SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2019] SC EDIN 24

[EDI-SG778-18]

NOTE BY SUMMARY SHERIFF ADRIAN COTTAM

in the cause

JAMIE DAVIS

Claimant

against

SKYFIRE INSURANCE

Respondent

Claimant: McQuade
Respondent: Jeffrey

Edinburgh 28th February 2019

NOTE

Introduction

[1] This case came before me on the claimant's opposed application for expenses. The dispute concerned the level of expenses recoverable when a simple procedure action had initially been defended on the question of quantum only, and then settled on the eve of the evidential hearing at a significantly lower amount than originally claimed. The dispute therefore concerned whether there was an exception to the "cap" on expenses set out in section 81 of the Courts Reform (Scotland) Act 2014 ("the 2014 Act").

Nature of claim

[2] The action itself involved a claim for damages following a road traffic collision. Liability to pay at least some of the claimant's loss was admitted at the outset. There was no

argument over the cost of repairs and in fact those costs formed no part of the claim. The outstanding issue was the amount due in relation to "credit hire" costs paid by the claimant (or better put, it would appear, by his insurance company) together with ancillary claims for inconvenience and miscellaneous costs.

Procedural History

[3] As arguments were developed, it became clear that a detailed chronology was required to allow the court to properly consider this case. Parties therefore helpfully submitted the following agreed chronology (I have added any of my own comments in brackets to put later submissions in context):

13.3.17 Respondent's agent ("R") make pre-litigation offer to settle at £784.

23.3.18 Claimant's agents ("C") send claim form to court (claim for £3,035.32).

10.4.18 Timetable received by C.

11.4.18 C serve claim form by recorded delivery.

12.6.18 Response form received by C. (Response accepted liability but challenged a number of aspects of the claim and called for the claimant to produce a number of pieces of documentation. As well as responding that the period of hire and hire charges were excessive, the form questioned the liability of the claimant to pay the credit hire company, the necessity for hire at all and the length of time the car involved in the collision was not roadworthy).

22.6.18 First orders from sheriff received, fixing case management discussion on 2nd August.

22.6.18 C emails R to ask if there is an offer to settle.

9.7.18 C emails R to ask if there is an offer to settle.

13.7.18 R email C and advise they are seeking a basic hire rates report ("BHR") and will have it within a week.

19.7.18 C email to ask if respondent's agents have the BHR.

25.7.18 R instruct BHR.

26.7.18 C email to ask if respondent's agents have the BHR.

26.7.18 R lodge incidental application to reschedule case management discussion. New discussion fixed for 13th September.

9.8.18 BHR received by R.

17.8.18 Email exchange. C email to ask if R have the BHR. R confirms they have and require clarification before it can be disclosed. R emails offer of £1,500. C reject same and state no counter offer until they see the BHR.

17.8.18 BHR emailed to C and confirm the intervention rates were taken into account in their offer (of £1,500). C requests evidence of delivery and proposes counter offer of £2,371.99, which is based on the average rate contained in the BHR.

3.9.18 C email R for a response on counter offer.

11.9.18 R emails C to reject counter offer and maintain previous offer. R advises they will seek an evidential hearing to be fixed. C responds stating they will also seek an evidential hearing and requests breakdown of R's offer in respect of BHR and the rates contained in the intervention letter.

12.9.18 R lodges list of evidence and provides breakdown of offer in respect of BHR and rates in intervention letter.

13.9.18 Both parties move the court at the case management discussion to fix an evidential hearing. Court fixes 14th November for hearing on quantum only.

23.10.18 R emails C for response to £1,500 offer.

1.11.18 C lodges list of evidence and list of witnesses.

1.11.18 R emails C for position on £1,500 offer.

2.11.18 C rejects the offer and proposes counter offer of £1,850.

2.11.18 R email and note the counter offer, but state it would be more economical for the respondent to proceed to the evidential hearing to test the agency argument set out in *Mode* v *Southern Rock Insurance Company Limited* [2014] 9 WLUK 470.

