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

[2024] SC EDIN 31

PIC-PN3578/22

NOTE BY SHERIFF K J CAMPBELL KC

in the cause

NICOLA BRUFF

Pursuer

against

ROYAL & SUN ALLIANCE INSURANCE LIMITED

Defender

Pursuer: Party
Defender: Richardson (BTO Solicitors, Glasgow)

EDINBURGH, 1 JULY 2024

Introductory

[1] This is the sequel to my judgment dated 15 May 2024, following proof in this action. In that judgment, I pronounced decree of absolvitor in favour of the defender following proof. The defender has now enrolled a motion in the following terms:

(1) To disapply qualified one-way cost shifting ("QOCS");

(2) To find the pursuer liable to the defender in the expenses of process; and

(3) To grant sanction for the employment of junior counsel.

The defender initially, at the time of enrolling the motion, also sought an award of expenses against Accident Exchange Unlimited on the basis that it was the *dominus litis*; however, by the time of the hearing that position had been departed from, and I heard argument only on behalf of the pursuer and the defender.

Defender's submissions

[2] The defender's solicitor referred to the written note attached to the motion, and adopted that insofar as it was directed against the pursuer. In relation to the part of the motion to disapply QOCS, the defender relied on three grounds as set out in section 8(4) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. The defender's position in short was that the pursuer had:

(a) made a fraudulent misrepresentation or otherwise acted fraudulently in connection with the claim and proceedings;

(b) behaved in a manner which is manifestly unreasonable in connection with the claim or proceedings; and

(c) had otherwise conducted the proceedings in a manner that amounted to an abuse of process.

[3] In making the motion, the defender principally founded on the statement provided by Daniel Donlin, which had been relied on by the pursuer throughout the proceedings up to the proof diet on 24 February 2024, which the court discharged ex proprio motu. The defender submitted that reliance on the statement by Daniel Donlin, now accepted by the pursuer to be false, fulfilled each of the criteria in section 8(4). The defender submitted that the only inference which the court could draw from these circumstances was that the statement had been procured by the pursuer to bolster her case. No explanation had been provided by the pursuer at proof, because she had relied on the privilege against self-incrimination, as she was entitled to do. A reasonable inference from the facts on which evidence was led was that Daniel Donlin, who was known to the pursuer through a work colleague of hers, had been asked to lie for the pursuer for the purpose of obtaining money

from the defender. The only person who would benefit from that would be the pursuer. Daniel Donlin was not a party to the action.

[4] In the context of the rules about QOCS, the Sheriff Appeal Court recently considered the question of fraud in the case of *Manley* v *McLeese* [2024] SAC (civ) 16. The Sheriff Appeal Court had approved the summary of existing case law in my decision in *Murray* v *Mykytyn* [2023] SC Edin 32 at paragraph 11. At paragraph 58, the Sheriff Appeal Court held that, in relation to disapplication under section 8(4)(a), ie fraudulent misrepresentation, the court requires to make a finding in fact that there has been such a misrepresentation. The defender's solicitor accepted that proposition was correct in the context where it appeared, however, he submitted that in the present case, the fraudulent statement had not formed part of the case at proof, and accordingly no finding had been made. On that basis, this case could be distinguished from *Manley*. Instead, the defender invited the court to consider the evidence which did emerge at proof, and consider whether there was sufficient evidence to make a finding that there had been a fraudulent representation. It was accepted that there would require to be sufficient evidence to permit the court to make such a finding before section 8(4)(a) could be successfully evoked. The defender relied on the material to which the court had been referred at proof in the context of the abuse of process argument (see paragraphs 6, 25 and 26 of the judgment after proof).

[5] The evidence about Mr Donlin's involvement was set out in paragraph 6 of my judgment. It was submitted from this material there was sufficient to allow the court to draw an inference that the statement had been made at the instigation of the pursuer. There was no other explanation indeed no explanation had been offered.

[6] The defender had an alternative argument about fraudulent representation. The defender submitted that the pursuer, her partner and mother made fraudulent

misrepresentations in evidence at proof about the defender's insured driver, Mr Clugston, admitting liability or at any rate fault. In finding in fact 10, the court had expressly rejected that evidence for reasons discussed in paragraphs 31 and 32 of the judgment.

