this effect was quoted with approval by Lord Justice-Clerk Wheatley in *Marks and Spencer Ltd. v. British Gas Corporation* 1984 S.C. 86, at p. 89, and it is hardly necessary to add that in our opinion it is an accurate statement of the law."

[35] The Lord President continued:

"The position in this case, therefore, is that the tender which was lodged on the defenders' behalf was in the ordinary and proper form. The pursuer's counsel was mistaken when he contended that it meant that the expenses which were offered were what he described as full expenses on the Court of Session scale without modification. As we have said, the expenses which were offered by the tender were those which were appropriate to the case as determined by the court. Rule of Court 347 (c) provides that in all cases as between party and party the court may direct that expenses shall be subject to such modification as the court may deem fit. There is no doubt that it was open to the Lord Ordinary in this case to modify the expenses by directing that they should be awarded on a scale appropriate to the sheriff court. In *Fleming Brothers (Structural Engineers) Ltd. v. Ford Motor Co. Ltd.* Lord Avonside rejected the contention that when a tender in these terms had been accepted the court could not allow an additional fee under rule 347 (d). As he put it, if the case is one of complexity which falls within the wording of the rule then the appropriate expenses which are offered will or may include an additional fee. *Marks and Spencer Ltd. v. British Gas Corporation* was a decision by the Second Division to the same effect where the action had been settled by way of joint minute in terms of which the defenders were found liable to the pursuer in expenses. The pursuer's counsel agreed that, in the light of these decisions, the court could have awarded an additional fee under rule 347(d) had this been appropriate in the present case. He was not able to point to any logical distinction for present purposes between the exercise of a discretion in the pursuer's favour in that regard and the exercise of a discretion in the defenders' favour by way of modification under rule 347 (c). His argument was simply that the discretion of the court had been excluded by the form

> of words which had been employed in the tender, and that a different form of words would have been necessary if the matter was to be left to its discretion. This is contrary to all the authorities to which we have referred."

[36] In view of what I regard as a clear statement of the law, insofar as *Martin* might be said to be authority for the proposition that acceptance of a tender expressed in terms approved in *McKenzie* in some way limits or constrains the discretion of the court to deal with expenses in any way which might otherwise be appropriate, I do not agree with it. Such an exercise does not involve "…ignoring the actual wording in the judicial tender in relation to expenses and substituting therefor a quite different basis upon which expenses are to be awarded"[1], but rather exercising the court's inherent discretion to deal with expenses and awarding "the legitimate and proper expenses to which the pursuer would be entitled if he succeeded in the action".[2]

[37] In other words, where a tender includes an offer to pay the expenses of process, the court's full powers to award, not award, increase, modify or restrict expenses as appropriate remain intact. As Mr Murray put it, what would a defender be able to do to protect itself where a pursuer had pursued a case in which one head of claim was found to be legitimate but another was hopeless, or grossly over-stated or even fraudulent? If *Martin* was correct, a tender containing an offer in respect of the legitimate head of claim plus expenses to the date thereof would carry with it an unqualified right to the whole expenses of the action with which the court was not able to interfere, even if the misconduct in pursuing the other head of claim was egregious.

[38] Even if I am wrong in the foregoing analysis, the present case and *Martin* are distinguishable on their facts. The situation in *Martin* concerned two tenders where the

---

[1] *Martin*, para [6].
[2] *Malcolm* v *Moore (1901) 4 F. 369*, p. 370.

matter at issue was the underlying value thereof to the pursuer. The present case also concerns two tenders, but the matter at issue is whether the late introduction of new heads of claim amounted to conduct of the case which justified a departure from the normal rule on expenses, to which issue I now turn.

The introduction of the new heads of claim

[39] It was not in dispute that new heads of claim were introduced late on in the action. The real issue is whether there was a reasonable explanation for that.

[40] In many cases, the 'shape' of a case may change as it proceeds. Sometimes, for example, a pursuer's ongoing symptoms will necessitate a review and updating of the medical evidence, which may disclose the need for operative treatment (for example) not previously foreseen. A proof may have to be discharged and the result may be that the claim for solatium expands. Such occurrences are not uncommon and are 'just one of these things' as far as the expenses of the action are concerned.

[41] In the present case, as Mr Hastie had properly anticipated in seeking information from those instructing him, the question is why the claims (particularly for the loss of the car) were not introduced earlier.

