SHERIFFDOM OF LOTHIAN AND BORDERS

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2020] SC EDIN 4

EDI-PN948-20

NOTE OF SHERIFF KENNETH J. McGOWAN

in the cause

CHRISTOPHER DOUGAN

Pursuer

against

PARKDEAN RESORTS UK LTD

Defender

Pursuer: Lindsay; Thompsons
Defender: Hennessy; Keoghs

Edinburgh, 6 January 2021

Introduction

[1] This claim for damages for personal injuries came before me on the defender's opposed motion to have an interlocutor signed by me treated as pro non scripto. Ultimately, the motion as made was in somewhat narrower terms, as is explained below.

The Rules

[2] As this case was brought in the Sheriff Personal Injury Court, motions business was transacted under Chapter 15A of the Ordinary Cause Rules ("OCR").

[3] Both firms had provided email addresses for the conduct of motions business: r. 15A.2(1).

[4] The form of motion and opposition thereto are prescribed: Forms 6A and 9A respectively, as appended to the OCR.

[5] The procedure for bringing opposed motions before the court is as follows:

i. Court day 1 – motion intimated by solicitor for party making motion ("the lodging party") by sending by email a completed Form 6A to solicitor for other parties to the cause ("the receiving party/ies"): rr. 15A.1A(1) and 15A.4(1);

ii. not later than 5pm on Court day 3, any receiving party who wishes to oppose the motion sends by email a completed Form 9A to the solicitor for the lodging party: r. 15A.5(1);

iii. the lodging party then sends the Forms 6A and 9A to the court by not later than 12:30pm on Court day 4: r. 15A.8(2);

iv. the court then fixes a hearing date.

[6] When a motion (whether opposed or unopposed) is lodged with the court, information must be provided confirming the email address to which intimation has been made, as required by r. 15A.4(1): Form 6A, section 9(a). Information may also be provided as to the "Additional email address(es) of fee-earner or other person(s) dealing with the case on behalf of a receiving party(if applicable)": Form G6A, section 9(b).

[7] The second method of intimation is not mandatory, but the practice of intimating motions to persons known to be handing particular cases is commonly adopted among firms practising in the Sheriff Personal Injury Court.

The sequence of events

[8] As I understood it, the sequence of events was a follows.[1]

[9] On 10 September, the defender offered £20,000 plus expenses by lodging and intimating to the pursuer's solicitors a tender in conventional terms, containing an offer of a principal sum, net of recoverable benefits "… with the expenses of process to the date hereof in full satisfaction of the craves of the initial writ" ("the tender").

[10] On 6 October, Ms Lindsay caused to be intimated to the email address for transacting motions business provided by Mr Hennessy's firm (as required by rr. 15A.2 and 15A.4(1)(c)) and to Mr Hennessy's own email address (i) a minute which purported to accept the tender ("the original acceptance") and (ii) a motion in terms of which was sought (a) decree in terms of the tender and the original acceptance; (b) certification of three skilled persons; and (c) "certification" (*sic*) for the employment of junior counsel for the purposes of certain specified items of work ("the original motion").[2]

[11] The original acceptance bore to accept the sum tendered "…together with the taxed expenses of process to date hereof…". This wording meant that the pursuer was implicitly seeking decree for expenses to the date of the original acceptance, when what had been offered was expenses to the date of tender. As such, even if it had been unopposed, the original motion would not have been granted because the terms of the original acceptance did not

[1] All dates are 2020.

[2] The terms of the motion for certification did not address the test as set out in r. 5.3(2) of the Act of Sederunt (Taxation of Judicial Expenses Rules) 2019, but were instead expressed in a long outdated formula.

meet the terms of the tender: *Sheriff Court Practice*, MacPhail, 3rd edition, para. 14.49. The supporting submissions briefly addressed the question of sanction for counsel.

[12] On 8 October, Mr Hennessy intimated opposition to the original motion, the terms of which identified the following matters as being in issue:

i. expenses, on the basis that given the delay in accepting the tender, the pursuer ought properly to be seeking expenses in favour of the pursuer to the date of the original tender and expenses in favour of the defender from the date of the original tender, the 'true' date by which the tender should have been accepted being a matter for the auditor or the Court; and

ii. sanction for counsel

a. as the pursuer's submissions in support of the motion provided an inadequate foundation for the Court to determine the reasonableness of the instruction of counsel; and

b. in any event, neither the quantification of the claim nor the proceedings as a whole involved actual or likely difficulty or complexity; nor was the case of significant value and importance.

[13] The defender's supporting submissions set out these grounds of opposition in some detail.

[14] In terms of r. 15A.8, the motion, having been opposed, was due to be lodged on Friday 9 October.

[15] Mr Hennessy assumed the original motion had been lodged and that notification of an opposed motion hearing would be received from the court by his firm in due course.

