SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH ALL SCOTLAND SHERIFF PERSONAL INJURY COURT

[2020] SC EDIN 35

PN974/20

NOTE BY SHERIFF K J CAMPBELL QC

in the cause

PAULINE WALLACE as executrix dative of the late WILLIAM WALLACE

Pursuer

against

(FIRST) COLIN McANDREW & PARTNERS LIMITED; (SECOND) CRUDENS (MILTON KEYNES) LIMITED, (THIRD) SIR ROBERT McALPINE LIMITED; (FOURTH) DOEMANT BCL LIMITED; (FIFTH) HART BUILDERS (EDINBURGH) LIMITED, and (SIXTH) McLAREN PROPERTY AND BUILDING COMPANY LIMITED

Defender

Act: Singer, Thompson's solicitors, Glasgow (for pursuer and second-sixth defenders)
Alt: Russell, advocate, BLM solicitors, Glasgow (for first defender)

Edinburgh 14 May 2021

Introduction

1. The pursuer is Pauline Wallace, who is the executrix dative of the late William Wallace ("the deceased"), who resided with her. The deceased's date of birth was 18 December 1944. During his working life, the deceased was a joiner. At various times he worked for each of the defenders. The action avers that throughout the course of his employment with the defenders, he was regularly exposed to substantial quantities of asbestos dust. He developed pleural plaques. The deceased unfortunately died on 25 December 2019, of an unrelated condition.

2. The present action was raised in May 2020, and seeks damages in respect of the deceased's pleural plaques. Efforts have been made by all parties to settle the action. Unfortunately, a problem has arisen which may undermine those efforts. That was the subject of submissions to me during a procedural hearing on 4 May 2021. Having heard those submissions, it seemed to me that matters were both more complex than they at first appeared and sufficiently important to require a written decision, and I made avizandum.

3. In order to put the argument I heard in context, it is necessary first to set out the recent procedural history of the action, and the terms of certain correspondence between agents, before turning to the issues in dispute.

Sequence of events

4. On 21 January 2021, the court received notification from the pursuer's agents by the lodging of a PI Action Settled form that the action had settled. On 22 January, in accordance with the court's usual practice, an interlocutor was issued appointing parties to lodge a Joint Minute within 28 days and in the event such a Joint Minute was not lodged, assigning a by order hearing on 1 March 2021. On 1 March, the court, having seen and considered email correspondence from parties, pronounced an interlocutor discharging, ex proprio motu, the by order hearing on 1 March 2021 and allowed a further six weeks for the lodging of a Joint Minute. Again, a hearing was assigned in the event that such Joint Minute was not lodged timeously. In the absence of further communication with the court, on 20 April, a hearing was fixed for 4 May.

5. On the morning of 4 May, a Joint Minute as between the pursuer and the second – sixth defenders was tendered by the pursuer's agent by email, along with an Inventory of Productions containing certain email correspondence between agents, and a Joint Minute

bearing to record settlement as between the pursuer and the second – sixth defenders. The first email on the Inventory bears to have been sent by David Magee, the fifth defender's agent, at 14.50 on 21 January 2021 to Paul Ramsay, the pursuer's agent. The agents for the other defenders were copied into the email.

The email is in the following terms:

> "Dear Paul,
>
> **Pauline Wallace v Colin McAndrew & Partners Ltd and Others**
> **Your Ref: LD/PRA/WALLACE/S18G0431**
> **Our Ref: RIV531-1486910**
>
> I refer to the above matter in which I am instructed on behalf of the fifth defenders.
>
> On behalf of all defenders I have instructions to offer £2,196.79 in settlement of crave (a) of the Record. This is the figure that the pursuer will receive in her hand, and is net of CRU and the FSCS shortfall in respect of the first defender's share.
>
> With regard to the restoration costs sought in craves (c) and (d) of the Record, given the duplication in the work in restoring the defenders for the purposes of this action, offers are submitted at £1,750 inclusive of VAT in respect of each of the craves (c) and (d).
>
> The first defender has no offer to make in respect of crave (b) of the Record.
>
> Your reasonably incurred judicial expenses will be payable in addition to the above offers. Certification of Drs Sproule and Todd can be agreed.
>
> I would be grateful if you could take instructions in advance of the pre-trial meeting this afternoon.
>
> Without Prejudice
>
> Kind regards,
>
> David"

6. The second email bears to have been sent at 15.35 on 21 January 2021 by Paul Ramsay to David Magee. Again the agents for the other defenders were copied in.

