SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 19
A2852/00

Lady Paton
Lord Drummond Young
Lord McGhie

OPINION OF THE COURT

delivered by LADY PATON

in the cause

by

ECCLESIASTICAL INSURANCE OFFICE PLC

Pursuers and Respondents

against

LADY IAM HAZEL VIRGINIA WHITEHOUSE-GRANT-CHRIST

Defender and Reclaimer

Pursuers and Respondents: Ellis QC; BLM Law
Defender and Reclaimer: Party

23 March 2018

Repudiation of a property insurance claim, and subsequent litigation

[1] In 1998 the defender purchased a former church in Boyndie, Banffshire, for £20,000. She took out property insurance with the pursuers, and moved in. On 13 February 2000, the property was seriously damaged by fire. The defender submitted an insurance claim. The pursuers repudiated liability on the ground of alleged non-disclosure.

[2] In October 2000, the pursuers raised the present action seeking declarator that they

were entitled to avoid the insurance policy on the ground that it had been obtained by non-disclosure of material facts. The defender denied any non-disclosure, and defended the action. On 9 March 2002, the defender lodged a counterclaim with conclusions for *inter alia* declarator, payment, a public apology, and erasure of entries in newspapers and websites. Later that year, on 31 October 2002, the action was sisted to enable the defender to seek Legal Aid. The sist remained in place for a period of over nine years, from 31 October 2002 until March 2012, partly as a result of the defender's health issues.

The defender's counterclaim and issues of prescription and limitation

[3] In March 2012, the sist was recalled. On 16 August 2012, the court allowed the pursuers' minute of amendment adding an additional conclusion for declarator that any obligation arising under the policy had been extinguished by the short negative prescription in terms of section 6 of the Prescription and Limitation (Scotland) Act 1973. After various procedures, it was held that the defender's claim for damages for defamation and calumny was time-barred in terms of section 18A of the 1973 Act, but that her claims for indemnity and damages for breach of contract had not been extinguished by the quinquennial prescription and should be remitted to probation (*Ecclesiastical Insurance Office plc* v *Whitehouse-Grant-Christ* 2016 SLT 990).

The defender's objection concerning an alleged conflict of interest

[4] After that decision, the pursuers instructed new agents, namely BLM Law. On 22 September 2016, the defender objected to the new agents' involvement on the basis of a conflict of interest, in that in 2000 she had consulted a partner of a legal firm which ultimately amalgamated with BLM Law. After a debate on 4 November 2016, the court made *avizandum*.

Ultimately the court repelled the defender's objection by a majority decision dated 26 May 2017 (*Ecclesiastical Insurance Office plc* v *Whitehouse-Grant-Christ* 2017 SLT 697).

The pursuers' minute of abandonment and minute of partial admission

[5] On 28 October 2016 (ie following the objection raised on 22 September 2016, but prior to the issuing of the decision on 26 May 2017), the pursuers lodged a minute of abandonment in the principal action, and a minute of partial admission in the counterclaim.

[6] The minute of abandonment stated:

> "TAYLOR for the pursuer stated and hereby states to the court that the pursuer abandons the principal action and seeks decree of dismissal in terms of rule of court 29(1)(b)."

[7] The minute of partial admission stated:

> "TAYLOR for the pursuer stated and hereby states to the court that the pursuer admits liability to indemnify the defender in terms of and to the extent undertaken in the insurance contract between the pursuer and the defender for the loss suffered by the defender as a result of damage to the property insured in the fire on or about 13 February 2000: for the avoidance of doubt the pursuer reserves all its rights and pleas available to it to defend all other claims within the counterclaim and also in respect of the quantum of any indemnity payment and any interest which may or may not be due thereon. "

[8] Those minutes gave rise to several issues, namely:

- Whether there should be a decree of dismissal or *absolvitor* in the principal action.
- Expenses.
- Further procedure, including pleadings.

Those issues were discussed at a hearing before the Inner House on 9 January 2018. At the outset, the court intimated that the expenses of the counterclaim would not be dealt with at that stage (as the counterclaim was a process which was continuing), and also that the court

was satisfied that the issues in the case were of such a nature that they could not sensibly be dealt with by summary decree.

