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

[2023] SC EDIN 44

PN 2422/21

NOTE BY SHERIFF G S PRIMROSE KC

in the cause

JAMES NELSON

Pursuer

against

JOHN LEWIS PLC

Defenders

Pursuer: Hofford KC *et* Miller, Advocate; Thompsons Solicitors
Defenders: Hennessy, Solicitor Advocate; Keoghs Scotland LLP

Edinburgh, 1 December 2023

Introduction

[1] This action concerned an incident which occurred on Saturday 13 October 2018 when the pursuer was working in the course of his employment as a nightshift shelf replenisher at the Waitrose store in Comely Bank, Edinburgh, which is owned and operated by the defenders. On the night in question, at about 10.30pm, the pursuer alleged that he had been struck by a ball, which was an item of stock, that had been thrown by a younger colleague, Mr James Moran, in an act of horseplay. The pursuer averred that the defenders had been aware of an ongoing course of conduct by Mr Moran and other younger workers whereby practical jokes and the throwing of balls had been prevalent during the nightshift. He alleged that such conduct had frequently been reported to the defenders and that they had

been aware of these incidents since at least 6 June 2018, when management had called a meeting with nightshift staff following complaints about such matters.

[2] The pursuer averred that despite this, the defenders had failed to take any effective action to address the general culture of horseplay, including the throwing of balls. He claimed that as a result of being struck by the ball on the right side of his head and partially on his right ear, he developed unilateral right-sided deafness, which had come on shortly after the incident. The defenders denied knowledge of an ongoing culture of horseplay within the Comely Bank Store and further denied that they had failed to adequately supervise Mr Moran following the meeting on 6 June. They pled that if Mr Moran had acted as the pursuer claimed, then he had been engaged on a "frolic of his own" for which they were not responsible. The defenders also sought to prove that the pursuer's deafness had not come on as a result of his being struck by the ball, but that he had, instead, suffered the onset of sudden right sided unilateral deafness of idiopathic origin which had not been caused by any trauma and which he had first become aware of upon waking on the morning of Saturday 13 October, that is, prior to going to work on the day in question.

[3] Whilst I found for the pursuer on the question of liability, I was not satisfied that he had established a causal connection between the incident when he was struck on the head by the ball and the onset of his unilateral deafness. This was largely because of the contents of an entry in his General Practitioner records from 15 October 2018 and a referral letter dated 16 October 2018, written following that consultation, both spoken to by the doctor who had seen and examined him on that day, Dr Sarah Oliver. Dr Oliver had recorded in the referral letter that the pursuer had woken with sudden onset unilateral deafness in his right ear and tinnitus in his left ear on the morning of Saturday 13th October, i.e., on the morning before he had gone to work at Waitrose for the shift during which he was struck by

the ball. Neither the referral letter nor the entry in the clinical records mentioned the pursuer having been stuck by a ball, nor that trauma of any description had anything to do with the onset of the unilateral deafness. Accordingly, I assoilzied the defenders after proof.

[4] The defenders then lodged a motion seeking the expenses of the action and sanction for the employment of junior counsel. The part of the motion seeking sanction for counsel was not opposed. The motion in respect of expenses, which was opposed, was in the following terms:

> "The Defender submits that an award of expenses should be made on grounds contained in Sections 8(4)(a) and (b) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018. The pursuer has made a fraudulent representation and acted fraudulently in connection this (sic) proceedings. Further the pursuer (and/or his agents) in bringing and proceeding with the litigation behaved in a manner which was manifestly unreasonable."

Thus, the present motion was one of a number of similar motions that have come before the court in recent months concerning the operation of the Qualified One-way Cost Shifting regime.

Submissions

[5] Both parties lodged written submissions, which were adopted in full and supplemented by further oral submissions at the hearing on expenses.