[7] It was submitted that the same material pointed to the pursuer's conduct being manifestly unreasonable, *ex separatum* an abuse of process. The court was entitled to disapply QOCS under any and all of the headings in section 8(4). In those circumstances, the defender should be awarded the expenses of the action.

[8] Turning to the question of sanction for junior counsel, Mr Richardson explained that he has extended rights of audience and had been instructed to take on conduct of the proof following the pre-trial meeting. The defender had not up to that point instructed counsel until the issue around Mr Donlin's evidence became live. Given the nature of that issue and the enquiries which the defender had had to conduct, cross examination of Daniel Donlin and the pursuer about these issues was both delicate and very important to the defender in establishing its case. As a large insurance company, the defender has an interest in the prevention of insurance fraud, and accordingly the case was of more than usual importance to the defender. Further, at the point in time when the pursuer was legally represented, she had had the assistance of a solicitor advocate at Thomsons. For all of those reasons, sanction for junior counsel should be granted.

Pursuer's submissions

[9] As the pursuer was again unrepresented, I explained to her the general nature of qualified one-way cost shifting and the general notion of sanction for junior counsel. The pursuer had read my judgment dated 15 May 2024, and accepted the result. When she put her case forward, she believed the accident was not her fault. She said she did not intend to

commit fraud, and that was why she had admitted to her lawyer and thereafter to the court on 24 February 2024 that Daniel Donlin's statements were untrue. She emphasised she had done that before the court had heard any evidence. She accepted that the matter was one for the court's assessment of all of the evidence and her conduct of the case.

Analysis and conclusions

[10] The starting point is section 8 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, which contains the principles relating to qualified one-way cost shifting. Section 8 is in the following terms:

> "**8 Restriction on pursuer's liability for expenses in personal injury claims**
>
> (1) This section applies in civil proceedings where—
>
> (a) the person bringing the proceedings makes a claim for damages for—
>
> (i) personal injuries, or
>
> (ii) the death of a person from personal injuries, and
>
> (b) the person conducts the proceedings in an appropriate manner.
>
> (2) The court must not make an award of expenses against the person in respect of any expenses which relate to—
>
> (a) the claim, or
>
> (b) any appeal in respect of the claim.
>
> (3) Subsection (2) does not prevent the court from making an award in respect of expenses which relate to any other type of claim in the proceedings.
>
> (4) For the purposes of subsection (1)(b), a person conducts civil proceedings in an appropriate manner unless the person or the person's legal representative—
>
> (a) makes a fraudulent representation or otherwise acts fraudulently in connection with the claim or proceedings,

(b) behaves in a manner which is manifestly unreasonable in connection with the claim or proceedings, or

(c) otherwise, conducts the proceedings in a manner that the court considers amounts to an abuse of process.

(5) For the purpose of subsection (4)(a), the standard of proof is the balance of probabilities.

(6) Subsection (2) is subject to any exceptions that may be specified in an act of sederunt under section 103(1) or 104(1) of the Courts Reform (Scotland) Act 2014.

(7) In subsection (1)(a), 'personal injuries' include any disease and any impairment of a person's physical or mental condition."

[11] The operation of section 8(4) has been the subject of discussion in a number of decisions of this court, which I sought to draw together in my decision in *Murray* v *Mykytyn* and, more recently, by the Sheriff Appeal Court in *Manley* v *McLees*e. This case is slightly different from some of the earlier cases in that all three strands of section 8(4) are relied on by the defender, albeit that essentially the same basic facts and circumstances are relied on in respect of each, with an additional strand in relation to fraudulent misrepresentation, with reference to the evidence of the pursuer, her partner and her mother about admissions of fault said to have been made by the defender's insured driver.

