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

[2023] SC EDIN 42

PIC-PN2645-22

JUDGMENT OF SHERIFF IAIN W NICOL

in the cause

HENRY CLARKE

Pursuer

against

MARKS & SPENCER PLC

Defender

Pursuer: Swanney, advocate; Digby Brown LLP, Solicitors, Edinburgh
Defender: Hennessy, solicitor-advocate; Keoghs, Solicitors, Glasgow

EDINBURGH 24 November 2023

[1] This case called on 22 November 2023 for a hearing on the defender's opposed motion No. 7/5 of process, for an order under OCR 31.A.2(1)(a) for expenses to be awarded in their favour following decree of absolvitor being pronounced at proof.

[2] The defender sought to dis-apply the rule under section 8(2) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 on the basis set out in section 8(4)(b) of the Act namely that the pursuer or his legal representatives had behaved in a manner which is manifestly unreasonable in connection with the claim or proceedings.

[3] Based on precedent emanating from this court in recent months parties were agreed that the following principles, summarised by Sheriff Campbell KC in the case of *Carty* v *Churchill Insurance Company Limited* [2023] SC EDIN 31, applied, namely:

a) Each case in which the issue of dis-applying QOCS arises must be considered on its own facts and circumstances (Lennox[1], para 61; Gilchrist[2] para 27).

b) "Manifestly unreasonable" means "obviously unreasonable" (Lennox[3], para 60).

c) The Legislative history and language indicates that the circumstances where proceedings were not conducted in an appropriate manner are likely to be exceptional (Lennox[4], para 61).

d) Where there is a finding that the Pursuer is incredible on a core issue in the action, the issue of manifestly unreasonable conduct may arise, but does not invariably arise (Gilchrist[5], para 27).

e) The Court preferring the defender's witnesses over the pursuer's account does not of itself give rise to disapplication; whether it does depends on the Court's reasons (Gilchrist[6], para 28).

f) Unusual circumstances may or may not be exceptional; whether they are is context-specific (Love[7], paras 56 & 65).

[4] It was further agreed by both counsel that the court is required to apply a high test or in other words the bar is set high when considering whether there has been behaviour which is, or has been, manifestly unreasonable.

[5] One principle which was not explicitly stated by either party, but goes hand in hand with principle (a) is that the court retains an unfettered discretion as to whether to dis-apply QOCS.

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[1] [3] Lennox v Iceland Foods Ltd [2022] SC EDIN 42

[2] Gilchrist v Chief Constable of Police Scotland [2023] SC EDIN 30

[4] Lennox, supra

[5] [6] Gilchrist, supra

[7] Love v Fife Health Board [2023] SC EDIN 18

Defender's submissions:

[6] The defender made it clear at the outset that his arguments were confined to the section 8(4)(b) exception and were not based on section 8(4)(c) relating to abuse of process.

[7] The defender undertook an analysis of the factual case pled by the pursuer. The legal arguments of fault advanced by the pursuer were highlighted along with a series of criticisms which, it was argued, meant the pursuer's case was hopeless from the outset. If he was not bound to fail the prospects were such that running the claim and court proceedings was tantamount to manifestly unreasonable behaviour.

[8] The court, at a hearing on expenses, has the benefit of 20/20 vision and can analyse the conduct of the proceedings at various stages and in their entirety. The argument was developed by considering various instances of what was said to be manifestly unreasonable behaviour throughout the case, namely:

(a) pursuing a claim on supposition so far as any defect was concerned.

(b) pursuing a claim without any evidence of knowledge (or constructive knowledge) on the part of the defender or its employees.

(c) failing to seek to recover evidence by court order in support of the claim.

(d) proceeding with the claim and/or proof in the knowledge that the evidence was insufficient to establish the necessary elements for liability in a tripping case.

(e) failing to aver the necessary elements for liability in a tripping case.

(f) failing to produce or lead evidence to establish the necessary elements for liability in a tripping case.

(g) failing to accept the defender's settlement proposals – firstly an offer of abandonment and subsequently a cost inclusive offer.

(h) at the latest, failing to abandon the action following the pursuer's affidavit being prepared on 11 September 2023.

(i) proceeding with proof and leading the pursuer as the only witness on liability.

