

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

[2023] SC EDIN 41

PIC-PN3358-22

NOTE OF SHERIFF IAIN W NICOL

in the cause

CHRISTOPHER HARVIE

Pursuer

against

(FIRST) DANIEL-ILIUTA AVRAMEORU

(SECOND) AMAZON UK SERVICES LIMITED AND

(THIRD) AMERICAN INTERNATIONAL GROUP UK LIMITED

Defenders

EDINBURGH, 7 NOVEMBER 2023

**Introduction**

[1] This case called on the opposed motions roll on 30 October 2023 for determination of 2 motions. Firstly, a motion by the pursuer to abandon the pursuer's claim against the third defender on a no expenses due to or by basis, opposed by the third defender in relation to expenses only. Secondly a motion by the third defender, lodged prior to a hearing date being fixed on the pursuer's motion, to grant summary decree for absolvitor in favour of the third defender, with an award of expenses to the third defender.

[2] The action was warranted on 16 November 2022 and served on the third defender on 24 November 2022. As such, the rules on Qualified One-Way Cost Shifting apply to the case. In relation to both motions, the third defender sought to dis-apply QOCS under:

1) Section 8(4)(b) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 ie the pursuer or his legal representative behaves in a manner which is manifestly unreasonable in connection with the claim or proceedings) and/or

2) OCR 31A.2(d), ie abandonment of the cause in terms of OCR 23.1(1) or at common law. (introduced into the Ordinary Cause Rules by The Act of Sederunt (Rules of the Court of Session 1994, Sheriff Appeal Court Rules and Sheriff Court Rules Amendment) (Qualified One-Way Costs Shifting) 2021)

[3] Parties were agreed that even if one or both of the above exceptions to QOCS applies, the court retains an unfettered discretion as to whether to dis-apply the protection afforded to a pursuer under section 8(2) of the 2018 Act, in whole or in part.

### **Third defender's position**

[4] The third defender adopted written submissions, lodged in advance of the hearing. They included a timeline of events as follows:

01/08/2022 Enterprise Holdings, the registered keeper of the vehicle with registration [redacted], wrote to the pursuer's agent and provided the motor insurer's details for the vehicle at the material time by e-mail. Those details were as follows: "Insurer; ZURICH Policy Number; [supplied but removed from this note for data protection reasons]."

24/11/2022 These proceedings were served upon the third defender.

12/05/2023 The third defender entered the action, albeit late. The explanation for the late lodging was as follows:

“The third defender’s agent received instructions from their client timeously however, due to an administrative oversight on the part of the partner receiving those instructions, a file was not opened and consequently, a notice of intention to defend was not lodged.”

On the same date, the third defender’s agent wrote to the pursuer’s agent by e-mail asking the pursuer’s agent to confirm why the third defender had been sued when they were not the motor insurer.

18/05/2023 The agent for the first and second defenders confirmed to the third defender’s agent that they were instructed by Zurich Insurance as the motor insurer, and there were no indemnity issues. [this was not copied to the pursuer’s agent].

19/05/2023 The third defender’s agent wrote to the pursuer’s agent by e-mail chasing their response to email of 12/05/2023. The content of that e-mail stated: “I understand that Zurich have confirmed they are the RTA insurer.”

26/05/2023 The third defender’s agent wrote to the pursuer’s agent by e-mail providing a copy of their defences, and chasing the pursuer’s agent’s response to their e-mail of 12/05/2023.

30/05/2023 The third defender’s agent left a voicemail for the pursuer’s agent chasing their response and requesting confirmation of their intentions given that the third defender had been incorrectly sued.

09/06/2023 The third defender’s agent wrote to the pursuer’s agent by e-mail chasing their response.

05/07/2023 The third defender’s agent wrote to the pursuer’s agent by e-mail chasing their response.

22/08/2023 The third defender’s agent wrote to the pursuer’s agent by e-mail chasing their response.

05/09/2023 The third defender's agent wrote to the pursuer's agent by e-mail chasing their response.