The defender's amendment

[9] By a previous interlocutor dated 26 September 2017 the defender had been permitted to amend her pleadings to a limited extent, as requested in her motion enrolled on 6 September 2017, which was in the following terms:

> "On behalf of the Defender and Reclaimer; under RCS 24.1(2)c) and 24.2.(2) to allow amendment of the sum sued for in terms of the Defender 'relevant claim' at Pleas-In-Law No.9 in the Defences dated 27 May 2002 as adjusted and reasserted in the Defences of the principal writ and the counterclaim under RCS 25 as follows.
>
> 1. **To delete,** 'NINE HUNDRED AND TWELVE THOUSAND SIX HUNDRED AND THIRTY SEVEN POUNDS (£912,637.00) Sterling' and all reference to (1) the formula calculations including (2) Index linking applied monthly, (3) Compound (4) Compounded monthly, (5) any interest rate above 8%
>
> 2. **And substitute with,** 'For Decree for payment by the Pursuer to the Defender, the sum of EIGHT HUNDRED AND SEVENTY THREE THOUSAND POUNDS (£873,000.00) Sterling, plus judicial interest at the rate of 8% per year from 13 February 2000 until payment, should be granted as sought and with expenses'
>
> 3. That being the Pursuer liability, obligation and debt for payment to the Defender for losses suffered by the Defender as a result of the damage to the Defender home (property insured) in the fire on 13 February 2000. The sum sued for being a reasonable estimate of the Defender fire indemnity claim under the insurance Policy Number HT9800273 issued by the Pursuer in favour of the Defender and which was current on 13 February 2000; decree for payment should be granted as sought; **to be amended in the following:**
>
>   a. OPEN RECORD (AS ADJUSTED) August, 2012 (No.41 of Process); at Pleas-In-Law No.5 for the Defender (pp.23 to 24). Conclusion No.1 of the Counterclaim (pp. 24 to 25). Statement IV. of the Counterclaim (p. 35). Pleas-In-Law No.1 of the Counterclaim (p. 52); and
>
>   b. CLOSED RECORD, March 2014/Reclaiming Print (No.83 of

Process) at Answers 7.1 in the Defences (p.37 to 38). Pleas-In-Law No.6 in the Defences (p. 210). Concuision No.II of the Counterclaim (p. 250); and Pleas-In-Law No.3 in the Counterclaim (p.274); and

c. All the various Written Submissions and MOTIONS enrolled on behalf of the Defender and Reclaimer up to and including the Motion enrolled 14 March 2017."

The reprinting of the record was dispensed with, and the defender was authorised to make the limited amendments by manuscript alterations to the record. However at the hearing on 9 January 2018 it transpired that the defender had made some further manuscript alterations to her pleadings as contained in the reclaiming print number 85 of process, as follows:

- Page 250C-D third conclusion in the counterclaim: the sum of £121,759 substituted for the sum of £133,468.38.
- Page 250D-E fourth conclusion in the counterclaim: the sum of £1 million substituted for the current wording beginning with the words "the sum equal to the amount".
- Page 274C-D plea-in-law 3 in the counterclaim: 1999 substituted for 2000 in the phrase "Policy Renewal Notice dated 18th February 2000".
- Page 275B-C plea-in-law 5 in the counterclaim line 4: third line: "breach of contract" inserted between the words "continued" and "calumny".
- Pages 275-279 pleas-in-law 5, 6, 7, and 8 of the counterclaim: the dates "2 October 2000 to 22 August 2012" deleted and the dates "7 September 2000 to date" substituted.
- Page 276C: 13 lines down from the top of the page, the words "up to 15 August 2012" deleted and the words "to date" substituted.

These proposed alterations (also listed in a sheet entitled "Note of amendments for the

defender and reclaimer" tendered at the bar on 9 January 2018 and subsequently numbered 135 of process) have not been authorised by the court.

The defender's submissions concerning dismissal/absolvitor, expenses, and further procedure

[10] The defender had prepared a 77-page written submission number 134 of process for the hearing on 9 January 2018. It comprised 216 paragraphs and several annexes. This written submission was delivered to the pursuers' agents and senior counsel at 9.40am on 9 January 2018. The defender also made oral submissions.

Expenses

[11] The defender sought the whole expenses of the cause from 2000 to the date of the hearing (9 January 2018), with no award of expenses to the pursuers. The defender submitted that she was the victim of abuse. The pursuers had used fraud and deceit. They had knowingly, maliciously, and oppressively deceived the court, in particular the Lord Ordinary (Lord Boyd). They had known of the existence of plea-in-law 9 (referred to in *Ecclesiastical Insurance Office plc* v *Whitehouse-Grant-Christ* 2016 SLT 990 *inter alia* at paragraph [41]) but had nevertheless sought to argue that her claim had prescribed. The defender emphasised the pursuers' fault, breach of contract, fraud, deceit, malice, defamation of her reputation, and the resultant personal injury which she had suffered. But for those wrongs, she would not have suffered the protracted litigation from 2000 to date, involving as it did time, effort, resources, and expense. The pursuers were guilty of an abuse of process (cf *Willers* v *Joyce* [2016] UKSC 43 and other authorities relating to fraud and deceit). Payment of the whole expenses by the pursuers should be made a condition precedent.