9.11.18 C email R for response to £1,850 offer.

9.11.18 Email exchange. R offers £1,700. C agrees in principle. Level of expenses disputed.

12.11.18 C emails R to set out position on expenses.

13.11.18 R emails C to agree principal sum extra judicially at £1,700. C lodges incidental application to discharge evidential hearing and fix a hearing on expenses.

13.11.18 Court administratively discharges the evidential hearing and fixes 16th January 2019 as a hearing on expenses.

16.1.19 Expenses hearing part heard and continued to allow chronology to be submitted and written submissions.

21st February Hearing on expenses concluded.

Statutory Framework

[4] Parties agreed that the starting point was Chapter V of the Act of Sederunt (Fees of Solicitors in the Sheriff Court) etc 1993 ("The 1993 Act"). This provides the default framework for assessing expenses in a defended action. Parties agreed the action was defended.

[5] Parties agreed that the 1993 Act was qualified by The Sheriff Court Simple Procedure (Limits on Awards of Expenses) Order 2016 ("The 2016 Order"). Article 3 of that order limits the expenses awarded in a case where the value of claim is greater than £1,500 but less than £3,000 to 10% of the value of the claim ("the cap"). Parties agreed, or at least did not seek to argue otherwise, that the value of the claim fell to be determined by the settlement figure and not the original claim. The original claim would of course have fallen out with any limit in article 3 of the 2016 Order. Therefore parties agreed that if the "cap" in the 2016 Order applied the expenses could not exceed £170.

[6] Parties further agreed that the argument therefore was in terms of the qualification within section 81 of the 2014 Act, and in particular section 81(5)(a)(ii). Read short, section 81(5)(a)(ii) states the "cap" does not apply if the defender, having stated a defence, has not proceeded with it.

[7] The principal question for the court then became whether or not the actions of the respondent amounted to "not proceeding with their defence"

[8] The claimant's written submissions did also indicate a possible further exception to the cap, in terms of section 81(6), namely that the case involved a "difficult question of law". Although that related to the impact of an intervention letter and the decision in *Copley*[i] this was not fully pursued in discussions. For completeness I would not have determined that the assessment of the hire costs due with reference to an intervention letter met that particular test.

The Claimant's Submissions

[9] The agent for the claimant submitted that the timeline of the case clearly showed that the respondent had both stated a defence, and, by virtue of settling the case before the hearing, had therefore not proceeded with it.

[10] The response form, whilst not disputing liability, indicated full and detailed defences, including not only averments of excessive charges, but also questions of agency and necessity for credit hire at all. These averments all required investigation and, as the claimant had never averred impecuniosity, obliged the respondent to investigate and prove a lower sum for the hire costs. It was not simply an argument over the amount due to be paid. The BHR instructed ran to almost 200 pages and covered more than a simple guide to spot hire and was designed to defend fully the total of the credit hire costs claimed.

[11] There is no difference as to whether the defence is to liability or the value of the claim. Section 81(5) only makes reference to stating a defence and not ultimately proceeding with it and does not distinguish between quantum and liability.

[12] This position was recently followed in a decision of Sheriff McGowan at Edinburgh in *Graham* v *Farrell* [2017] SC EDIN 75. The case settled before the evidential hearing and Sheriff McGowan awarded chapter 5 expenses on the basis that the respondent had lodged a defence and not proceeded with it. Proceeded with it meant proceeding all the way to a decision after a hearing (proof). This decision followed a decision of the Sheriff Principal at Edinburgh in a small claims case, *Tallo* v *Clark* 2015 SLT (Sh Ct) 181, where it was held that not proceeding with a defence:

> "means not proceeding with the hearing of evidence in obtaining a decision and judgement of the court".

[13] Whilst *Tallo* was a small claims case, Sheriff McGowan [at para 67] stated it was:

"highly persuasive"

in simple procedure. The application of the rule in those cases also applies where the defence is to quantum only, as set out *in Semple* v *Black* 2000 SCLR 1098 and in *Glover* v *Deighan* 1992 SLT (Sh Ct) 88.

[14] The action was raised to recover costs incurred by the claimant as a result of the negligent driving of the respondents' insured. The parties could not agree a settlement therefore the claimant had no option but to raise the action.