Submissions for the defenders

[6] The defenders submitted that in terms of section 8(1) and (2) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (the 2018 Act), the default position was that the Court must not make an award of expenses against a person who brings proceedings in respect of a claim for damages for personal injuries where that person

conducts the proceedings in an appropriate manner. Section 8(4) of the 2018 Act provides for three categories of conduct which are not conduct of an appropriate manner. The conduct covers both that of the litigant and his legal representatives. The defenders in the present motion relied upon Sections 8(4) (a) and (b), which provide that a person conducts civil proceedings in an appropriate manner unless the person or their legal representatives

> "(a) makes a fraudulent representation or otherwise acts fraudulently in connection with the claim or proceedings or
>
> (b) behaves in a manner which is manifestly unreasonable in connection with the claim or proceedings…"

Reference was made to a number of authorities to which, it was submitted, the court could look for guidance in respect of the interpretation of these sections.

Defenders' submissions on fraudulent representation or acting

[7] Firstly, the defenders referred to a decision of the All Scotland Personal Injury Court in *Gilchrist* v *Chief Constable of Scotland* 2023 SLT (Sh Ct) 119 at paragraph [23] in which Sheriff Campbell observed that the concepts of a fraudulent misrepresentation or otherwise acting fraudulently were not defined or characterised in the 2018 Act and thus Parliament must have intended for the established definitions of these concepts to apply, although it had to be borne in mind that the court was dealing with civil matters, rather than a crime of fraud. Sheriff Campbell referred to Professor McBryde's analysis of the concept of fraudulent representations, particularly at paragraph 14-10 of W McBryde Contract (3rd Ed), where the author said:

> "The simplest fraud is the straight lie."
>
> And at paragraph 14-12 where he said:

> "The law has not had much difficulty with the distinction between the straight lie, knowing that the statement is false, and a false statement made with the honest belief that the statement is true. The latter is not fraud; it may be innocent or negligent misrepresentation….".

[8] The Solicitor Advocate for the defender also referred to the definition of fraud and fraudulent misrepresentation in the context of the 2018 Act as contained within Sheriff Principal Taylor's Report on the Review of Expenses and Funding of Civil Litigation in Scotland published on 11 September 2013 ("the Taylor Report") at paragraphs 74 and 75:

> "In Scots law, the general definition of fraud is where the defender has, by his dishonest word or deed, deliberately persuaded the pursuer to act to his detriment. The test for fraudulent representation in Scots law is found in the English case of Derry v Peek, where Lord Herschell held that: 'Fraud is proved when it is shown that a false representation has been made (1) knowingly or (2) without belief in its truth or (3) recklessly, careless as to whether it be true or false.' This was followed by the House of Lords in Robinson v National Bank of Scotland. Further in Derry v Peek Lord Herschell held that making a false statement through want of care falls very far short of, and is very different from, fraud. This approach was approved in Boyd and Forrest v Glasgow and South Western Railway Co where it was held there was no fraud where a defender had an honest belief in his or her representations."

[9] Reference was also made to the passage in *Derry* v *Peek* (1889) 14 App Cas 337 at page 374 where Lord Herschell said *inter alia*:

> "To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth."
>
> And at page 375, where went on to say:
>
> "In my opinion, making a false statement through want of care falls far short of, and is a very different thing from fraud, and the same thing may be said of a false representation honestly believed though on insufficient grounds….At the same time I desire to say distinctly that where a false statement has been made the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration…..I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the Court that it was not really entertained, and that the representation was a fraudulent one."

[10] It was accepted that in present case that the defenders had not averred fraud, although it was submitted that there was no need to plead evidence, particularly where the

evidence related to a pursuer's credibility, see *Grubb* v *Findlay* [2017] CSOH 81 at paragraph 12.

[11] Whilst the defenders accepted that the court had not made a formal finding of fraud, it was submitted that this was not necessary, under reference to the unreported decision of Sheriff Stirling in the All-Scotland Personal Injury Court in the case of *Manley* v *McLeese*, 16 August 2023, where Sheriff Stirling said:

> "I do not accept the submissions of counsel for the pursuer to the effect that averments of fraud required to be made by the defender, or that a finding in fact of fraud required to be made by the sheriff before expenses could be awarded with reference to section 8(4)(a)".