[9] The defender's primary position was that they should be awarded the expenses of process. Failing that, they sought an expenses award either from the date the record closed or the date the pursuer's affidavit was obtained.

Pursuer's submissions:

[10] The pursuer submitted that there were two strands to his argument namely:

1. The pursuer had pled a relevant case on record and there was a sufficiency of evidence, had it been accepted, which would have allowed the court to find in his favour and;

2. There had been an oversight on the part of the pursuer's agent in failing to lead particular evidence which would have potentially strengthened the pursuer's argument that the defender's employees knew or ought to have known of the existence of the defect and armed with that knowledge ought to have done something which would have prevented the accident from occurring.

[11] In relation to the first point the pursuer argued that the critical issues which the pursuer required to establish in order to succeed at proof were that:

i) he tripped on the safe distance sticker; and

ii) the safe distance sticker presented a foreseeable risk of tripping, ie it was a hazard against which reasonable precaution ought to be taken.

[12] By his own admission the pursuer was not aware of what had caused him to trip at the moment he fell. Instead, immediately following his fall he had to infer from his

surroundings and what was reported to him by others what it was that had caused him to trip. He was able to do so having observed the sticker on the floor and spoken to others. As such, it was likely to follow that the court would infer he must have tripped on the sticker given the absence of any other reasonable explanation in the evidence. It is therefore the finding in relation to whether the sticker presented a foreseeable risk of injury which was critical to the outcome of the Proof. It was submitted that the foregoing analysis is supported by the reasoning of the court in finding against the pursuer due to the lack of reliable evidence to allow it to find that there was a defect which had caused the pursuer to trip. That reasoning was, it was submitted, critical to the decision to grant decree of absolvitor.

[13] The pursuer sought to establish the two issues identified in the foregoing paragraph, via his own evidence alone. His evidence was that around a quarter to a half of the safety sticker was adhered to the floor (and so between a half and three quarters was not so adhered). In examination he described the sticker as being raised from the floor and that it had gradually been lifted. He was also taken to his affidavit in which he described the sticker as being like a wig which "you are not able to pull off properly." The Court did not consider that evidence was sufficient to establish dimensions or a level of protrusion which allowed it to make any finding as to the nature of the risk, if any, posed by the safety sticker and so whether it was a hazard against which some reasonable precautions ought to have been taken, or whether it was likely to have been the cause of the pursuer's fall.

[14] The pursuer argued that notwithstanding the court's findings, having regard to what is said above, it was not inevitable the pursuer's case would fail. Indeed, there was a stateable case which could have succeeded if the pursuer's evidence was accepted.

[15] In relation to the second point, it was accepted that evidence was not led at proof as to the customer service desk being constantly manned. It did form part of the pursuer's affidavit and so it was not unreasonable to expect it would form part of his evidence, and neither was evidence led to establish from the photographs at 5/4 where the customer service desk was in relation to the safety sticker so as to allow the court to make a finding as to whether those manning the desk could, or ought to have been able to, see the safety sticker from their vantage point. That this evidence was not led at proof is not sufficient to meet the very high test for manifest unreasonableness. It was nothing more than an oversight by the agent running the proof, which was a consequence of the inevitable stress and strain of litigation. That falls far short of the type of obviously unreasonable conduct (particularly when it is the pursuer's conduct and expenses with which we are concerned) envisaged by s.8 of the 2018 Act. If we were to look for a counsel of perfection in the manner in which proofs were conducted then the protection established by the 2018 Act would rarely be afforded to pursuers, which is the opposite of the underlying intention of s.8 and contrary to the principles underpinning that section as recognised by this court previously.

Discussion:

[16] The criticisms which are being levelled by the defender can be broadly summarised as:

1. The prospects of success with the claim were so lacking throughout that it was manifestly unreasonable on the part of the pursuer or his agent to pursue the claim at all, or at least, as the claim progressed, to fail to review prospects and take decisions to discontinue the claim;

2. There was a degree of ineptitude in how the claim was investigated and presented, including the conduct of the proof, which met the threshold for manifestly unreasonable behaviour.