[16] In the event, Ms Lindsay did not lodge the motion on 9 October. She did not notify Mr Hennessy or his firm that the original motion was not being proceeded with at that stage.

[17] Mr Hennessy was on annual leave for the week of Monday 12 October to Friday 16 October.

[18] On 12 October 2020, Ms Lindsay, having taken advice from counsel, intimated what was said to be a revised motion ("the revised motion") and minute of acceptance ("the revised acceptance") to the email address for transacting motions business provided by Mr Hennessy's firm and to Mr Hennessy's own email address. The effect was that a new motions timetable began running.

[19] The terms of the revised motion set out in Part 6 of Form G6A were identical to the terms of the original motion. The supporting submissions at Part 9 of the Form G6A had been amended (deletions shown and additions underlined) to read:

> "It was reasonable to instruct junior counsel in respect of this matter. The accident arose out of an accident occurring during the course of the pursuer's employment. Liability was admitted pre-litigation subject to contributory negligence. The defender sought to rely upon this in defence of the action. The pursuer sustained post-concussion syndrome as a result of the accident. The pursuer's injuries were complex in nature, as was his recovery. The pursuer had a complicated employment history in the immediate aftermath of the accident. It is respectfully submitted that case the case (sic) was sufficiently complex to justify the instruction of counsel."

[20] In addition, the revised acceptance contained an alteration, the phrase:

> "…together with the taxed expenses of process to date hereof…"

being replaced with:

> "…together with the taxed expenses to the date of the tender hereof (*sic*)…".

[21] The same day, Ms Lindsay received an out of office email from Mr Hennessy which advised that he was away until Monday 19 October.

[22] Due to a misunderstanding in Mr Hennessy's firm's office, the revised motion was not opposed, as it should have been, as it was mistakenly assumed that he was aware of it.

[23] No opposition having been received, Ms Lindsay instructed that the revised motion be lodged with the court as unopposed on 15 October.

[24] That was done and an interlocutor granting decree was pronounced the same day.

[25] The result was that the defender lost the opportunity to be heard on a contra-award of expenses arising since the date of tender and sanction for counsel.

[26] On Monday 19 October, having become aware of the interlocutor of 15 October, Mr Hennessy emailed Ms Lindsay explaining the oversight; that the opposition on the same terms should have been maintained; and asking whether she would be prepared to agree to the interlocutor being treated as pro non scripto, re-intimation of the motion so that it could be opposed and proceeding to an opposed motion hearing.

[27] Ms Lindsay declined to consent to the treating of the interlocutor as pro non scripto.

[28] There then followed a brief correspondence which did not lead to a resolution and the motion which came before me was then intimated, opposed and lodged with the court,

Submissions for defender

[29] It was accepted that the court had limited grounds on which to exercise its power to interfere with an interlocutor previously granted and that the consent of all parties was normally required.

[30] It was submitted that it could not be the case that the defender was obliged to submit the same opposition to the same motion six days after it had already done so; and that in the circumstances the court should hold that the revised motion was in fact opposed. The court

was invited to make a decision on that issue in the expectation that if it so decided, the pursuer would consent to the correction of the interlocutor of 15 October.

[31] The original motion sought decree in terms of the tender and acceptance; certification of three skilled witnesses; and sanction (erroneously referred to as certification) for the employment of junior counsel. The supporting submissions ran to some seven lines.

[32] The original motion was timeously opposed in respect of the expenses of action (the date of the tender) and sanction for counsel.

[33] The opposed motion should have been lodged with the Court on Friday 9 October. The relevant rule of court used the word "must".

[34] In fact, the motion was not lodged and no intimation of that was given to the defender's solicitors.

[35] The revised motion intimated on 12 October was in precisely the same terms as the original motion with three additional sentences added to the supporting submissions.

[36] Those had presumably been added because a preliminary point taken in the grounds of opposition to the original motion was that there was a lack of supporting submissions in relation to the question of sanction for counsel.

[37] It was accepted that the motion had been intimated to the defender's solicitors' generic and Mr Hennessy's email inboxes. The latter generated an out of office message. The former did not provoke a reaction because those in the defender's solicitors' office assumed that Mr Hennessy knew of it because, although he was on leave, he had been in touch with the office with occasional emails. As a result, the revised motion was not opposed by the intimation of a Form G9A.

[38] The interlocutor of 15 October ought to be corrected. The motion had in fact been opposed. It had been assumed that the pursuer's solicitors would consent to the correction of motion in the circumstances.

[39] The situation had arisen through oversight but opposition to the revised motion would have consisted of intimating the same document in the same terms (the Form G9A).

[40] The revised motion was identical in its terms to the original motion. Nothing had changed.

