SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2019] SC EDIN 93

EDI-A305/19

JUDGMENT OF SHERIFF KENNETH J McGOWAN

in the cause

RICHARD HARDIE

Pursuer

against

GEFION INSURANCE A/S

Defender

Edinburgh, 6 November 2019

Introduction

[1] This is a claim for damages arising from a road accident which occurred in Gorebridge, Midlothian on 15 September 2017.

[2] The matter came before me on the pursuer's opposed motion 7/3 of process. In terms of that motion, the pursuer was seeking (i) decree for payment in terms of minutes of tender and acceptance thereof; (ii) discharge of a forthcoming rule 18.3 hearing; and (iii) an order finding the defenders liable to the pursuer in the expenses to the date of tender on the ordinary cause scale.

The present case

[3] It was apparent from the papers that a tender of £2,000 was being accepted and accordingly it seemed likely that the battle ground was going to be expenses. On that basis, I arranged for an email to be sent to agents, emphasising the need for any timeline to be

relied upon to be agreed in advance and for any relevant documentation (such as correspondence or authorities) to be lodged with the court as soon as possible.

[4] An email was received by the court at 16.31 pm the day before the motion called indicating that:

a. the defender's agent had prepared a draft timeline which had been sent to the pursuer's agents for approval;

b. the opposition was in relation to expenses, the defenders' position being that

   i. the action had been raised against the wrong party and although that had been remedied by the lodging of a minute of amendment, the court had reserved the question of expenses;

   ii. the matter settled well below the ordinary cause limit and accordingly the pursuer was not entitled to ordinary cause expenses; and

   iii. disclosure of the engineer's report and information about loss of use dates had been requested pre-litigation, but there had been a delay in producing it and as soon as the report was available a settlement offer was put forward which was accepted.

[5] On the morning of the hearing, the pursuer's agent tendered a three page "case chronology" (timeline); an inventory of productions containing 23 documents and pieces of correspondence (letters and copy emails); and a copy of the Act of Sederunt (Taxation of Judicial Expenses) Rules 2019, running to 57 pages.

[6] The defender's agent tendered a different three page timeline; and a bundle of documents (correspondence and the like) running to some 43 pages. (There was no inventory – nor even any staple or other method of keeping the documents together.)

[7] Thus, at the calling of the case, the court was faced with in excess of 100 pages of hitherto unseen material.

The pursuer's position

[8] The pursuer's solicitor commenced by seeking to amend the instance of the initial writ by substituting Gefion Assurance ("Gefion") for Action 365 Limited ("Action 365"). It was explained that Gefion were the insurers of the driver who was said to have caused the accident giving rise to the claim. Thereafter, I was invited to grant decree in terms of the minute of tender and acceptance; discharge the Rule 18 hearing; and award expenses on the ordinary cause scale.

[9] It was accepted that the action had been raised against Action 365 and that this was the wrong defender. This had come about because although a claims handler at Enterprise (the owners of the damaged car which was hired to the pursuer) knew that Gefion were the relevant insurers and that Prestige was the claims handler for them, he or she was told that Action 365 would be dealing with this claim.

[10] A "payment pack" had been provided at the outset which set out the basis of the claim and included the invoice for the hire charges. It was accepted that the engineer's report was not provided at that time, but the loss of use dates had been provided on 5 May 2019. Prior to the commencement of the proceedings correspondence had been sent to Action 365 but they did not respond.

[11] After the raising of the action, there had been no response between May and September 2019 to the question as to whether the defenders' agents did in fact have instructions to act for Gefion. In these circumstances, the pursuer had been entitled to litigate.

[12] So far as the scale of expenses was concerned, the action was warranted after 29 April 2019. Accordingly expenses were regulated by the Act of Sederunt (Taxation of Judicial Expenses) Rules 2019. The General Regulations found in Schedule 1 to the 1993 Act of Sederunt did not apply. Thus, there was no rule that that expenses were to be taxed 'by reference to the sum decerned for, unless the sheriff otherwise directed'.

[13] The action had been raised and contested as an ordinary action. Expenses should be awarded on the ordinary cause scale.

Defenders' position

[14] The motion to amend was not opposed but the wrong party had been sued. Accordingly, the defenders were entitled to the expenses of the action.

[15] In any event, liability had been admitted from the outset but there were questions as to the date when the repairs were commenced and the reason for the lengthy delay in them being completed. The loss of use dates and the engineer's report were required to enable the defenders to assess the value of the claim. The latter was requested on numerous occasions starting on 15 May 2019. Vouching was finally provided on 12 September 2019 and a settlement offer, which was accepted, followed soon after that.