[12] It was recognised by the defenders that in *Gilchris*t at paragraph [24] the court found that "in order for a case to fall within section 8(4)(a), the court would require to make a finding that a pursuer or his legal representative had acted intentionally to mislead the court", and that in the present case such a finding was not made. However, it was submitted that this analysis was at odds which the principles in *Derry* v *Peek*, that it imported a requirement into section 8(4)(a) that was not contained within the language of the rule itself and that it was contrary to the decision in *Manley*.

[13] The defenders invited the court to find that: A fraudulent representation in the context of section 8(4)(a) means (i) a false representation made by a pursuer or his legal representative (ii) made knowingly or without regard to its truth. That "otherwise acts fraudulently" in the context of section 8(4)(a) meant behaving dishonestly in connection with the claim or proceedings.

[14] It was submitted that a specific finding that the pursuer was not credible was not a fundamental prerequisite for section 8(4)(a) to be engaged, nor was it necessary for the court to find that there had been a "fraudulent representation". If such findings had been

necessary, then the language of the section would have reflected that. A single instance of a fraudulent misrepresentation would be enough to entitle the court to make a finding under section 8(4)(a), and it was immaterial that the court had found for the pursuer on certain aspects of the case. The requirement under section 8(4)(a) could be contrasted with the English concept of "fundamental dishonesty" and wider aspects of credibility were irrelevant to a consideration of the test under section 8(4)(a). In the present case the pursuer had made a false representation by suggesting that Dr Oliver had been mistaken as to the cause of his deafness, thus the court was not in the realms of an innocent or negligent misrepresentation.

[15] It was further argued that the section 8(4) was concerned with the conduct of the case and the proceedings as a whole and that the court was entitled to look at factors in respect of which specific findings in fact were not made and to look beyond the pleadings. The correct approach was for the court to firstly identify a false representation and then to identify whether that representation was made knowingly or without regard to its truth.

Defenders' submissions on manifestly unreasonable

[16] In relation to the concept of manifest unreasonableness, the defenders submitted, under reference to what Sheriff Fife had said in *Helen Lennox* v *Iceland Foods* [2022] SC EDIN 42 that manifestly unreasonable behaviour was behaviour that was obviously unreasonable and that, although reference had been made in both *Lennox* at paragraph [57] and in the Taylor Report at paragraph [78] to the fact that a consideration of whether conduct by a pursuer or their representative was unreasonable was subject to a "high test", there was no attempt in either of these sources to define the precise parameters of such a test. Whilst Sheriff Principal Taylor had referred to the appropriate test as being that of 'Wednesbury

unreasonableness', being reasoning or a decision which no reasonable person acting reasonably could have applied or come to, this was not the test selected by those who had drafted the legislation, there being no specification of what manifestly unreasonable actually was.

[17] It was accepted that manifestly unreasonable behaviour was obviously unreasonable behaviour as in *Lennox*, and that to qualify as such the conduct had to be exceptional. Thus, the test would only be met in rare circumstances and would be difficult to satisfy and whether the test could be applied in any given case would depend entirely on the facts and circumstances of that case.

[18] In respect of the facts of the present case the defenders referred to the findings in fact which I had made in paragraphs [32], [34], [43] and [54], of my judgment, which dealt generally with the finding as to how the pursuer's right sided deafness and left sided tinnitus had arisen spontaneously on the morning of Saturday 13th October 2018, the debility becoming apparent when he had woken that day, and not because of the incident when he was struck by the ball on his ear. The Solicitor Advocate for the defenders also referred me to the pursuer's evidence as to how his deafness had arisen, in particular paragraphs [19], [71], [72] and [74] of my judgment, in which I dealt with the pursuer's denial that his deafness had arisen spontaneously on the morning of 13th October, his assertion that Dr Oliver, the General Practitioner, must have wrongly recorded the history he had given and the contrast between the history which appeared in the medical records and the pursuer's account in his evidence of the deafness coming on shortly after he was struck by the ball on the evening of 13th October. The defenders further referred to my findings on the evidence that the two conflicting histories were completely different, that the pursuer's suggestion that Dr Oliver had misheard or misunderstood what he had told her