[42] As I understand it, the car was a total loss. I was told that the pursuer made enquiries of his own insurers, who appear to have declined indemnity. Some kind of enquiry appears to have been made of the defender as insurer of the driver (the pursuer's brother). I was not provided with full information as to when that was, the nature of the enquiry, or the reason for the apparent refusal of the defender to deal with it then.

[43] Nevertheless, the pursuer knew that he had suffered a loss, in the sense that his car had been written off and scrapped. I was told that he did not volunteer any information to

his agents about that. But what I find surprising is that the agents did not discover, even incidentally, that the pursuer had a possible claim in that respect.

[44] I would have expected that in the course of taking instructions, they would have found out that he was a passenger in his own car and that it had been seriously damaged. It is difficult to understand why no further enquiries were made about whether the pursuer had suffered any vehicle damage related losses.

[45] The only reasonable inference is that the pursuer's agents should have become aware of the head of claim related to the damage to the pursuer's car at a much earlier stage; and that it could and should have been introduced as a head of claim much earlier than it was.

[46] It is clear that the inefficient handling of a litigation may be a factor justifying the court dealing with expenses in a way other than "expenses follow success": *Sheriff Court Practice*, McPhail, 3rd edition, paras. 19.10 – 19.12. That is so particularly where the inefficiency has caused needless or wasted expense.

[47] In this case, the unexplained delay in bring forward heads of claim which were or should have been readily discoverable is redolent of inefficient handling of the pursuer's case which merits the court marking its disapproval through how expenses are dealt with.

[48] In order to try to evaluate the extent of the failure and what might be an appropriate way for the court to deal with it, it is necessary to formulate a hypothesis as to what might have transpired had these claims been included from the outset.

[49] Liability was admitted. An offer in settlement had been made pre-litigation. The initial difference in the valuation of the claim as it then stood was not large. When the new heads of claim were eventually introduced, they were investigated reasonably quickly (Covid-19 permitting), found to be largely justified and an offer was put forward in settlement of them in the form of a tender which was accepted. There is no reason to

assume that the defender would not have approached the matter in the same way pre-litigation if the 'full' claim had been put forward timeously.

[50] If that had happened, the defender would still have incurred certain expenses. It seems likely that the vehicle valuation report would still have been required. It may be that the defender would not have required to obtain its own medical report, though given the difference between the parties as to the valuation of solatium, it may well have done so.

[51] It is reasonable to proceed on the basis that had all the relevant heads of claim been made pre-litigation, an offer in settlement would have been made. But any retrospective prediction as to the likelihood that the case would have having settled at that stage must remain Delphic. The pursuer's interest would be served by as high a settlement as possible, whereas the defender's interest would be served by settling the claim for as little as possible. So I cannot say with confidence that the case would have settled pre-litigation.

[52] The defender's proposition was that the court could infer that had all the relevant claims been made and information disclosed, the defender would have, in the absence of a pre-litigation settlement, tendered appropriately with the defences; and that that tender would have been likely to have been accepted.

[53] I think that it is reasonable to infer that a full value offer would have been made by way of tender early in the proceedings. The question then is whether it is likely that such an offer, representing the full value of the claim, would have been accepted.

[54] The difficulty for the pursuer is that despite what was said by way of justifying the raising of proceedings in March 2019 (a valuation of £35,000), when the case ultimately settled by way of the second tender, the element of the offer then made attributable to solatium was largely unchanged. The main change in the total value of the claim was attributable to the vehicle loss, which had been introduced late. The elements of the claim

other than solatium were largely 'fixed'; and the solatium figure offered in the second tender was not materially different to that which had been offered in the first tender. Thus, I think it can be inferred that the case would have settled when the first tender was lodged (assuming, as I am prepared to do, that that tender would have been an appropriate full liability offer).

[55] In these circumstances, the inefficient handling of this claim has had very serious consequences and led, as a matter of probability, to the proceedings being longer and both parties incurring expense which could easily have been avoided.

[56] I shall refuse the pursuer's motion in part and grant the defender's motion in part. I shall (i) find the pursuer entitled to decree for payment of the sum tendered (ii) find the defender liable to the pursuer in expenses of process to the date of the first tender; (iii) certify the three skilled witnesses as sought by the pursuer; and thereafter (iv) find the pursuer liable to the defender in the expenses of process from the date of the first tender to the date hereof. I do not grant certification of the defender's skilled witnesses as I think these cost would have been incurred any way.