The email is in the following terms:

> "Hi David,
>
> Thank you for your email below.
>
> On behalf of the Pursuer, I can accept the offer of £2,196.79 in net damages due to her in settlement of her claim, together with our reasonable damages.
>
> I can also agree the offers from the Fourth and Sixth Defenders of £1,750 inclusive of VAT each in satisfaction of craves (c) and (d).
>
> I shall be seeking Decree against the First Defender in respect of crave (b) in the Joint Minute in absence of an offer.
>
> I will advise the Court of the settlement in due course, and can confirm the Pre-Trial Meeting for this afternoon can be cancelled.
>
> Can you please provide me with the breakdown of payments due from each Defender so that I may keep an eye on damages as they come in, and so to assist the drafting of the Joint Minute in due course?
>
> Kind regards,
>
> Paul"

I was told that there was no further correspondence responding directly to this email.

Parties' submissions

7. Introducing the matter, Mr Singer, who is the pursuer's agent, and who also appeared of consent for the second – sixth defenders, submitted the settlement form had been lodged in error. There was agreement about damages and expenses. There was a dispute about crave (b), which related to the cost of restoring the first defender to the Register of Companies. The first defender was not prepared to pay the cost of restoration, and appeared to be arguing settlement was contingent. However the pursuer's position was settlement was agreed as between the pursuer and the second – sixth defenders. He moved me to interpone authority to a Joint Minute, and to find the defenders liable in expenses in

the proportions indicated. He also moved me to certify Dr Michael Sproule, consultant radiologist, and Dr GeoffreyTodd, consultant chest physician, as skilled persons and to grant sanction for the instruction of junior counsel.

8. Mr Singer referred to the email exchange set out above. He submitted that the message from Mr Magee contained an offer, and there was no indication the pursuer required to waive her claim for the costs of restoring the first defender to the Register. The first defender appeared to be arguing that nothing was agreed until all was agreed. The pursuer's position, set out in Mr Ramsay's email, was that settlement had been reached on all matters except restoration of the first defender.

9. The pursuer sought decree against the first defender for its share of the settlement and expenses to date in the agreed percentage (23.65%). It was acknowledged that would be paid by the Financial Services Compensation Scheme ("FSCS"), and therefore 90% would be recovered. Thereafter, the pursuer sought to have the matter continued to a proof against the first defender in relation only to the restoration costs.

10. Counsel for the first defender, Ms Russell, indicated the first defender took no issue with certification of the skilled witnesses nor sanction for junior counsel. She took no issue with matters as between the pursuer and the second – sixth defenders. The pursuer's motion to appoint the case to proof as between the pursuer and first defender was opposed.

11. Ms Russell explained that prior to the offer in Mr Magee's email of 21 January, all six defenders took instructions, since it was necessary for each to know what it was paying for. There was agreement amongst the defenders. There was no agreement about restoration costs separate from the overall settlement. Ms Russell submitted the email from Mr Ramsay was an acceptance of the offer. A draft Joint Minute was sent to all six defenders on 21 March 2021, whose terms bore to grant decree against the first defender for a sum equal

to its share of the principal sum plus a sum representing the restoration costs. That had not been agreed as a term of settlement, because restoration costs from the first defender were expressly not offered. There had ultimately been six draft Joint Minutes circulated prior to that before the court today.

12. Terms of settlement were clear, and the offer made and accepted clearly did not include the costs of restoring the first defender to the Register of Companies. That had been excluded because the first defender's insurer is insolvent, and thus FSCS is involved. FSCS was unable to agree to pay restoration costs because it is a funder of last resort. The pursuer's agents had been made aware of that in the autumn of 2020.

13. Further, in Ms Russell's submission, the position in relation to recoverability of the costs of restoration of a company was governed by the decision of Lord Drummond Young in *Aitken* v *FSCS* 2003 SLT 878. Ms Russell said that as a result of that decision, there has been industry-wide acceptance that FSCS will not meet costs of restoring companies to the Register.

14. Ms Russell submitted it was also necessary to have regard to the economics of the case. The first defender's agreed share of the principal sum in the settlement offer was 23.65%, and as the first defender's insurer is insolvent, FSCS would be meeting the liability up to 90%. That amounted to approximately £475. An amount had been offered in relation to restoration of the fourth and sixth defenders; that was less than the full amount claimed because there had been a degree of duplication of work. A proof would be a waste of time, expense and court resources. A lot of time and money has already been used up arguing about this since 21 January. If the pursuer succeeded at proof, she would receive £2670.40, of which approximately £1500 would be agents' fees in relation to restoration.

15. In a brief reply, Mr Singer submitted that the pursuer needed to know how much she would receive in any settlement. The position about restoration costs should have been made clear and if necessary separate proposals made. The correspondence made clear that the pursuer was continuing to seek those costs. In relation to *Aitken*, Mr Singer was not in a position to have a debate about the application of that decision. However, the court should distinguish *Aitken* because in that case, there had been an issue about the insurer being the dominus litis, and there had been no argument about an action against the insured company directly.