was implausible and that his evidence generally about the onset of his hearing loss was unreliable. Reference was also made to my finding that the pursuer's expert ENT surgeon, Mr Newton, had failed both in his reports and in his evidence in chief to deal with the terms of the referral letter which Dr Oliver had written after the consultation on 15th October 2018 recording that the pursuer's deafness had occurred spontaneously upon waking on the preceding Saturday morning, an omission which I found seriously undermined the weight which I could attach to his opinion.

[19] In all the circumstances it was submitted that there was a clear inference that the pursuer's evidence on causation was not credible, my having variously described that evidence in the judgment as: (i) contradictory to wholly credible evidence; (ii) weak; (iii) unsatisfactory; (iv) absent explanation; (v) lacking in possibility; (vi) implausible and; (vii) unreliable. It was submitted that a specific finding that the pursuer was not credible was not needed and that the exercise which the court required to undertake in terms of Section 8(4)(a) was to identify a false representation and then to identify whether that representation was made knowingly or without regard to its truth.

[20] The defenders further submitted that the pursuer's representation from the outset of the claim that his hearing loss had been caused by being struck by a ball thrown by his colleague was obviously false, and that this was "beyond doubt" from the terms of my judgment. Furthermore, it was submitted that this statement was made "knowingly and without regard to its truth." It was submitted that in the absence of a finding by me that the pursuer had negligently represented the position on causation, or had forgotten what had happened, or had made a genuine mistake, then there could be no other explanation for what he had said other than that his evidence on the cause of his hearing loss was knowingly false. In that situation he had continued with an action based on a false

representation and occupied the court's time with a claim that had no merit. Both he and his advisers had continued with the action in the face of compelling evidence as to the true causative mechanism.

[21] Insofar as section 8(4)(b) is concerned it was submitted that it was obviously unreasonable for the pursuer and / or his legal representatives to have continued with the case when he had: (i) reported to his treating clinicians that his hearing loss had been caused by the work incident when he knew that it had occurred before that incident had happened; (ii) reported to his employer that his hearing loss had been caused at work; (iii) intimated a legal claim on that basis and then continued with the claim once the referral letter dated 16th October 2018 had been recovered in his GP records; (iv) provided false information to Professor Newton regarding his past hearing loss and aspects of his post-incident hearing, and; (v) refused to abandon the action when that disposal was offered at two different stages, including at the Pre-Trial Meeting.

[22] It was further submitted that to ignore the terms of the referral letter of 16 October 2018, which I had described both as a "vital adminicle of evidence" and of "fundamental importance" regarding the question of causation, was in itself obviously unreasonable, as was the failure to ask Professor Newton to consider and comment on it in his two reports, to fail to ask either the pursuer or Professor Newton about it when they were led in evidence, and for the pursuer to make a "baseless challenge" to Dr Oliver's record of the meeting in his own evidence.

[23] It was suggested that the pursuer must have known that there was such a contradictory account in his GP records and ought properly to have dealt with this by seeking to establish that the entry was inaccurate. It was open to the court to draw the most unfavourable of inferences from the failure to lead evidence in rebuttal of that letter. Whilst

it might be one thing for a party to try and persuade the court on a contentious issue and nonetheless ultimately fail on that issue, it was quite another to effectively ignore such a piece of evidence and proceed in the hope that the case might, nonetheless, be decided in that party's favour. Such behaviour ought not to be condoned and QOCS could not have been intended to protect a claimant who had acted in this way. It was not in the interests of justice for litigants to be encouraged to proceed in this way. This behaviour was obviously unreasonable, the circumstances were exceptional and such conduct would not occur in a case which had been appropriately conducted.