Submissions for pursuer

[41] Ms Lindsay submitted that the motions were not identical. There had been differences between the submissions. The Form G6A had been revised.

[42] It having been intimated, there had been an opportunity to oppose the revised motion but no intimation of opposition had been made or received.

[43] It was not for the pursuer's solicitors to second-guess the intentions of the defender's solicitors. It was not uncommon for a motion to be opposed and then for the opposition to be withdrawn if additional information was put forward.

[44] The defender's solicitors were aware of the revised motion. As no form of opposition had been received, it was not for the pursuer's solicitors to guess and they were entitled to lodge a motion with the court as unopposed.

[45] It was accepted that on 19 October the pursuer's principal solicitor had received an email from Mr Hennessy apologising for the oversight and seeking agreement that the interlocutor of 15 October be treated pro non scripto.

Further information/submissions supplied at request of court

Pursuer

[46] It was thought appropriate to lodge the second, revised motion as unopposed on the basis that intimation had been made to the defender's solicitors' motions email address. They ought to have actioned the motion and intimated any opposition in Mr Hennessey's absence.

[47] Mr Hennessey had confirmed that the motion was received by his office and they failed to action re-intimation of the opposition. This failure is described as an 'oversight', so it cannot be suggested that the defender's solicitors were unaware of the revised motion or that it was intimated incorrectly. Intimation of a motion to a case-handler was additional and not required by the rules for the purposes of correct intimation.

[48] The revised motion of 15 October was lodged with the court by an administrative assistant. Ms Lindsay was responsible for the contents of the revised motion, having drafted it and instructed the administrative assistant to lodge it with the court at the appropriate time.

[49] It was deemed appropriate to maintain the terms of para 9(b) of Form G6A of the revised motion on the basis that the motion had been sent to Mr Hennessy, as well as to the generic motions inbox, although his out of office had been received to accurately reflect that the motion had been sent to him at the time of intimation.

[50] The administrative assistant had been instructed to lodge the revised motion on the morning of 15 October. This instruction had been conveyed via an electronic case management system.

[51] If opposition had been intimated by the defender to the revised motion as opposed, the administrative assistant would have been instructed to lodge the motion as opposed. As no such opposition was received, she was instructed to lodge the motion as unopposed.

[52] Prior to the motion of 6 October, parties had not entered into any dialogue regarding the expenses of the action, the relevant date of the acceptance of tender or any contra-account.

[53] Following receipt of Mr Hennessy's opposition to the motion of 6 October, and a discussion with counsel instructed in this matter, it was deemed necessary to adjust the submissions in support of the motion and to change the terms of the original acceptance. The motion was re-intimated and it was highlighted to Mr Hennessy, and the recipient of the intimation via the motions inbox, that the acceptance had been revised.

[54] The terms of the original acceptance had been altered to reflect the fact that the pursuer was seeking the expenses of process to the date of the tender. The defender's opposition to the original motion sought expenses from the date of tender along with opposing sanction for counsel. As the pursuer had conceded the point of the expenses from the date of the tender, the opposition to the original motion did not correlate to the terms of the revised motion or acceptance.

[55] It was not Ms Lindsay's place to (a) make assumptions regarding the defender's intentions in respect of the revised motion or (b) as the pursuer had accepted one part of the opposition, to second-guess whether the defender intended to maintain the other ground of opposition.

[56] The opposition of 6 October motion would not have been the same as any opposition which could have been intimated to the revised motion since one of the points of opposition was no longer relevant. It was incorrect to suggest that the same document would have been re-sent.

Defender

[57] The amended terms of the revised acceptance had no effect on the decree being sought in the first instance – those were always going to be expenses to the date of tender unless otherwise modified by the court. The fact that the acceptance was amended (to no effect) was not relevant to the central issue, which was that the motion was in identical terms.

[58] The defender's opposition to that motion related to a modification of expenses to seek expenses in favour of the defender from the date of tender, and opposition to sanction. The defender's opposition remained operative on all grounds notwithstanding (1) an unnecessary amendment to the acceptance and (2) the addition of three further short sentences in the submissions in support of the motion.

[59] The opposition intimated to the original motion was a valid form of opposition for the revised motion, it being the same motion intimated 6 days (or 4 working days) later.

[60] The defender fully accepts that this submission would have considerably less force in circumstances where the motion was in different terms, and that this particular issue is unique to the particular circumstances of this motion. Principally, those are that the pursuer did not notify the defender of the intention to not proceed with the original motion prior to enrolment on the expected lodging date of 9 October (a time prior to Mr Hennessy's absence on leave) coinciding with an oversight, allowed an otherwise correctly opposed motion to proceed unopposed.

Grounds of decision

The defender's motion

[61] As alluded to at the outset, the motion ultimately made was not that I should move directly to hold that the interlocutor of 15 October was pro non scripto, but rather that I should, in the circumstances, hold that the revised motion was in fact opposed.