Discussion

16. As presented, there is a dispute between the pursuer and the first defender about the element of the claim relating to the costs of restoring the first defender to the Register of Companies. On further consideration, it seems to me that masks a more fundamental issue, namely whether there truly is consensus about settlement of the action.

17. Having regard to the email exchange on 21 January 2021, a number of things emerge.

- An offer to settle was made by the fifth defender's agent, but expressly writing on behalf of all defenders.
- The email contained an offer in settlement of crave (a) which is the pursuer's claim on behalf of the deceased's estate for solatium, which bears to be made on behalf of all defenders.
- The email contains an offer in respect of craves (c) and (d), the costs of restoring the fourth and sixth defenders to the Register of Companies.
- The email indicates the first defender "has no offer to make" in respect of crave (b), the costs of restoring the first defender to the Register.

- The offer includes judicial expenses and agreement to certification of Drs Sproule and Todd.
- The pursuer's response was to accept the offer in respect of the principal sum, crave (a), and the craves (c) and (d).
- The pursuer's response also indicated she would be seeking decree in respect of crave (b).

18. As I have noted above, I was advised there was no further correspondence directly addressing this settlement offer, though I was told that there was correspondence exchanged about the drafting of a Joint Minute, which went through a number of iterations before the version which was before me at the hearing on 4 May.

19. It seems to me that the real question to be resolved here is whether parties have reached consensus about settlement of the action. This is not narrow formalism. The court encourages efforts to settle actions where, as in most cases, that is appropriate. Multi-party actions are common in this court, and it is important that parties, and the court, are clear about the effect of settlement offers, and the response to them.

20. In my opinion, the offer on behalf of the defenders addresses all of the matters in the action. In my opinion, the pursuer's response is a counter-offer which does not address the offer fully. I do not accept the pursuer's submission that the offer on behalf of the defenders contained no indication the pursuer was required to waive her claim for the costs of restoring the first defender to the Register. In my opinion, that is precisely what was intended by the offer: the words "the first defender has no offer to make in respect of crave (b) of the record" are unambiguous in themselves, and the more so in the context of an offer addressing all other elements of the action.

21. That matters because unlike, say, negotiation of terms in a commercial contract, where rejection of an offer may sometimes take the form of a counter-offer with different terms, in the context of negotiations to settle an action of this kind, in my opinion it is necessary that all elements of the action are addressed in offer and response/counter-offer. This is but the application of general principles of the law of contract to the particular situation of compromise of litigation. Acceptance must meet the offer or there is no consensus (cf. McBryde *Contract* (3d ed) para 6-85; *Chisholm* v *Wardrope & ors* (2005) SCLR 530).

22. Where there is a single cause of action, in this case a delictual act, it is no matter that there may be several defenders, the action is an unum quid. The fact that there are several defenders may well result in discussions amongst the defenders whereby they agree to contribute in certain proportions to a proposed settlement; that is not uncommon, and it is what happened here. However, in order to bring the action to a conclusion against all, offer and acceptance will need to take account of all issues and all defenders.

23. Against that background, it appears to me the effect of the email exchange on 21 January 2021 is that the action has not settled among the parties generally. I reach that conclusion with regret, but I consider it is inevitable: an offer has been made on behalf of all defenders, addressing all of the issues in the action, and there is disagreement between the pursuer and first defender. Until that is resolved, there is no resolution amongst all parties: liability for the primary claim is joint and several, albeit that there are also specific claims against the first, fourth and sixth defenders for the costs of restoration of those defenders to the Register of Companies.

24. Given what I have been told about the sums in issue as between the pursuer and first defender, it seems to me there is also an issue of the proportionality of expending time and

resources on a proof, even in the absence of an over-riding objective of the kind found in other forms of procedure in this and other common law jurisdictions. That is afortiori where there appears to be no real dispute between the pursuer and second – sixth defenders; indeed, I was shown a Joint Minute amongst those parties which seeks to dispose of their respective interests in the action.

25. Does the case of *Aitken* v *FSCS Ltd* assist? That case was mentioned in submissions but I was not taken to the decision in detail. In *Aitken*, the pursuer raised an action of payment against FSCS, in which he sought to recover judicial expenses awarded in an earlier action at his instance against the insurers of his former employers. He was put to the necessity of doing that because the insurer had become insolvent between paying the principal sum and taxation of the expenses.

26. In my opinion, the following key points emerge from the decision in *Aitken*:

(a) It is only the liabilities of the insolvent insurance company that FSCS are to indemnify (para [5] p881F).

(b) Policy wording is therefore critical (para [5] p881F).

(c) The liability for expenses must be one which arises "under the terms of" the insurance policy (section 6(4) and para [10] p88I).

(d) The critical feature of the insurance policy was that it was an indemnity policy, thus "the amount recoverable is measured by the extent of the insured's pecuniary loss" (para[11] p882J).