[24] Finally, the Solicitor Advocate for the defenders referred to paragraph [28] of Sheriff Campbell's opinion in *Gilchrist* and submitted that Sheriff Campbell had suggested that in some circumstances for a pursuer to proceed to proof where a report contains information which is inconsistent with, or contrary to, his position on record and at proof, this could constitute unreasonable behaviour. The present case was an example of such a situation as the pursuer's evidence and that of his experts was clearly contradicted by the referral letter of 15 October 2018.

Submission for the pursuer

[25] Senior Counsel for the pursuer invited me to refuse the defenders motion and to find that no award should be made against the pursuer on the grounds contained in sections 8(4)(a) and (b) of the 2018 Act. In the event that I refused the defenders motion I was further invited to award the expenses of the Opposed Motion in the pursuer's favour.

Pursuer's submissions on fraudulent representation or acting

[26] On behalf of the pursuer, I was reminded of Sheriff Campbell's finding in *Gilchrist* at paragraph [23], to the effect that the concept of fraudulent acting or fraudulent misrepresentation is not a new concept in Scots Law and I was also referred to the passages in Wm McBryde, The Law of Contract in Scotland at paragraphs 14-02 and 14-03. Having regard to these principles, it was submitted that I ought to find that the threshold for a finding of fraudulent misrepresentation was a high one, and, in accordance with Sheriff Campbell's reasoning in *Gilchrist* at paragraph [24], that for a case to cross the threshold for section 8(4) of the 2018 Act, it would be necessary for the court to have made a finding that the pursuer had acted intentionally to mislead the court.

[27] Senior Counsel for the pursuer observed that no such finding had been made in the present case and nor had there been an explicit finding that the pursuer was incredible or deliberately untruthful. In the absence of such findings, it was further submitted that there was no merit in the defenders argument that the case had been conducted in an inappropriate manner for the purposes of section 8(4)(a) and that no inference could be drawn from any of the findings or reasoning of the court to the effect that there had been a fraudulent misrepresentation by the pursuer. In the first place, the court had accepted the pursuer's evidence regarding the mechanism of the accident (paragraph [53] of the judgment). Secondly the court accepted the pursuer's evidence on the reporting of complaints (paragraph [60] of the judgment). Thirdly, whilst it was accepted on behalf of the pursuer that the court had made a finding on causation which was adverse to the pursuer at paragraph [73] of the judgment, and that this had been prefaced with an adverse comment regarding the pursuer's version of events when contrasted with the evidence of Dr Oliver, it was submitted that these passages in the judgment were no more than the court

preferring one version of events to another regarding the timing of the onset of the hearing loss.

[28] Whilst on the basis of these findings the pursuer's evidence could be said to have been unreliable, plainly wrong or constituting innocent or negligent misrepresentation, this did not mean that any adverse inference could be drawn that he was either incredible, or that he intended to mislead the court by making deliberately untrue representations. Thus, the motion ought to be refused.

Pursuer's submission on unreasonable behaviour

[29] Senior Counsel noted that the concept of unreasonable behaviour was not defined or characterised by the 2018 Act, but that in *Lennox* v *Iceland Foods Limited* [2023] SLT (Sh Ct) 73, Sheriff Fife held that 'manifestly unreasonable' meant 'obviously unreasonable' and that "circumstances where proceedings were not conducted in an appropriate manner were likely to be exceptional and that each case would be considered on its own facts and circumstances".

[30] The pursuer had been largely vindicated in this litigation in that he had established liability, despite the defenders having repudiated liability throughout the course of the action. His version of events in question had prevailed and he had established negligence, with his evidence being found to be credible and reliable in these respects. Thus, no criticism could be advanced in respect of the conduct of the proceedings by the pursuer or his legal representation regarding the issue of delictual liability of the defender for the purposes of Section 8(4)(a). In the absence of any finding that the pursuer was incredible, and instead with the issue of causation turning on the court having preferred Dr Oliver's

evidence on causation to that of the pursuer, his behaviour could not constitute manifestly unreasonable behaviour for the purposes of Section 8(4)(b).