Damages

[12] In her motions of 15 March 2016 and 14 September 2016 and in her written submissions, the defender sought damages for harassment in terms of the Protection from Harassment Act 1997 (*Ferguson* v *British Gas Trading Ltd* [2009] EWCA CIV 46 and other authorities) and on the ground of the tort of malicious prosecution and abuse of process (*Crawford Adjusters (Cayman) Ltd* v *Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17, particularly pages 366H to 367H; *McKie* v *Strathclyde Joint Police Board* 2004 SLT 982, paragraph [46]). The defender claimed not only payment for indemnity but also damages for foreseeable losses and personal injuries. References to "breach of contractual obligations" and "breach of contract" could be found in the written submission number 134 of process (for example, at paragraph 94, 108.2, 143, 149, 157, 161 and 175). The total claim amounted to £5,498,729.95 (paragraph 76 of the written submission, as detailed in paragraphs 95 *et seq*; 111 *et seq*; 130 *et seq*; 177 *et seq*).

Interest

[13] The defender sought interest on any sum awarded at the rate of 8 per cent per annum.

Absolvitor

[14] In the light of the pursuers' minute of abandonment, the defender sought *absolvitor* from the conclusions of the summons in the principal action.

Set-off

[15] If any expenses were to be awarded to the pursuers, the defender requested the court

to allow a "set-off" against the sums which were to be awarded to her, and to postpone payment of any expenses found due to the pursuers.

Submissions for the pursuers concerning dismissal/absolvitor, expenses, and further procedure

[16] Senior counsel for the pursuers adopted the order of proceedings outlined in the court's Note on the Order of Proceedings (number 127 of process).

The minutes of abandonment and partial admission of liability and their procedural implications

[17] As abandonment was sought in terms of rule of court 29(1)(b), dismissal of the principal action was available to the pursuers as of right upon payment of full judicial expenses. Senior counsel explained that the reason for seeking dismissal was not to attempt to evade the indemnity obligation (hence the clear admission in the minute of partial admission of liability). The reason for seeking dismissal was the existence of certain passages in answer 8 of the defences: for example page 71C-D of the reclaiming print, paragraph 8.61 (references to breach of contract, malicious abuse of process); page 157 paragraph 8.20 (indemnity), 8.21 (loss and damage as a result of breach of contract). The whole of answer 8 was incorporated in the counterclaim in various places, for example at page 252. By seeking dismissal, senior counsel hoped to avoid any question of *res judicata* which might arise if issues had been raised in the principal action in which *absolvitor* had been granted. The safest way forward was dismissal of the principal action, whereupon the counterclaim could be considered on its merits.

[18] As for further procedure, senior counsel submitted that it would be necessary to recall

the sist of the counterclaim (the court's interlocutor of 2 March 2016) and ultimately to remit the counterclaim to the Outer House to proceed as accords, but, he submitted, under deletion of any averments relating to malicious prosecution, calumny, and the like. Senior counsel outlined the averments which he submitted should be deleted. Remaining averments might still be the subject of challenge (for example, on relevancy), but that would be a matter for debate in the Outer House. The pursuers were keen to have a proof about (i) the indemnity claim and (ii) any damages for breach of contract. Remoteness of damage might be in issue.

Possible amendments sought

[19] Senior counsel opposed the defender's proposed amendments (other than those allowed by interlocutor of 26 September 2017) mainly on the ground that this was a matter better dealt with in the Outer House. If a claim for damages (including *solatium*) was to be based on breach of contract rather than libel and defamation, clear averments were required. If a minute of amendment were to be allowed, the pursuers would wish to answer it.

Expenses

[20] Senior counsel invited the court to find the defender liable in the expenses of the debate before Lord Boyd on the ground that the pursuers had been wholly successful and expenses should follow success. The Lord Ordinary had reached a correct conclusion on the basis of the material placed before him (as the closed record had not included the defender's plea-in-law 9, apparently through oversight or inadvertence on the part of those responsible for preparing the closed record, namely the pursuers). No-one (in particular the defender) had, during the debate, mentioned plea-in-law 9. Thus the pursuers had been wholly successful before the Lord Ordinary, and expenses should follow success.