[15] After the response form was received, the case management discussion was rescheduled at the request of the respondent in order to obtain the basic hire report. The claimant received the report 4 months after serving the claim form. The defence relied on basic hire rates, an intervention letter and a question of agency. The respondent had informed the claimant they wanted an evidential hearing to test their arguments. This is therefore not a straightforward dispute and required considerable consideration and work by the claimant's agents. The litigation was protracted and complicated by the respondents, who had 5 months from the date of service until the evidential hearing was fixed.

[16] Thereafter compromised settlement was reached extra judicially and the evidential hearing was discharged on the day before it was fixed to call. The claimant has not acted unreasonably both in the course of the action or in requesting expenses that he is statutorily entitled to.

[17] There is nothing in the circumstances to distinguish this case from the accepted rule, based on the case law above and the legislation, that chapter V expenses should be awarded. The interpretation of the law is not affected by the merits of the defence or whether there is a compromised settlement. It is simply whether the respondent proceeded with their defence, which they did not.

[18] It is accepted there is a discretion set out in schedule 1 of the 1993 Act, but the work carried out and procedure detailed in this action, as above, shows that there is no reason to depart from the norm and no reason for the court to exercise its discretion and not award chapter V expenses.

The Respondent's Submissions

[19] The statutory framework is correctly stated by the claimant as is the definition of "having stated a defence and not proceeded with it". However that does not apply here as the respondent's defence was not only stated but was successful and therefore capped expenses should apply. The settlement figure was almost half the sum sued for and therefore the defence that said sum sued for was excessive was made out. The respondents therefore proceeded with their defence.

[20] The court should consider in this case, and to give guidance for future cases, the question

> "If a respondent lodges a defence on quantum only and said defence results in a settlement figure (substantially) less than the sum sued for, does it remain the position that the claimant is entitled to 'scale costs' and that capped expenses do not apply?"

[21] The case law relied upon by the claimant can be distinguished as it relates to situations where a defence on liability has been lodged and not been proceeded with. Unlike in *Graham* v *Farrell* and *Tallo* v *Clark* the respondents in the present case conceded liability immediately. At paragraph 19 of Tallo, the Sheriff Principal states

> "it was argued before me that a strict interpretation of the provision is the enemy of settlement. Of course compromise is a worthwhile and valuable objective in litigation. The appellant's argument however misunderstands small claims procedure. If small claims procedure is understood properly parties must pin their colours to the mast by the date of the first hearing. A defender cannot rely firstly on a hearing on evidence and secondly on negotiation following a defence being stated."

The respondents did pin their colours to the mast straight away. The defence was that the claimant had not mitigated their loss and that the sum sued for was excessive. The respondent placed a number of calls to the claimant to obtain further information to investigate the credit hire claim as none of it was in the original claim form. The original claim was for credit hire which is widely known to be higher than basic hire rates. If a claimant does not plead impecuniosity then the claimant should use basic hire rates. The respondent was not advised that the claimant was pecunious until the proceedings were commenced. The respondent always argued credit hire was excessive. The respondent also argued that as an intervention letter was sent to the claimant those rates should apply.

[22] Sheriff McGowan in Graham said that *Tallo* was at the very least highly persuasive but at para 67 stated:

> "there is no relevant factor distinguishing [Graham] from that of Tallo".

The present case can be distinguished as the defence related to the sum sought only. This is not the defenders lodging a full defence and then "throwing in the towel". The respondent argued the merits of the credit hire claim and the fact that that claim was excessive. Despite being successful in negotiating a considerably lower settlement the claimant now seeks scale costs. If that reasoning was followed, and the reasoning in *Graham* and *Tallo*, then it would never be open to the respondent to challenge the sum sued for in a response form without the risk of facing higher scale expenses, unless they always ran the hearing to a conclusion.

[23] The claim was for £3,035.32, of which £2,860.32 was for credit hire, £100 for inconvenience and £75 for miscellaneous costs. The respondents offered £1,500 in August which was countered with an offer of £2,371. A further counter proposal two months later from the claimant was £1,850. This was two weeks before the evidential hearing. The case

settled the night before the hearing at £1,700. The respondent has therefore proceeded with their defence and was successful in reducing the excessive claim. Capped expenses only should apply.

