EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 79
PD53/14

Lord Brodie
Lord Drummond Young
Lord Malcolm

OPINION OF THE COURT

delivered by LORD MALCOLM

in the cause

by

CRAIG ANDERSON (AP)

Pursuer and Respondent

against

JOHN IMRIE

First Defender

and

ANTOINETTE IMRIE

Second Defender and Reclaimer

Pursuer and Respondent: Milligan QC; Drummond Miller LLP
First Defender: (No appearance)
Second Defender and Reclaimer: Springham QC; BTO Solicitors LLP

18 December 2018

[1] The question for the court is whether a pursuer's offer in terms of chapter 34A of the Rules of the Court of Session can be lodged and given effect to in the Inner House. The

Lord Ordinary awarded damages to the pursuer in the sum of £325,000 against the second defender. After a reclaiming motion (appeal) was marked, the pursuer intimated and lodged a pursuer's offer to settle the cause in the sum of £300,000. The offer was not accepted. The reclaiming motion was unsuccessful (2018 CSIH 14). The pursuer now seeks an award of expenses plus a 50 per cent uplift in the solicitor's fees in terms of rule 34A.9. In opposition to the uplift, the second defender submits that pursuers' offers can only be operated in respect of claims pending in the Outer House. The pursuer contends that it would be unfair if, unlike tenders, they were not available in the Inner House. The relevant rules refer to "the court", not to the Outer House.

[2] It is true that the rules do not expressly exclude pursuers' offers in the Inner House, but there are a number of indications that this was the intention. We note the following provisions. Rule 34A.1 defines a pursuer's offer as one seeking to "settle a claim against a defender". Rule 34A.3 requires a pursuer's offer to be lodged in process before the court makes avizandum (a reserved decision) or gives judgment, or, in a jury trial, the jury retires to consider its verdict. A pursuer's offer can be accepted at any time before those events, after which decree can be granted in terms thereof – rule 34A.6. The court must not be informed of the offer until after judgment or the jury's verdict – rule 34A.5. If a pursuer's offer is not accepted and the judgment or verdict is at least as favourable to the pursuer as the offer, and the court is satisfied that it was a genuine attempt to settle the proceedings, the pursuer can move for an uplift of 50 per cent on the pursuer's solicitor's taxed fees, including any additional fee, in relation to the relevant period – rules 34A.8 and 34A.9.

[3] In our view the language of chapter 34A is redolent of proceedings in the Outer House. This is consistent with the purpose of encouraging early settlement of

personal injury actions. We conclude that chapter 34A pursuers' offers are not available in respect of a challenge to a final decision taken in the Outer House.

[4] A question might be posed as to the position if an interlocutory decision of a Lord Ordinary is reclaimed. Does this prevent the lodging of a pursuer's offer while the matter is pending in the Inner House? We consider that the answer is no. The decision on the substantive merits of the case will still be for the Lord Ordinary, after which the implications, if any, of a pursuer's offer would require to be addressed.

[5] While the above is sufficient for disposal of the matter before the court, we offer the following more general observations. The review of Outer House business carried out by Lord Cullen in 1995 expressed concern about late settlement of actions and the need for measures to encourage earlier agreements. Amongst other things, the introduction of pursuers' offers was recommended. It was recognised that there would need to be a "sufficient incentive" for defenders to accept them (paragraph 7.2). In due course pursuers' offers were introduced, the incentive being an uplift in the expenses recoverable by the pursuer if the defender failed to "beat" the offer. Not long thereafter it was held (*Taylor* v *Marshalls Food Group* 1998 SC 841) that the court had no power to impose such a penalty upon defenders, and the relevant rule was declared *ultra vires*. (Subsequently the necessary power was granted by the Courts Reform (Scotland) Act 2014.)