[21] In relation to the Inner House hearing concerning prescription (2016 SLT 990), senior counsel submitted that there had been divided success. The defender was successful in relation to the question of prescription of the indemnity claim, but on the basis of a new argument. The pursuers were successful in that the defamation claims remained time-barred. The defender's motion for decree *de plano* was also rejected. The defender's fifth to thirty third pleas inclusive in the principal action were repelled following the reclaiming motion. There should be a finding of no expenses due to or by either party. Alternatively, if there were to be an award of expenses in favour of the defender, there should be some modification to reflect the element of success on the part of the pursuers.

[22] In relation to the Inner House hearing concerning conflict of interest (2017 SLT 697), the defender had been unsuccessful. Again, expenses should follow success, and the defender should be found liable in expenses.

[23] Senior counsel acknowledged that, in terms of rule of court 29, a party was entitled to dismissal (rather than *absolvitor*) if that party paid "full judicial expenses". However he submitted that, in this particular case, it was appropriate for the court to deal with the procedural aspects of the case in discrete parts as the prescription debates before Lord Boyd and the Inner House (2016 SLT 990) involved the counterclaim, which complicated the issue, as not all of the expenses of those hearings could be attributed to the principal action which was being abandoned. In any event, senior counsel submitted, the debate on conflict of interest (2017 SLT 697) took place after the lodging of the minute of abandonment on 28 October 2016. Senior counsel submitted that the court always had the power to modify any award of expenses: the current wording of rule of court 42.5 permitted modification in any circumstances. The decision in *Nobel's Explosives Company Limited* v *The British Dominions General Insurance Company Limited* 1919 SC 455 had been made in the context of a common

law power, and prior to the current wording of rule of court 42.5. *Nobel's Explosives* could not therefore be regarded as determinative in the present case.

Set-off

[24] In relation to the defender's submissions relating to set-off, senior counsel advised the court that the pursuers would be content (if they obtained an award of expenses) that extract should be superseded until the end of the case.

Other matters raised by the defender

[25] Turning to the defender's assertions of harassment, malicious prosecution and malicious abuse of process, senior counsel submitted that there were no pleadings supporting such claims. An action might be abandoned for many reasons. The fact that an action was abandoned did not imply that it had been improper to raise the proceedings. In the present case, the principal action was being abandoned on legal advice, to some extent due to the passage of time and the fact that a witness on the merits had died. Senior counsel agreed with observations from the bench that it was arguable that judges who had participated in the litigation criticised as "malicious" should not hear any case concerning alleged harassment, malicious prosecution and malicious abuse of process based on that litigation: such matters would be best dealt with by judges who had not previously been involved.

[26] Any personal injury claims made by the defender (possibly arising from any breach of contract claim) would require to be properly focused in the pleadings. The defender appeared to be changing her claim for damages for defamation into a claim for damages for personal injuries arising from, for example, breach of contract. In such circumstances, the question of time-bar might have to be considered.

Final reply by the defender

[27] The defender submitted that she was indeed claiming damages for *solatium* for breach of contract. But the claim for calumny and defamation should remain, as those matters were related to the breach of contract. The defender opposed the removal of the passages which the pursuers' senior counsel had invited the court to excise. Damage had been caused while the action was in process, long before the action would be finally determined (cf *Crawford Adjusters (Caymen) Ltd* v *Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17 pages 366H to 367H). Now that the principal action had been abandoned, the defender was pursuing the personal injuries claim.

Discussion

Dismissal or absolvitor in the principal action

[28] We note the terms of rule of court 29.1(1)(b) and the authorities relating to dismissal on payment of full judicial expenses. However many of the issues in the principal action in this case are, in our view, reflected or repeated to a substantial extent in the counterclaim. While the principal action is to be abandoned, the counterclaim is to continue. We therefore consider that a mechanical application of rule 29 is inappropriate in this particular case. We propose to exercise the discretion which is always open to a court in a matter of expenses, in the manner set out in paragraph [29] *et seq* below. As for the question of dismissal or *absolvitor*, we are prepared to grant decree of dismissal in the light of senior counsel's explanation noted in paragraph [17] above.

Expenses in the principal action

[29] An important feature of this case is that the defender's counterclaim is to continue, and its outcome is as yet unknown. We are satisfied that (i) the debate before Lord Boyd; (ii) the reclaiming motion concerning prescription (2016 SLT 990); and (iii) the debate concerning conflict of interest (2017 SLT 697) were relevant not only to the principal action, but also to the counterclaim. We consider that we should take that special feature into account. In other words, any award of expenses made by this court at this time should reflect the fact that many of the issues discussed in the three hearings (i) to (iii) were relevant to both the principal action and the counterclaim.