[31] It was submitted that the purpose of Section 8 of the 2018 Act was not to allow Qualified One-way Cost Shifting to be disapplied merely because a pursuer has been unsuccessful due to a failure to adduce reliable evidence in support of their claim. On the contrary, the intention of Parliament was to rectify a perceived imbalance between pursuers and defenders so as remove the possibility of an adverse finding of expenses as a deterrent to the raising of civil proceedings.

[32] In the absence of an express or implied finding that the pursuer was incredible, or that the progress in of the litigation by his legal representatives was such that the claim was obviously bound to fail, no criticism can be advanced in relation to the conduct of these proceedings in respect of the matter of causation for the purposes of Section 8(4)(b). In the whole circumstances, the defenders motion ought to be refused and the pursuer ought to be awarded the expenses of the present motion.

Decision: Fraudulent representation – section 8(4)

[33] I reject the submission advanced on behalf of the defenders that it is not necessary for the court to have made a finding that the pursuer or his legal representatives acted intentionally to mislead the court before a case can fall within section 8(4)(a) of the 2018 Act. In this matter I respectfully agree with the views of Sheriff Campbell in *Gilchrist* v *Chief Constable* at paragraph [24].

[34] Whilst it is correct to say that the language of section 8(4)(a) does not contain a specific requirement that, before it can become operational, there must have been a finding by the court that the pursuer was either not credible or guilty of a fraudulent representation,

it appears to me that a finding that there had been such conduct is a necessary ingredient in any situation where the court considers that a pursuer in any given set of proceedings should to lose the protection of QOCS. The court must ask itself, using the language of Lord Herschell in *Derry* v *Peek*, whether there has been either:

(i) a false representation made knowingly or without belief in its truth (the "straight lie" as referred to by Professor McBryde), or

(ii) a statement made recklessly, without regard to whether it was true or false.

[35] Any conduct which falls foul of this test may constitute a fraudulent misrepresentation or an otherwise fraudulent act. But, in my view, if there is no such finding of a false misrepresentation or a statement made with reckless disregard as to its truth, then there cannot be a basis for a finding under Section 8(4)(a). For the avoidance of doubt, I consider that a statement made recklessly as to whether it was true or false would be a statement made intentionally for the purpose of misleading the court, as per Sheriff Campbell in *Gilchrist*. The maker of such a statement would be aware that they did not know whether it was true or not and could also be taken to know that the court would, nonetheless, rely on the answer given in reaching judgment in the case. Thus, such statement could be said to have been made to intentionally mislead the court.

[36] I agree with the observation of Sheriff Stirling in *Manley* that there is no requirement for an averment of fraud by a defender before either a fraudulent misrepresentation or fraudulent acting can be established. In some cases, it could not be predicted before proof that evidence a pursuer intended to lead would be false, and that fact might only become apparent when the evidence led was tested alongside other evidence in the cause, for example where it became apparent that there had been collusion between witnesses during their evidence.

[37] However, I disagree with Sheriff Stirling's finding that there does not need to be a finding of fact of fraud or a finding that the pursuer was not credible before section 8(4)(a) can operate. As I have stated above, in my view, if there is no such finding in fact then there is no basis in the evidence for a finding such as to justify a reversal of the normal rule under Section 8(2) of the 2018 Act, that is to say that the court must not make an award of expenses against a pursuer.

[38] Nor do I consider, as the Solicitor Advocate for the defenders submitted, that to hold that there must be a finding that the pursuer or his representatives acted intentionally to mislead the court contradicts *Derry* v *Peek*. In *Derry* the court was defining the type of conduct which would objectively amount to fraud. Section 8(4)(a) provides that the section will not operate unless conduct of a particular nature has been identified. It seems to me to be self-evident that the court has thus to come to a clear view that this conduct has occurred as a matter of fact, and then make the requisite finding that the conduct has been established before the protection from an award of expenses established by the QOCS regime is lost. The wording of the section supports this view. Section 8(4) provides that a person will be deemed to have conducted proceedings in an appropriate manner unless the person or the person's legal representative: (a) **makes** a fraudulent representation **or otherwise acts** fraudulently (emphasis added).