06/09/2023 The pursuer's agent responded by e-mail in the following terms:

"The first and second defenders have yet to admit liability on record. I have put them on notice that if they fail to do so we will move for summary decree after the closing of the record. In order to protect our client's rights we will consider releasing your clients from the action only after the first and second defenders admit liability to make reparations."

12/09/2023 The third defender lodged their first inventory of productions (productions 1 to 8). This was the full inventory of productions. The cover sheet only was then lodged on 14/09/2023. On the same date, the third defender intimated their inventory to all parties. The content of that e-mail was as follows:

"Dear both, Please find attached our inventory of productions that we are lodging in process. It is obviously unreasonable for this action to continue against the third defender. Kind regards, Fiona"

14/09/2023 The third defender responded to the pursuer's email of 06/09/2023 in the following terms:

"The liability position re the first and second defender is irrelevant to the fact you have sued the wrong insurer. Your refusal to abandon this action against us is manifestly unreasonable. I am instructed to seek our expenses under s.8(4)(b) of the 2018 Act. If this matter is not resolved quickly, then I may be instructed to make submissions under subsection (c) as well given the pre- and post-litigation correspondence confirming the above. I would be most grateful if you would confirm the pursuer is abandoning this action against the third defender, with expenses, within the next 7 days."

19/09/2023 Interlocutor issued fixing Proof

20/09/2023 The third defender served a notice to admit upon the pursuer. The pursuer did not answer this notice. On the same date, the Pursuer confirmed by e-mail that as an admission of liability had now been received, they would be

intimating a motion to release the third defender from the action. The terms of the e-mail were as follows:

“Dear Fiona, I refer to my letter dated 6 September 2023. Please note that we have just received an admission of liability from the agents for 1st and 2nd defenders. We are content to release your clients from the action and a motion to this effect will come through in due course. Kind regards, Constantin”

On the same date, the third defender responded stating they required their expenses for the action to be paid. The terms of the e-mail were as follows: “Dear Constantin, Thank you for your confirming. We require our expenses to be paid. Kind regards, Fiona”

[5] The notice to admit, served on 20 September 2023, *inter alia* included calls on the pursuer to admit that the third defender is not the motor insurer of the first and second defenders, the motor insurer of the first and second defenders is Zurich Insurance plc [the policy number was provided] and that the pursuer had been informed of that information in an e-mail dated 1 August 2022. It further called on the pursuer to admit that the third defender had been incorrectly sued. The pursuer did not respond with a notice of non-admission within the 21 day period prescribed under OCR 29.14(2). Indeed the pursuer never responded directly to the notice to admit. However, on the day that it was served the pursuer confirmed that steps were going to be taken to release the third defender from the action since an admission of liability had been received by them from those acting for the first and second defenders.

[6] The third defender’s submissions can be summarised as follows:

- i. the pursuer is abandoning his action against the third defender. This is an exception to the general rule that a pursuer shall not be found liable to his successful opponent for expenses. The circumstances of the case mean the dis-application of

QOCS should be done without qualification and the pursuer should be found liable to the third defender for their expenses.

ii. the circumstances of the action and in particular the fact that the correct insurance position was notified to the pursuer's agent on 1 August 2022 (pre-litigation) but not acted upon until 20 September 2023 has led to the third defender having to defend an action which they should never have been part of. They have been forced to incur expense in defending a claim where they were never going to incur a liability to the pursuer. Whilst it was acknowledged that the Motor Insurers' Database search undertaken by the pursuer's agent did provide erroneous information as to the identity of the relevant insurer, the correct information was supplied well before proceedings were raised. The pursuer's agent had failed to act on the information that had been supplied and that was tantamount to conduct which fell within the scope of section 8(4)(b) of the 2018 Act.

iii any suggestion that the pursuer was entitled to keep the third defender in the action pending a decision on liability from the first and second defenders is misconstrued. The issue of liability did not and was never going to involve the third defender. The pursuer knew that as far back as 1 August 2022

[7] The third defenders referred to the decision of this court in the case of *Lennox v Iceland Foods Ltd* [2022] SC EDIN 42 as support for their submission that the pursuer's agent had behaved in a manner which was manifestly unreasonable in connection with the claim or proceedings. In that case, Sheriff Fife held that "manifestly unreasonable" means "obviously unreasonable" and each case would be considered on its own facts and circumstances.