[62] I understand that that approach was taken in recognition of the limited grounds on which the court could interfere with an interlocutor previously granted: *Sheriff Court Practice,* MacPhail, 3rd edition, paras 5.87 – 5.90; *Halligan* v *Sutherland's Fruit & Veg Ltd and Another* [2018] SC EDIN 25; 2018 G.W.D. 15-199.

[63] The key question which requires to be resolved is whether the revised motion was "the same motion" as the original and thus whether the original opposition remained operative, thereby eliminating the need for a new Form G9A to be intimated to the pursuer's solicitors.

[64] In my opinion, this requires a consideration of the rules which regulate the procedure, as well as the content of the Form G6A.

[65] As Mr Hennessy observed, r. 15A.8, which regulates the lodging of opposed motions, provides:

> "(2) The (opposed) motion must be lodged by the lodging party not later than 12.30 p.m. on court day 4 by—
>
> (a) sending an email in Form G6A headed "Opposed motion", to the address of the court;
>
> (b) attaching to that email the opposition in Form G9A intimated by the receiving party to the lodging party.
>
> (3) Where a motion is lodged under paragraph (2), the sheriff clerk must advise parties of the date on which the motion will be heard, which will be on the first suitable court day after court day 4."

[66] Thus, the lodging of the opposed motion and the opposition thereto triggers the fixing of a hearing, but that only happens if these documents have been submitted by email to the

court. If they are not, then the motion procedure initiated by the intimation of the Form G6A comes to an end, because the court cannot accept the motion and no hearing is fixed.

[67] If that is correct, then in my opinion, if a new Form G6A (even in in identical terms) is intimated, that is a new motion which commences a new motion procedure under rr. 15A.(3)(b) and 15A.4(1). It is the intimation of the Form 9A under r. 15A.5(1) which makes the motion opposed.

[68] In other words, a strict construction of the rules is appropriate. To interpret the rules otherwise would be to introduce uncertainty where certainty is required.

[69] Furthermore, in the present case, although the changes to the supporting submissions were of little materiality and the motion itself (section 6 of the revised Form G6) was in the same terms as before, the practical effect of it, if granted, was different because of the wording of the revised acceptance. The grounds of opposition would not have been entirely the same because of the concession that the pursuer would be entitled to expenses to the date of tender rather than the date of acceptance. That is sufficient to dispose of the motion before me, but there are some other matters on which I wish to comment.

Competency

[70] No point was taken about competency and I was not addressed on it, but I think it likely that a sheriff is entitled to alter even a final interlocutor if the recognised criteria for treating it pro non scripto are shown to exist. Unfortunately that is not the position in this case, absent consent from the pursuer's solicitor.

Intimation

[71] Although the rules in Ch 15A do not require that a lodging party who decides not to proceed with a motion by lodging it on "court day 4" to intimate that fact to the receiving party copy, I would suggest that as a matter of courtesy that should be done.

Scope of dispute

[72] Ms Lindsay appears to have been proceeding on the basis that the amendment to the revised acceptance dealt fully with the opposition insofar as it related to the expenses of process themselves. But the effect of the opposition as to expenses was to put in issue three matters, namely (i) the true date of tender: MacPhail, para.14.51; (ii) the date up to which the pursuer was entitled to expenses (i.e. the date of tender, not the date of acceptance); and (iii) what was to happen to the expenses arising after the date of tender (the defender seeking a contra-award). The alteration to the wording of the acceptance had the effect only of clarifying the pursuer's position as to the second of these points.

[73] That said, the defender has not lost the opportunity to state its position about the true date of the tender as that can and usually is dealt with by the auditor of court.

Disposal

[74] What has gone wrong in this case is the type of circumstance, arising from human error or misunderstanding, which could happen to any solicitor in any firm at any time. The consequence is that the pursuer has gained an advantage, in that the risk of a contra-award of expenses and/or refusal of sanction has been eliminated.

[75] The refusal of the pursuer's solicitors to yield to the request that the interlocutor of 15 October appears to me to be a question of professional etiquette, and as such raises no

justiciable point. Accordingly, I have reluctantly reached the conclusion that the defender's motion must be refused.

[76] I observe that this is the type of situation which, were the interlocutor in question not a final one, might be amenable to review by me even without the consent of the pursuer's solicitors: MacPhail, para. 5.97; *Hardy* v *Robinson* 1985 SLT (Sh. Ct) 40; and *Murrie* v *The Distillers Company (Bottling Services) Ltd*, 23 March 1990, Lord McCluskey, unreported.

[77] In the circumstances, I answer the question posed by Mr Hennessy thus: the revised motion was a new motion and was not opposed. The defender's motion is refused. All questions of expenses are reserved.