[39] Thus, the section does not operate unless the requisite fraudulent statement has been made or the person has otherwise been found to have acted in the required manner.

[40] Therefore, contrary to the submission by the defenders in the present case, it appears to me that to hold that there must be a finding by the court that such a representation was made or that there had otherwise been fraudulent acting before the protection otherwise

provided by QOCS can be withdrawn is entirely in keeping with the language of the provision itself.

[41] As Senior Counsel for the pursuer observed, I did not make a finding of fraudulent misrepresentation in this case. Nor did I hold that the pursuer was incredible. There were two competing accounts as to the likely causal mechanism for the pursuer's unilateral deafness in this case and I preferred the version advanced by the defenders. The reasons for that decision are set out in full in my judgment. Much like Sheriff Campbell in *Gilchrist* and Sheriff Stirling in *Manley*, I do not consider that it would be appropriate for me to expand upon these reasons, nor to engage upon what Sheriff Campbell called a "meta-analysis" of that reasoning. The important point is that I did not make a finding that the pursuer had made a fraudulent representation. Nor did I find that he had otherwise acted fraudulently and, for the reasons explained above, I do not consider that in these circumstances it is open to me to hold that the defenders are entitled to an award of expenses.

Manifestly unreasonable behaviour – section 8(4)(b)

[42] In the *Lennox* v *Iceland Foods Limited* 2023 SLT 73 at paragraph [57] Sheriff Fife held that on any view the test for what amounted to unreasonable conduct was a high test and that there was nothing complicated about the term manifestly unreasonable, it meant "obviously unreasonable" (paragraph [60]). He went on at paragraph [61] to observe that the Scottish Parliament recognised that circumstances where proceedings were not conducted in an appropriate manner were likely to be exceptional and that each case would be considered on its own facts and circumstances. I respectfully adopt that analysis.

[43] In the present case, the aspects of the conduct of the litigation complained of as amounting to manifestly unreasonable conduct centred around the way in which the

pursuer's case on causation was presented. The gravamen of the complaint was that the pursuer and / or his legal advisers had continued to represent both prior to and during the court action that his hearing loss had been caused by the incident at work and that it was unreasonable to have done so, particularly after the recovery of the referral letter of 16 October 2018 within the GP records when, thereafter, it must have been known that his hearing loss had come on spontaneously and had started before the incident at work had even occurred. Aspects of the pursuer's reporting to Professor Newton were also criticised as was the decision to refuse the defender's offers of abandonment prior to proof.

[44] Further criticisms were made insofar as the conduct of the proof itself was concerned, those being that Professor Newton was not asked specifically to comment in his reports about the referral letter and that there had not been any questioning of either the pursuer or Professor Newton about the referral letter in examination in chief. The pursuer was also criticised for his "baseless challenge" of Dr Oliver's evidence.

[45] In respect of the criticisms to the effect that the action ought not to have been continued with, and should have been abandoned, I do not consider these to be valid. Leaving aside for a moment the contents of the GP note and the referral letter, the pursuer's position appeared always to have been that his deafness had come on after he had been struck by the ball in the incident at his work on 13 October 2018. He maintained that position in his pleadings, in evidence and in his report to the experts who examined him for the purposes of the case for both sides. I agree with the submission made by Senior Counsel for the pursuer that absent a finding that the pursuer had deliberately misled the court on this matter, or that he had been incredible, it is difficult to see why, just because he maintained this position and presented his case on that basis, he ought to be found to have acted with manifest unreasonableness. Whilst the GP note of 15 October and the referral