### **The Pursuer's position**

[8] No written submissions were available to the court to set out the pursuer's position. It was accepted by pursuer's counsel that a) the time-line produced by the third defender's agent set out above was correct and b) the third defender's notice to admit had not been answered although it was suggested that was due to an administrative oversight. In any event, the notice to admit was served on the same day as the pursuer confirmed to the third defender that they would be released from the action ie 20 September 2023.

[9] Pursuer's counsel explained the unusual circumstances of the accident namely that the pursuer had been driving down a slip road to join a motorway, was building up his speed when he was confronted by a van being driven by the first defender driving the wrong way up the slip road. He tried to take evasive action but a collision resulted whereby the pursuer suffered serious injuries. The first defender's whereabouts for the purposes of the claim and litigation was never established. Information had been obtained subsequent to the accident which suggested the first defender was working for the second defender at the time.

[10] The pursuer's agent had performed a Motor Insurers' Database search on 17 June 2022 which showed that the insurer for the vehicle in question was the third defender. They relied upon that information.

[11] It was accepted that the pursuer's agent had received an e-mail from the third defender's agent on 1 August 2022 advising that the vehicle in question was

"being used by a corporate user at the time of the incident and they were covering all aspects of the rental including third party liabilities. Their details are as follows:  
Amazon UK Services Ltd."

An address in London was provided along with details of the insurer, Zurich and the policy number. A request was made to redirect the claim to them.

[12] It was submitted that when that e-mail was received the pursuer's agent was not certain that the first defender was driving for the second defender. The van was unbranded and the first defender could not be traced. Therefore to protect the pursuer's interests as time bar was fast approaching the safest course of action was to raise against the insurer who was listed in the MID search.

[13] The pursuer's agents, rather than contacting Zurich to confirm they were the relevant insurers, concentrated their efforts in trying to secure confirmation that the first defender was acting in the course of his employment with the second defender and pressing the second defender to admit liability. It was argued that only once liability was admitted on behalf of the first and second defenders did the pursuer have the comfort of knowing he would receive a settlement and could take steps to release the third defender from the action. That was confirmed to the third defender's agent on the same day as the first and second defenders admitted liability.

[14] With reference to the third defender's submissions regarding the e-mail of 18 May 23, sent by the agents for the first and second defenders, which confirmed to the third defender's agent that they were instructed by Zurich Insurance as the motor insurer and there were no indemnity issues, this was not sent to the pursuer's agents. Had it been, the pursuer could have released the third defender from the action then and there. The terms of the e-mail were not averred on record.

[15] Whilst it was accepted that the pursuer was abandoning his action against the third defender and that OCR 31A.2(2)(d) applies, it was submitted that the pursuer was entitled, based on the MID search and the lack of clarification from the agents on behalf of the first and second defenders, to have raised proceedings against the third defender. The court should therefore exercise its discretion not to find the pursuer liable for the third defender's



expenses. It was further submitted that there was nothing obviously unreasonable in the way the pursuer or his agent had conducted themselves in connection with the claim or proceedings and as such the court should not dis-apply QOCS based on manifestly unreasonable behaviour.

### **First and second defenders' position**

[16] Whilst the agent for the first and second defenders was present when the motion was argued, and had lodged written submissions, she adopted a mainly neutral stance. Her position was simply that the liability position between the pursuer and her clients was irrelevant to any decision to sue the third defender. She adopted a "holding" position in case the decision of the court has a bearing on the expenses position to be adopted by the third defender against her clients.

### **Decision**

[17] Dealing firstly with the pursuer's motion to abandon on a no expenses due to or by basis, there can be no question that OCR 31A.2(2)(d) is engaged, namely the pursuer is abandoning his case against the third defender at common law. The question for the court therefore is whether the court should exercise its discretion to dis-apply the protection afforded to the pursuer under the QOCS rules.