[16] In any event, the hire cost according to the invoice was £4,043.39. Accordingly, it was clear that this action should not have been raised as an ordinary action and expenses should be restricted to the simple procedure scale.

Reply by pursuer

[17] The hire invoice provided two figures for the hire cost – one at £4,043.39 and one at £5,660.75. I was told that so far the pursuer had paid nothing by way of hire charges. The

pursuer's solicitor was unable to tell me which figure represented his actual liability. Neither party was in a position to produce a copy of the invoice.

Grounds of decision

Comments on procedure in opposed motions

[18] Before turning to the substance of the dispute in this case, I wish to make some observations about the practice and procedure concerning contested motions.

[19] The court has a legitimate expectation that prior to an opposed motion calling in court, there should be a dialogue between agents as to (i) the basis for the motion; (ii) the basis of opposition thereto; and (iii) whether there is any scope for compromise acceptable to all parties which means that the motion can proceed of consent or unopposed.

[20] Where agreement is not reached, agents are expected to appear in court knowing exactly what it is that they do not agree about. That is important, because the court's function is to adjudicate on matters in issue. Thus, it is essential that any matter which the court is being asked to adjudicate on is properly focussed. All too often, it becomes apparent during opposed motion hearings that parties are not clear what it is that they disagree about. If the parties do not fully understand what they are arguing about, how is the court to adjudicate on it? So a pre-hearing dialogue is essential.

[21] It is not for the court to prescribe how such a dialogue should take place, but it should preferably be done orally ie face to face or by telephone. (An exchange of laconic emails is more likely to lead to a misunderstanding than an understanding as to points of agreement or disagreement.) The key point is that communication must both be effective and timely. In this context, timely means well before the day on which the opposed motion

is due to call. Again, it becomes apparent regularly that if there has been a discussion at all, this has happened only when agents meet at court on the day when the motion is due to call.

[22] Where possible, the principal agents should attend the calling of any opposed motion. If local agents or counsel are to be instructed, it is essential that comprehensive instructions are provided. This means that questions which the court may ask or information which the court might seek must be anticipated.

[23] Where the history of a case (including, on occasions, the pre-litigation history) is relevant, it must be borne in mind that the procedural history which the court has direct access to is limited to that contained in the process. The court is not party to communications which have taken place directly between parties. Accordingly, where necessary, a written timeline with all relevant dates should be prepared, discussed and (so far as possible) agreed between the parties prior to any proposed motion calling.

[24] The court should be notified well in advance of any authorities or other documents which are to be relied on in the course of submissions. Where the document is already in process (eg either record or production), it is sufficient to identify the document in question. If the document is not in process, a copy of it should be made available to the court prior to the motion calling. In both cases, the section of any document to be referred to must be identified. Correspondence or other documents referred to in a timeline should be identified, agreed and produced. All of this is important, because if it turns out that there is a factual dispute between parties about the history of the case, it may be difficult, if not impossible, for the court to resolve it on the basis of *ex parte* submissions.

The present case

Wrong party sued

[25] There was no opposition to the motion to amend the name of the defender from Action 365 to Gefion. In my view two points flow from that.

[26] Firstly, the defenders' reliance on the wrong party having been sued as a basis for their motion for expenses of the whole action evaporates. (I would have been inclined to allow the amendment even if it had been opposed, since it was clear that defenders were not prejudiced in any respect by that error.)

[27] On the other hand, I was unconvinced by the explanation as to why the wrong party had been sued. It appears from the paperwork that those acting for the pursuer knew who the insurers of the vehicle were. I cannot see why it was thought that an action against Action 365, who were plainly – at best – the agent for those insurers could ever have been merited.

[28] The only residual issue is how the expenses of the amendment procedures should be dealt with. No motion was made on behalf of the defenders for the expenses of that exercise but nevertheless it is a step of procedure which was brought about unnecessarily and accordingly in relation to the amendment procedure itself, I shall find no expenses due to or by either party.

Overall liability for expenses

[29] The pursuer's proposition was straightforward: information vouching the claim had been provided; no proposals had been forthcoming; and the pursuer was justified in litigating.

[30] Ultimately, I was not very clear as to what precise motions the defenders' agent was making in relation to the overall question of expenses.

[31] So far as the raising of the action was concerned, it was clear that at least some information had been provided by the owners of the hire car to Action 365 and that had elicited no response. That included a letter by recorded delivery. Accordingly, as at that stage, I think that the pursuer was entitled to litigate.

[32] The next question which arises is whether there was then a delay in providing information which reasonably required to enable the defenders to value the claim. Given that the claim had apparently given rise to a 59 day hire resulting in hire charges of £5,660.75, that was a matter the defenders were well entitled to seek information about.