[24] If the court does not agree that *Tallo* and *Graham* can be distinguished and scale costs must apply, the court can still exercise a discretion and award lower expenses in terms of article 3A & 5 of the 1993 Act. The respondents ask the court to exercise that discretion in their favour firstly as the negotiated settlement was considerably lower than the sum sued for and, as submitted, shows the success of the respondent's argument. The respondents have also had to go to considerable time and expense to be in a position to answer this excessive claim, not only paying for a BHR but also paying for the investigations into the factual and legal position. The timeline shows the work carried out and it will be noted that there was a two month delay in receipt of a credible counter offer from the claimant. The respondent did not require to lodge a BHR as the claimant was pecunious, but they did this to be able to negotiate a lower rate. The negotiated settlement was far closer to the original offer by the respondents than any offer by the claimant.

[25] The litigation was effectively raised by the claimant knowing that the rates sought by him were excessive, leaving the respondents to prove they were too high. Having done that, the respondents are then entitled to the exercise of discretion reducing the scale expenses to the capped figure or at least some other modification.

Discussion

[26] There are in effect three questions posed in this case. Firstly does the accepted rule from *Tallo*, followed in the simple procedure case of *Graham*, apply if a response challenging quantum is submitted, an evidential hearing is assigned but does not proceed due to

settlement. Secondly, if the same rule applies and settlement is reached at a lower figure than the sum sued for , can the court look behind that and at parties' actions and exercise its discretion to modify chapter 5 expenses (a sub question being, just how would the court do that?). Thirdly what if anything can a respondent do to avoid chapter V expenses and still be in a position to challenge the level of a claim.

[27] As hinted at in both *Tallo* and *Graham*, the idea that a party settling a case (thereby avoiding the cost and time of a full evidential hearing) should be in effect penalised by an award of larger expenses is difficult to rationalise with the ethos of simple procedure and the need to avoid wasting court resources. That is particularly difficult to rationalise when the final settlement is far lower than the sum sued for. By settling the respondent has avoided further costs to the claimant of conducting the evidential hearing, and potentially freed up valuable space for an unrelated proof or evidential hearing to take place. If the option is to hold out and argue the point and lose, then the cost transfers primarily to the court and impacts on other business, other litigants and of course, given the limit on expenses under £3,000, means no one is really compensated for the work, even if successful. It does not encourage settlement by the respondent, especially in a quantum case, after the response form is lodged, as no matter the result the expenses could far outstrip any award of damages. This undesirable result is even commented upon in the *Fenton*[ii] case referred to in *Tallo*.

[28] Parties in the present case agreed with what could be said to be an illogical conclusion. However, the rule of course prevents a party lodging a spurious defence, putting the claimant to more work and more expense and then conceding, perhaps with little investigation and resource themselves, at the door of the court.

Decision

[29] The respondent is correct in their submissions that *Tallo* and *Graham* are not strictly binding on me. The Sheriff Principal's case is under another procedure and, as I understand it, Sheriffs are only persuasive on summary sheriffs. There are points on which I could distinguish them. However the respondent's argument falls when I consider *Semple* and *Glover.* These together with *Tallo* are all Sheriff Principal appeal cases and the difference in procedure is so small that they must be highly persuasive. Sheriff Principal Hay in *Glover* was dealing with a liability case but is clear that

> "[summary cause scale] expenses fall to be awarded where a defence is stated initially but the claim is subsequently met, whether in full or **by compromised settlement**. The **only** exception will be a case where the parties agree otherwise in relation to expenses" (emphasis is mine).