[17] In dealing with the interpretation of the phrase "manifestly unreasonable" the previous decision of this court in *Lennox* held that it means obviously unreasonable. This derives from the dictionary definition of manifestly. The words patently or evidently could have been used. It is important to use the phrase in the context that applies to a motion to dis-apply QOCS. It is accepted by parties, rightly in my view, that the bar is set high. It is a difficult test for the defender to overcome and the granting of motions under s. 8 (4)(b) will be the exception rather than the norm. That means that the qualification of the word "unreasonable" by the word "obviously" takes the level of unreasonableness into a different category than behaviour which is "unreasonable". What might be deemed unreasonable behaviour will never be sufficient to form a basis for dis-applying QOCS under this exception. The court has to look at the specific facts and circumstances which arise in any given case to determine whether the behaviour complained of is obviously unreasonable and, if so satisfied, it must then exercise its discretion on whether to dis-apply QOCS.

[18] Whilst the court does have the benefit of taking an overview of how a claim was conducted, both at the pre-litigation and litigation stages, it is not the court's function to second guess professional judgments taken by legal advisers. Any consideration of whether behaviour is tantamount to being manifestly unreasonable requires to be considered at the time of the behaviour, not through the lens of 20/20 hindsight. It would be grossly unfair to do otherwise as it would mean the reasonableness of conduct would be analysed having regard to what had happened after decisions were made and the outcome of the action was

known. These are matters which would not have been within the knowledge of the agent at the time the decisions were being taken.

[19] Further, I do not consider it necessary or appropriate when considering the issues relevant to this motion to forensically analyse the decision making process of the pursuer's agent with a view to picking fault in their approach. That is not to say that specific parts of the claim procedure and presentation should not be looked at but if a reasonable explanation is advanced as to why the claim progressed in the way it did then it is less likely that there will be a sufficient basis for founding a QOCS motion under S8(4)(b).

[20] I made it clear at the conclusion of the proof that I was not criticising the pursuer for forming the view that he fell because of the floor sticker. This is not a case where the pursuer has been found to be incredible or has fabricated evidence to support a claim. He had no doubt told his solicitors that was his belief. His solicitors had ingathered documentation from the defender relating to the accident, in particular the accident investigation report. They had prepared an affidavit of the pursuer which set out a position which they considered to be a proper legal basis for proceeding with the claim. The fact I did not find the pursuer's evidence to be sufficiently reliable to then make a finding that the defender was liable to pay the pursuer damages does not mean the pursuer's agent was behaving in a manner which was manifestly unreasonable.

[21] There is no question of bad faith - I did not understand that to be a suggestion of the defender and their decision not to present the motion based on s. 8(4)(c) is consistent with that view. Nor has there been any wilful and persistent disregard of the court rules.

[22] An important factor is that a motion for summary decree was presented by the defender on the morning of the proof and that was refused. In my opinion, the pursuer had stated a relevant case on record and I was unable to hold at that stage that the pursuer was

bound to fail if he proved everything that he had averred. I am not satisfied that there is any basis for suggesting that the averments should never have been made nor am I satisfied that there has been any failure to review prospects in the lead up to the proof which ought to have led to abandonment. There is no requirement on the part of a pursuer's agent to remain of the view that prospects of success exceed 50%. They simply have to be of the view that there is a stateable case and not persist with a litigation where it is obviously unreasonable to do so. In my view we are not in that territory.

[23] In relation to the second criticism, it would be wrong to equate ineptitude, which is at the level of innocent mistakes, with manifestly unreasonable behaviour. I accept that it can be said that there was a failure to lead evidence at proof on an aspect of the pursuer's case relating to whether staff at the customer service desk knew of the alleged defect and whether they ought to have done something about it in advance of the accident but that does not come near the threshold needed for 8(4)(b). Mistakes are made regularly by agents in this and other courts. Where they are innocent, even careless, resulting from the pressures which an agent is under during the conduct of a proof they should not be viewed as constituting behaviour which is manifestly unreasonable. I also reject any suggestion, if indeed it was being made by the defender, that the threshold required for manifestly unreasonable behaviour differs in this court compared to other courts simply because ASSPIC is a specialist personal injury court. The test under s. 8(4)(b) is the same regardless of where the case is litigated.

Decision

[24] For all of the foregoing reasons I shall pronounce an interlocutor refusing the defender's motion no 7/5 of process; I shall find the defender liable to the pursuer in the

expenses occasioned by the motion and sanction the preparation and presentation of the motion as suitable for the employment of junior counsel.