[33] I observe that an email dated 15 May 2019 from the defenders' agents to the pursuer's agent was produced which states:

> "We have reviewed our client's papers and also note that an email was sent to the Innovation group upon receipt of the payment pack requesting a copy of the engineer's report and loss of use dates. A reply was sent to our client advising that this request had been sent to Enterprise to action. No further response appears to have been received by our clients."

[34] No copy of the correspondence referred to in that email was produced.

[35] Instead, the pursuer's agents seem to have entered into an arid debate about what was to happen to the action which by that stage had been raised against Action 365 and whether the defenders' agents were now instructed to act on behalf of Gefion. Given that the defenders' agents were specifically requesting information with a view to seeing whether the matter could be resolved, I think that it was implicit that they had instructions to deal with the matter.

[36] On the other hand, there were tools available to the defenders' agent. Commission and diligence could have been sought in early course for recovery of relevant

documentation. Instead, matters were allowed to drift on – albeit against a background of arguments about the amendment to replace one defender with another – until September, at which stage documentation was disclosed which enabled an offer to be made and the tender of £2,000 was lodged. That was initially rejected and a counter proposal was made – but the counter proposal in its turn having been rejected, the tender was accepted.

[37] Looking at the overall picture, my view is that the pursuer was entitled to raise an action; thereafter there was a failure to produce documentation but also a failure by the defenders to take steps to recover that documentation. Accordingly, in my view both parties contributed to the proceedings lasting longer than they need otherwise have done. Accordingly the pursuer will be entitled to the expenses of raising the action, but from the end of May 2019 to the date of the settlement, expenses will be modified by fifty per cent.

Scale of expenses

[38] As already noted, the 2019 Act of Sederunt does not contain the rule as to expenses being linked to the sum decerned for as was contained in the 1993 Act of Sederunt.

[39] I was not favoured with submissions from both sides as to the effect on the court's powers of that rule change. It may be that it was thought that the old rule was superfluous, given the court's residual power to modify expenses where appropriate.

[40] In the present case, the claim as originally set out in the writ was for hire charges of £5,660.75 plus inconvenience of £200 giving £5,860.75. However a tender of £2,000 was accepted. Accordingly, quite apart from any express rule, it appears to me that that raises a question as to whether it was reasonable for the action to have been raised as an ordinary one.

[41] The matter is then further complicated by the reference to the invoice. It was accepted that it contained two figures, one of which was below £5,000. I was told by the pursuer's solicitor that the pursuer had paid nothing yet and it was not possible to confirm what his liability for hire charges will be.

[42] Accordingly, there is no clarity about the pursuer's liability and thus the total value of the "loss and damage" suffered by him.

[43] The fact that liability at its highest may only amount to hire charges of about £4,000; and that the claim settled for £2,000 leads me to the conclusion that the pursuer has not shown that it was reasonable for this action to be raised as an ordinary cause.

[44] In these circumstances, I shall find that the pursuer is entitled to the expenses on the simple procedure scale.

Summary and Disposal

[45] I shall (i) (retrospectively) discharge the Rule 18.3 hearing; (ii) grant decree for payment in terms of minutes of tender and acceptance thereof; (iii) find no expenses due to or by either party in respect of the amendment procedure; (iv) find the pursuer entitled to the expenses of the action on the simple procedure scale, the expenses attributable to the period from 1 June 2019 to the date hereof being modified by a 50 per cent reduction.

Footnote

[46] I set out above a summary of the practices which I consider are appropriate in the lead up to opposed motions being heard.

[47] In the present case

a. the position ultimately adopted on behalf of the defenders in court was different to that which had been intimated to the court the previous day by email;

b. the pursuer's position as to the effect of the 2019 Act of Sederunt seems to have come as a surprise to the defenders' agent;

c. extensive documentation was produced, but crucial documents were not: there was no copy of the email correspondence which was said to have taken place pre-litigation and neither party produced a copy of the hire invoice.

[48] All of this suggests the absence of a proper pre-hearing dialogue between the parties as to their respective positions and what was in dispute.

[49] The absence of a proper pre-hearing dialogue can have a number of effects such as:

a. One or the other party can be wrong footed and therefore not in a position to properly address the court on a matter raised by the other party.

b. Hearings tend to last longer. In a busy court, where other agents are waiting to be heard, that is both inefficient and discourteous.

c. Additional burdens are placed on the court. Instead of the presiding sheriff being able to go into court knowing – or at least being able to establish quickly – what the dispute is about, unfocussed oral submissions and the lodging at the last minute of bundles of documents make it more difficult for the court to follow and note arguments, leading to longer hearings and increasing the risk that the court may have to make avizandum to issue a written decision later, rather than being able to deal with the matter immediately.

[50] The court's expectations as set out above should be noted and acted upon.