[6] This did not end the jurisprudence on pursuers' offers. In *Cameron* v *Kvaerner Govan Limited* 1999 SLT 638 Lord Bonomy held that a settlement offer by a pursuer was a relevant factor in respect of an application for an additional fee. The pursuer had sought to lodge a minute containing a settlement offer in the court process. In the light of the *Taylor* decision, the court administration refused to accept it. Lord Bonomy stated that it should have been received, albeit not shown to the judge until the appropriate time. His Lordship observed:

> "… any step which might clarify the position of a party in a reparation action, or limit the areas in dispute between the parties, or focus the issues between them more clearly, should be encouraged unless there are sound reasons why such a course should not be followed… On one view, a pursuer's minute of offer to settle may have no significant consequence since, in the absence of a tender by the defenders, material success by the pursuer at a figure lower than that which he offers to take is in the ordinary course likely to result in an award of expenses in his favour in any event. On the other hand, it is easy to imagine circumstances where both parties state their position in the form of minutes and the case is determined somewhere between these figures, and in which the court might consider these positions clearly stated by the parties in their minutes to be relevant to the question of liability in expenses. These are matters which fall to be resolved when they arise as issues in live cases." (page 639)

[7] In *Tenbey* v *Stolt Comex Seaway Limited* 2001 SC 638 the question was whether, as with a tender, a pursuer's offer to settle remained open for acceptance after initial refusal. Lord Osborne answered in the negative, holding that the ordinary law of contract applied to pursuers' offers. It followed that actings of the defender inconsistent with the offer precluded later acceptance thereof. Commenting on the decision in *Cameron*, his Lordship recognised the possible relevance of such an offer to an application for an additional fee, but he had difficulty in envisaging the utility of an unaccepted pursuer's offer to the matter of expenses (pages 643/4):

> "In normal circumstances, the issue of expenses in a litigation involving a pecuniary conclusion will be determined in the light of the sum ultimately awarded and the amount of any tender which may have been made. In the absence of a tender, it is difficult to see what significance a pursuer's offer would have, beyond that which I have recognised and the giving to the defender of an indication of the pursuer's position generally… My conclusion is that a pursuer's offer cannot properly be equiparated with a tender, as recognised in our law and practice. It follows from that conclusion that any law and practice which may be specifically applicable to the system of judicial tenders, distinct from the ordinary law of contract, cannot properly be regarded as applying to a pursuer's offer. In this situation, in my opinion, a pursuer's offer, which could, of course, if accepted, result in a binding contract to settle a litigation on particular terms, is to be treated simply as an offer to which the ordinary law of contract would apply."

[8] The above is of some relevance to the present case in that much of the pursuer's argument depended on the proposition that there is an equivalence between the two

procedures, and that it would be unfair if the second defender and reclaimer could tender in the Inner House, but the pursuer could not place similar pressure on his opponent. This submission ignores the difference in the operation of pursuers' offers, all as discussed above, and which explains why, in respect of pursuers' offers, it was necessary to provide for something in the nature of a penalty, as opposed to simply an allocation of liability for judicial expenses. In addition it fails to acknowledge the superior position in which the pursuer would be placed in an appeal of the present kind, where the only available outcome was complete success for one side or the other. The sole question was whether the pursuer was entitled to retain the damages awarded by the Lord Ordinary. As is often the case in the Inner House, there was no "halfway house" other than by agreed extrajudicial settlement; something which is always open to parties. Whatever the result in the appeal, if the second defender had tendered a compromise figure, which was not accepted, it could have no decisive impact upon the ultimate expenses awarded. However, if the pursuer's offer is permitted and put into effect as per the scheme set out in chapter 34A, it would give the pursuer a penalty uplift in the expenses awarded in his favour as the successful party. If this was allowed there would be an argument in favour of introducing a similar regime for tenders in "all or nothing cases" where the settlement offered does not reflect an available outcome in the litigation. (Similar comments could be made in respect of causes in the Outer House where there is no issue as to *quantum* or apportionment of liability.)

[9] The result is that the court will refuse the application for an uplift in fees in terms of rule 34A.8(3) on the basis that it is incompetent. For completeness it should be noted that the second defender contended that in any event the offer was not a genuine offer to settle the appeal given that it involved a relatively small reduction in the Lord Ordinary's award in circumstances where, if successful, the reclaimer would avoid liability altogether. In the

circumstances we do not require to rest our decision upon this, but we consider that there is force in the submission.