[12] In my judgment following proof, I did not accept the pursuer's evidence about the circumstances of the accident, nor did I accept the evidence of her partner or her mother. My reasons for doing so are set out in paragraphs 30 and 31 of my judgment. I found that none of these witnesses was credible or reliable on a number of key matters. I did not make a finding that there was a fraudulent representation. The court did not hear evidence from Daniel Donlin, presumably as a consequence of the pursuer's acknowledgement that his prior statements both to her former solicitor and to the defender's agents were false. The background to the role of Daniel Donlin was the subject of detailed submissions by the

defender at proof (see paragraph 25 of my judgment), that was in the context of the defender's self-standing abuse of process defence. Given that the Sheriff Appeal Court in *Manley* held (paragraph [58]) that a sheriff requires to make a finding that there had been a fraudulent misrepresentation before section 8(4)(a) is established, and given that I was not in a position to make such a finding, I am unable to sustain this branch of the defender's submission. I have given consideration to whether the requirement might be met in a circumstance where the court has sufficient material available to allow it to make such a finding, as the defender urged on me in submissions. While there is perhaps a certain attraction to that approach, I consider that the better view is the court requires to proceed on findings in fact actually made, at least where the court is being invited to consider the issue after proof. That is because following proof, the court is inevitably weighing evidence and making findings in fact.

[13] Turning to whether the pursuer's conduct was manifestly unreasonable (section 8(4)(b)), in *Lennox* v *Iceland Foods* [2022] SC EDIN 42; 2023 SLT (ShCt) 73, Sheriff Fife held that "manifestly unreasonable" means "obviously unreasonable" (paragraph [60]). I also note that the threshold is behaviour in "in a manner which is manifestly unreasonable in connection with the claim or proceedings". I consider that it is obviously unreasonable for a party to an action knowingly to seek to rely on the witness whose testimony is completely untrue, whether that reliance occurs at the stage of formulation of the case, or thereafter in preparation for proof, rather than necessarily at proof itself. I am satisfied that "in connection with the claim or proceedings" is sufficiently wide to encompass that.

[14] I also consider that knowingly seeking to rely on a witness whose statement is entirely untrue amounts to an abuse of process. In my view, there can be few more

egregious examples of abuse of process than knowingly relying on a witness for a material part of a case whose evidence is subsequently accepted to be completely untrue.

[15] Accordingly, I consider that the defender has established that the grounds in section 8(4)(b) and 8(4)(c) are established and that I should disapply the QOCS and make an award of expenses in favour of the defender against the pursuer. Although it was not the subject of submission, I have given consideration to the question of whether such an award of expenses ought to be for the whole of the process or from a particular point in the life of the action. I did so because this is not a case where the fact of an accident occurring is in dispute, there was an accident, and there is some evidence that the pursuer suffered minor injuries. In that respect the case falls to be distinguished from cases where there is a dispute about whether the accident happened at all. However, because the circumstances in which the accident occurred were central to the case and to the proof, and because the proposed witness Daniel Donlin was put forward as a central pillar of the pursuer's argument in that respect for a significant proportion of the life of the action, I consider that the defender is entitled to expenses covering the whole period of the action.

[16] I turn to the question of sanction for counsel. The test is set out in section 108 of the Courts Reform (Scotland) Act 2014. Section 108 in so far as material provides as follows:

> "**108 Sanction for counsel in the sheriff court and Sheriff Appeal Court**
>
> (1) This section applies in civil proceedings in the sheriff court or the Sheriff Appeal Court where the court is deciding, for the purposes of any relevant expenses rule, whether to sanction the employment of counsel by a party for the purposes of the proceedings.
>
> (2) The court must sanction the employment of counsel if the court considers, in all the circumstances of the case, that it is reasonable to do so.
>
> (3) In considering that matter, the court must have regard to—

(a) whether the proceedings are such as to merit the employment of counsel, having particular regard to—

(i) the difficulty or complexity, or likely difficulty or complexity, of the proceedings,

(ii) the importance or value of any claim in the proceedings, and

(b) the desirability of ensuring that no party gains an unfair advantage by virtue of the employment of counsel.

(4) The court may have regard to such other matters as it considers appropriate.

…"

[17] I consider that the issues of fraudulent misrepresentation, and abuse of process are both of sufficient difficulty and complexity to merit the employment of counsel. I am also satisfied that the issues of fraudulent misrepresentation and abuse of process are in this context matters of importance to both parties but particularly to a motor insurance company which has an obvious interest in preventing widespread abuse of insurance by reason of fraudulent claims. I will therefore grant sanction for the employment of junior counsel.

[18] The defender has been successful in the motion and accordingly I will also find the defender entitled to the expenses of the motion.