[18] I was not referred to the case of *McCrae v Screwfix & Anr* [2023] SC EDIN 28 which involved, *inter alia*, a consideration of issues relevant to a motion to dis-apply QOCS as a result of abandonment. In that case, similar to the present case, the pursuer was, or was at least going to be, successful against one defender and as a result chose to abandon against another. In the *McCrae* case it was argued that one defender had effectively induced the

pursuer to bring in the other defender. No such suggestion arises here. What is clear, similar to the *McCrae* case, is that the successful defender adopted an entirely consistent approach throughout their dealings with the pursuer's agent. Here, the third defender made it clear that they were not the vehicle insurer. They provided the pursuer's agent with the correct details for the second defender and their insurers.

[19] Following receipt of that information on 1 August 2022, the pursuer's agent did not seek to intimate a claim to Zurich as road traffic insurer. They did not contact Zurich to check the veracity of the information provided to them. They did not seek confirmation from those acting for the first and second defenders that Zurich were indeed the vehicle insurer, or at least I was not told they did. Even if they had queried Zurich's involvement with the first and second defenders' agent but received no response, the obvious course of action to take was to contact Zurich direct. They chose instead to press the agents for the first and second defender simply for an admission of liability and confirmation of the first defender's employment status. Such an approach was, in my opinion, misconceived. The issues which the pursuer's agent was focussing on were of no relevance to whether the third defender could be held liable.

[20] Having been told by the third defender that they were not the vehicle insurer and having been provided with the correct information, it was clearly incumbent on the pursuer's agent to make enquiries. Had that been done it would probably have been confirmed by Zurich that Zurich were the correct insurer.

[21] There was a gap of almost 4 months between the time that Zurich's details were provided to the pursuer's agent and the date proceedings were served. This was ample time for the position to be clarified. The pursuer's agent has a duty to ensure that reasonable steps are taken to investigate the correct defenders and sue the correct parties. Clearly some

time would have been required for them to do that. It may have taken up to 2 months to action the investigations and receive a response from Zurich verifying their involvement. On any view the position ought to have been clear before proceedings were issued. The third defender should never have been sued. It is not clear to what extent any pre-litigation expense incurred on the part of the third defender is attributable to the period prior to 1 October 2022 ie the end of the aforementioned 2 month period – that is a matter which the Auditor can rule upon if required – but I am satisfied that the third defender is entitled to an award of expenses against the pursuer from 1 October 2022 onwards. I am of the view that my discretion should be exercised in favour of the pursuer for any expenses incurred prior to that date.

[22] The circumstances narrated above in relation to the lack of action taken by the pursuer's agent to investigate the position, and in particular their conduct of the claim from 1 October 2022, is in my view, clearly consistent with behaviour which is manifestly unreasonable. The pursuer's agent had not only received the correct insurance details and had failed to take cognisance of them resulting in an action being raised against the wrong insurance company, they persisted in the action despite various e-mails being sent to them from the third defender's agent chasing a response to the e-mail of 12 May 2022. This is not a situation, in my opinion, which falls within what might be termed reasonable professional judgement on the part of the pursuer's agent as to how to conduct a litigation. There was a positive obligation to act upon information which stated that American Insurance Group were not the vehicle insurers. The failure to do so has clearly resulted in the third defender being needlessly sued and remaining in process for almost a year. As such I am satisfied that based on the Section 8 (4)(b) ground, the third defender is entitled to an award of expenses against the pursuer from 1 October 2022 onwards.

[23] Therefore in terms of the pursuer's motion to abandon on a no expenses basis, this will be granted to the extent of decree of absolvitor being awarded in favour of the third defender and no expenses due to or by up to and including 30 September 2022 but *quoad ultra* refused. The pursuer is found liable to pay to the third defender the expenses of process as taxed, or otherwise agreed, from 1 October 2022 including the expenses occasioned by the opposed motion hearing on 30 October 2023.

[24] Given the foregoing decision it is unnecessary for the court to consider the third defender's motion for summary decree. Clearly the third defender cannot be assoilzied twice. I will formally refuse the third defender's motion and make a finding of no expenses due to or by any party in relation thereto.