[30] Sheriff Principal Wheatley was dealing with a quantum only case in *Semple*, and the position was perhaps even better for the defender there as the case settled on the basis of the defender's tender. Although he was looking at section 36B(3)(a)(ii) of the Sheriff Courts (Sc) Act 1971, the relevant section was stated in exactly the same terms as s81(5)(a)(ii). Having considered the case he set out the following rules:

> "Where a defender states a defence and subsequently has a tender accepted, this does not necessarily mean that he has, or has not, insisted upon his defence. The statute does not distinguish between a substantive defence on the merits, and one restricted to quantum. Therefore, so long as the defender continues to dispute quantum, even where he has conceded liability, he can be said to have persisted in his defence. It is essentially a matter for the sheriff to decide whether in all the circumstances the defender can be said to have **in fact** persisted in his defence. Given that section 36B(3)(a)(ii) appears to intend that the restriction in expenses should be available where the lodging of defences has not protracted the process, it does not seem to matter whether the reason for a defence being stated and to proceeded with is a dispute on the merits, or on quantum of damages, or both. Significant preparation may still have to be done by the pursuers even when liability is admitted and the only matter which has to be decided is the quantum of damages. It may be that somewhat different consequences are involved for the pursuer if a defender agrees liability as opposed to agreeing the measure of damages, but if in effect any significant or substantial point of the defence to an action is not immediately

> conceded when defences are lodged, then it would appear that the defender may not be able to avail himself of the restriction in expenses allowed by section 36B of the Act."

[31] Sheriff Principal Wheatley therefore confirms the claimant's submission that a defence is a defence. However he confirms that two exercises of discretion may be open to the sheriff in determining the question of expenses. He states as above that the question of persisting in the defence is not an absolute rule, but one depending on the circumstances. Even if that question was answered in the negative then there is still a further exercise of "absolute discretion as what level of expenses is appropriate in terms of the proviso to paragraph 2 of schedule 1 to the 1993 regulations. ('unless the sheriff otherwise directs' which are the same words in article 3A as applicable here").

[32] Of course in *Fenton* and *Tallo* the strict reading of the words "not proceeded with" were upheld for the reasons therein, and it was said no discretion applied to the definition of section 36B(3)(a)(ii), despite it being perhaps attractive overall in the interests of justice. The current sitting Sheriff Principal (Stephen) in *Tallo* confirms at para 18:

> "Accordingly the reference to not proceeding with a defence means not proceeding with the hearing on evidence and obtaining a decision of judgement of the court".

At para 19 she continued:

> "the argument advanced on behalf of the appellant is to the effect that the court should have a discretion as to expenses….. a strict interpretation of the provision is the enemy of settlement….The appellant's argument however misunderstands small claims procedure. If small claims procedure is understood properly parties must pin their colours to the mast by the date of the first hearing".

[33] I agree with Sheriff McGowan in *Graham*, for the reasons he sets out, that I must regard the Tallo decision as at least highly persuasive with regard to the interpretation of the words "having stated a defence has not proceeded with it". I cannot follow Sheriff Principal Wheatley's approach for the reasons set out in *Tallo*. The respondent lodged a defence, and a

detailed one at that. Each point could have led to an evidential hearing or legal debate (which in simple procedure would in effect be at a hearing anyway). The case settled the night before the hearing which was fixed.

[34] Therefore the answer to the first question I posed is that there is no difference in statutory interpretation whether the defence is to liability or quantum or both. The respondent therefore has stated a defence and not proceeded with it and the cap on expenses in section 81 does not apply.

[35] The case cannot however, in my opinion, rest there. Firstly there are significant differences in the approach and ethos of simple procedure. At every stage parties and the court have to consider the principles of simple procedure set out in rule 1.2. The duty on the court is to take those principles into account when managing the case as when interpreting the rules [1.4(1)] and encourage cases to be resolved by negotiation…where possible [1.4(3)]. One of the main principles, as highlighted in every order produced in the life of a case is rule 1.2(4) "Parties are to be encouraged to settle their disputes by negotiation…and should be able to do so throughout the progress of a case".

[36] The rules on expenses are not stated expressly in the simple procedure rules but are of course derived originally from the same Act of Sederunt before we end up back at the 1993 Act.