letter of 16 October both clearly contradicted the assertion that the hearing loss was caused by the ball incident, the pursuer maintained that he had not said that he had woken with spontaneous hearing loss to Dr Oliver, and that she must have misheard or misunderstood him. I should record that this evidence was led without objection, despite an agreement in the Joint Minute in the case to the effect that the referral letter was true and accurate in its terms, a matter of which sight was clearly lost by both parties in the proof. Be that as it may, Senior Counsel for the pursuer advised in submission that both the pursuer and Mr Newton had been shown the referral letter. Despite the terms thereof, the pursuer had steadfastly adhered to his position that his hearing loss had been caused by the ball, and Mr Newton had said that the content of the letter made no difference to his position. So even when the letter had eventually come to light, the pursuer and his expert had maintained their respective positions on causation.

[46] Whilst I did not accept the pursuer's evidence on the point, that did not mean that the corollary of this was that his conduct in pursuing the action on the basis of the causative mechanism he preponed was manifestly unreasonable. I rejected the pursuer's evidence on causation when I contrasted this with the other relevant evidence on the point in the case, that of Dr Oliver, and I preferred one body of evidence over another and provided reasons for doing so. It is difficult to accept the proposition that the action ought to have been abandoned, just because there was a contradictory causal mechanism narrated within the GP records. Most cases which proceed to proof have some difficulty in the evidence which a pursuer may or may not overcome. That is why some cases do not settle. The pursuer was entitled to go to proof and to assert that the incident with the ball had occurred (in respect of which I found him to be both credible and reliable) and that this incident had been

responsible for his deafness, and the fact that he failed to establish the latter point does not, in my view make his conduct manifestly unreasonable.

[47] In respect of the criticisms made in respect of the actual conduct of the proof and the absence of specific comment from Mr Newton on the referral letter, I do not find that the way in which matters were dealt with in relation to the question of causation was manifestly unreasonable. For their own reasons, the pursuer's advisers chose not to meet the issue of the referral letter 'head on' by attempting to defuse or at least minimise the damage which the content thereof could potentially cause. Rather, they chose to let the evidence about it come out in cross-examination and from the evidence of the defender's witnesses. That may perhaps have been in the hope that it would not be as significant as it transpired to be, or because it was hoped that the evidence led for the defenders on causation might be weaker than it ultimately was. Alternatively, it may have been because they recognised that the letter was going to be problematic, but nonetheless wished to see how the letter was dealt with by the defenders before deciding how much to ask about it or how to otherwise deal with it. In his evidence, albeit in cross-examination, the pursuer did at least do something to try to negate the effect of the letter by suggesting that Dr Oliver may have misunderstood or misheard what he said, although I rejected that evidence. The decision by the pursuer's advisers not to deal with the letter themselves in evidence may not have been the most advisable tactic given the strength of Dr Oliver's evidence, but it was, nonetheless, a course reasonably open to them. Ultimately, the tactic failed and although it may have been better, as the defenders suggested, for the pursuer to have mounted a more rigorous attempt to prove that the letter was inaccurate, it is difficult to see what form such an attack could have taken or how that might have succeeded given the strength of the evidence of Dr Oliver. However, be that as it may, I do not think that it can be said, as the defenders asserted, that

the pursuer's failure to do more in respect of the letter meant that his conduct or that of his advisers was manifestly unreasonable. If, for example, Doctor Oliver had been a less impressive witness, or if other evidence had cast doubt on the causal evidence described in the letter, then the question of causation may not have been as easy to resolve as I found it to be. None of this could have been fully known to the pursuer's advisers prior to actually commencing the proof and hearing the evidence.

[48] Accordingly, I reject the submission that the conduct of the action, both before and during the proof, was such as could be described as manifestly unreasonable.

[49] Whilst Mr Hofford K.C for the pursuer invited me to award the expenses of this motion in the Pursuer's favour if he succeeded, Mr Hennessy for the defender did not make any submission on expenses. Accordingly, a hearing on the expenses of this motion will be fixed.