[30] Having carefully considered the issues discussed at these hearings and their related outcomes, it is our opinion that an appropriate award in respect of each of the three hearings is one of "no expenses due to or by either party". While the defender was unsuccessful before Lord Boyd, a significant plea-in-law had been omitted from the closed record and was not drawn to the Lord Ordinary's attention. When the plea-in-law was subsequently taken into account in the reclaiming motion, the pursuer's indemnity claim was held not to have prescribed, although her defamation claim was held to be time-barred (*Ecclesiastical Insurance Office plc* v *Whitehouse-Grant-Christ* 2016 SLT 990). In other words, there was divided success. That divided success should in our view be recognised in the expenses of both prescription hearings (ie (i) before Lord Boyd and (ii) before this bench in the Inner House). As for (iii) the conflict of interest debate, we consider that the point raised was one which required to be fully ventilated in open court, resulting in an authoritative ruling by the court. It is therefore our view that the award in respect of that hearing should also be one of no expenses due to or by either party.

[31] In relation to any other parts of the principal action for which no ruling on expenses

has as yet been made, we award the expenses in respect of those matters in favour of the defender.

[32] In relation to any rulings on expenses which have already been made in the principal action:

- Where expenses have been "reserved" by the court, we award those expenses in favour of the defender.
- Where expenses have been awarded against the defender, those awards remain unaltered (subject to the supersession of extract noted in paragraph [24] above).
- Where there has been a finding of "no expenses due to or by either party", such a finding remains unaltered.
- Where expenses have been ruled to be "expenses in the cause", we award those expenses in favour of the defender.

[33] The expenses reserved in the interlocutor dated 8 September 2017 (concerning the hearing on that date resulting in the court's refusal of the defender's motion for Lord McGhie to recuse himself, and the refusal of the defender's application for permission to appeal to the United Kingdom Supreme Court against the interlocutor of 26 May 2017) are to be "no expenses due to or by either party": cf paragraph [30](iii) above.

Pleadings and further procedure in the counterclaim

[34] To assist the court in making decisions about the pleadings and further procedure in the counterclaim, the court should be provided with a reprinted record containing only the pleadings in the counterclaim (without the pleadings in the principal action). Only those amendments permitted by the court's interlocutor dated 26 September 2017 should be

included in the print. There should also be an appendix to the reprinted record, containing any passages originally in the principal action but adopted by the defender in the counterclaim. Such passages should be clearly identified and printed in full in the appendix, to enable the reader to see precisely what passages have been adopted and where they have come from. As the pursuers have the benefit of professional services, we have decided that the best way forward is to make the pursuers responsible at this stage for the carrying out, and the cost, of this reprinting exercise. The question of ultimate liability for such expense is reserved meantime. We wish again to emphasise that this is a case in which the defender would benefit from legal representation. The court would also benefit. The complicated way in which the defender (as a party litigant) has set out her pleadings to date may not assist her cause. Also we have a concern that much of her material (for example, claims based on assertions of malice and abuse of process) may be based on a misunderstanding of the relevant law.

[35] To assist the court further, the pursuers' agents are requested to send the draft record, reprinted as outlined in paragraph [34] above, to the defender. The defender should intimate to the pursuers' agents any suggested typographical corrections (but note that new material, intended amendments, or desired alterations to the existing text are not permitted at this stage). If necessary, the pursuers' agents should be prepared to discuss any aspects of detail with the defender. Once a final copy of the reprinted record has been agreed, a copy should be intimated and lodged in court.

Decision

[36] In the principal action, we shall issue an interlocutor dealing with dismissal and expenses as outlined above. In the counterclaim, we shall postpone issuing an interlocutor

concerning pleadings and further procedure until we have had sight of the record reprinted as specified in paragraphs [34] and [35] above. We continue the following matters:

- The defender's application for permission to appeal to the United Kingdom Supreme Court against the court's interlocutor of 2 March 2016.
- The defender's motion enrolled on 14 September 2016 insofar as seeking declarator and decree for damages for loss, injury and damage on the grounds that the defender is a victim of the pursuers' malicious prosecution, malicious defence *et separatim* malicious abuse of process *et separatim* abuse of process *et separatim* bad faith and unfair dealing.
- The defender's motion enrolled on 14 March 2017 insofar as seeking decree for payment to the defender of the relevant claim under plea 9 of the defences in the sum of £33,542,733."