[37] It cannot make sense, applying the principles, to punish a party who avoids a hearing, and who ultimately is at least partially, if not wholly successful in a defence and who negotiates a settlement without taking up court and parties' time and resources with a hearing. The difference in the award of expenses between the cap (£170) and the likely assessed expenses (in advance of £2,000 perhaps) means that punishment, if the claimant is right in this argument, is excessive and does nothing to encourage negotiation "throughout

the progress of the case". The rule encourages the claimant to only negotiate down after a case management hearing, with an eye to higher expenses, and places an obstacle in the path of the respondent as soon as they dare challenge what they see as an excessive sum sued for.

[38] Whilst I am bound by the strict interpretation of section s81(5)(a)(ii) in terms of the case law and rules of statutory interpretation, and therefore in a position that I must apply chapter 5 of the 1993 Act, I am left in my view with a discretion in terms of article 3A & 5 of the 1993 Act. It appears to me, to look overall at the principles of simple procedure, that I can have those in mind when I consider applying that discretion. In addition of course, the award of expenses is also an equitable matter, attempting to achieve substantial justice between the parties by the exercise of sound judicial discretion. The ethos and principles of the procedure being considered must be relevant to a view on what is equitable in all the circumstances.

[39] In the present case the sum sued for was in excess of £3,000. It must have been obvious to the claimant that any basic rate report would reduce that amount, and in fact that was shown by the first counter offer. Throughout the proceedings the respondents made offers, all based on the defence that the amount sued for was excessive. By the eve of the hearing they were successful in persuading the claimant of their position as the eventual settlement was lower not only than the original claim but lower than any counter offer made by the claimant. There is an argument that the respondent was in fact successful in their defence as they always accepted they required to pay some of the hire costs.

[40] It is true both parties went to expense in preparing and arguing their cases. There can, however, in fact be little difference in the costs incurred. The claimant would have mitigated those costs had they settled earlier. They were the ones who in the end accepted

an offer at the lower end of the scale argued throughout the progress of the court. Both parties could have avoided further costs by agreeing on expenses.

[41] Applying the principles of simple procedure to the question of my discretion in respect of expenses, it appears to me that the award of assessed expenses would be contrary to my duties set out in rule 1.4. I therefore prefer the respondent's submissions and award expenses in the sum of £170 (the equivalent had this been a "capped expenses" case) to the claimant.

[42] I should say the logical extension of my decision, when a respondent is successful in showing the sum sued for was excessive and achieves a far lower award of damages, is that either no expenses should be awarded or expenses would follow success and go in fact to the respondent. However the former was not argued and the latter is probably a step too far.

[43] In considering submissions I posed a sub question of how the court would approach the exercise of discretion when settlement is reached in similar cases. The answer is relatively straightforward. The court is asked daily to consider facts and circumstances and apply a discretion, or an equitable/interests of justice test. If I am right in my interpretation of article 3A & 5, then if expenses in similar cases are not agreed parties can argue whether the usual rule relating to assessed expenses should be departed from. That may well involve, as here, an examination of the timeline, of where success actually lies, of parties actions, etc. Such an exercise of discretion is extremely unlikely to be made, if ever, in a liability case or where the quantum claimed was practically the same as the settlement. But as here, the process followed was within the principles of simple procedure and the respondent was entitled to my exercise of discretion.

Post script

[44] Whilst not strictly necessary, given my opinion, I should comment on the respondent's request for guidance if their position (and mine) is incorrect. How can they challenge an excessive sum sued for without falling foul of s81(5)(a)(ii) and facing expenses running to the thousands? It appears to me that a party could submit a response form asking for a pause to discuss settlement, or even an incidental application falling short of a response form seeking same, explaining that they accept an amount is due and wish to discuss same That is clearly in keeping with the rules and ethos, not least as it keeps the matter out of court when the vast majority of these type of cases settle anyway. There is no real prejudice in any delay caused by a pause, as more often than not these cases are really exchanges of money between insurance companies. Parties also of course could negotiate expenses but as transpired here I accept there is an element of risk for the respondent in relying on that being successful.

[i] Copley etc [2009] EWCA Civ 580

[ii] Fenton v Uniroyal Englebert Tyres Ltd 1995 SLT (Sh.Ct) 21