(e) The insured is limited to an indemnity against the legal expenses of the claimant in any action against the insured (para [14] p883I-J).

(f) The judicial expenses were not a sum due to the policyholder under a policy of insurance, accordingly did not fall to be met by FSCS under section 6(4) (para [17] p884F).

(g) In the event liability to meet the judicial expenses did fall upon FSCS, because insurance for that risk was not compulsory, any claim would be limited to 90% (para 18 p884G-K).

27. At the time *Aitken* was before the court, FSCS exercised functions under the Policyholders Protection Act 1975, inter alia in meeting claims under insurance policies against insurers which had gone into liquidation or had a provisional liquidator appointed. I gratefully adopt the account of the statutory background set out by Lord Drummond Young at paragraphs [3] and [4] of his opinion. It is important to note the 1975 Act was repealed by the Financial Services and Markets Act 2000, and not re-enacted in quite the same terms. In part, that is because the 2000 Act is very wide-ranging in its scope, covering a range of financial services activities including, but not limited to, insurance business. In terms of section 213, the financial regulators are required to establish a scheme for compensating people where regulated entities are unable or likely to be unable to satisfy claims. FSCS is that scheme.

28. The scheme is not found in statute, but in the FCA Handbook, which is accessible online (https://www.handbook.fca.org.uk/handbook). The section of the Handbook which deals with the operation of FSCS is entitled 'Redress' and in particular the sub-division "Compensation".

Section COMP 10 contains provisions about limits on payment, which so far as material are as follows:

Protected non-investment insurance distribution	**(1) where the** *claim* **is in respect of a** *liability subject to compulsory insurance* **: 100% of** *claim*
…	
	(5) In all other cases: 90% of claim

Section COMP 11 deals with payment mechanics.

29. It is also convenient to set out a number of key definitions which apply to these provisions:

"Claim"

> '(in *COMP*) a valid claim made in respect of a civil liability:
> (a) owed by a *relevant person* to the claimant; or
> (b) owed by a *relevant person* to the claimant and responsibility for which has been assumed by a *successor*; or
> (c) owed by a *successor* to the claimant as a result of the *successor's* assumption of responsibility for liabilities arising out of the acts or omissions of a *relevant person*.'

"Contract of insurance:"

> '…(in accordance with article 3(1) of the *Regulated Activities Order* (Interpretation)) any contract of insurance which is a *long-term insurance contract* or a *general insurance contract*,..'

"Liability subject to compulsory insurance"

> 'any liability required under any of the following enactments to be covered by insurance or (as the case may be) by insurance or by some other provisions for securing its discharge:
> …
> (b) section 1 of the Employers' Liability (Compulsory Insurance) Act 1969 or Article 5 of the Employers' Liability Order (Defective Equipment and Compulsory Insurance) (Northern Ireland) Order 1972;
> …'

"Protected non-investment insurance distribution"

> '*Protected non-investment insurance distribution* is an *insurance distribution activity* where the *investment* concerned is a *relevant general insurance contract* or a *pure*

protection contract but which is not a *long-term care insurance contract* or a *reinsurance contract*,…'

30. In my opinion, while the section of COMP 10 quoted above is not worded identically to section 6(4) of the 1975 Act with which the court was concerned in *Aitken*, that is accounted for by its non-statutory form. Having regard to the defined terms which I have set out, in my opinion, the intent is to achieve the same effect as sections 6(4) and 6(6) of the 1975 Act.

31. While Mr Singer was correct in observing that in *Aitken* the insurer had been found liable as dominus litis in the original proceedings, in my opinion, that is not to the point. That is because the real focus was on the character of the sum claimed by Mr Aitken and its relationship to the terms of the insurance policy. In *Aitken*, the issue was liability for judicial expenses incurred against the insurer; in the present case, it is the nature of the disputed part of the claim, namely the cost of restoring the first defender to the Register of Companies. I was not provided with the relevant policy terms, but I suspect they are unlikely to extend to restoration of the insured company to the Register. If I am correct about that, my provisional view (and it is provisional because I have not seen the policy, nor have I been addressed on it) is that although the expense item is different, its character vis a vis indemnity is similar to the judicial expenses in *Aitken* in the sense that it is not a liability arising under the policy because it is not a pecuniary loss of the insured, i.e. the first defender. From that it follows the approach taken by the court to the nature and scope of FSCS liability to indemnify in *Aitken* would be equally applicable in this case.

Decision

32. Given the view which I have reached about the effect of the email exchange on 21 January 2021, and the rather more tentative views I have expressed about the effect of *Aitken* its application to the current form of FSCS, I will put the case out for a procedural hearing on 31 May 2021. At that time, I expect parties to address me on proposals for further procedure. I will reserve all questions of expenses meantime.