OUTER HOUSE, COURT OF SESSION

PD452/14

OPINION OF LORD KINCLAVEN

in the cause

GRANT GRUBB

Pursuer:

against

JOHN FINLAY

Defender:

Pursuer: Bain QC, Hastie; Digby Brown
Defender: Springham QC; Clyde & Co

15 September 2017

[1] This is my decision on the disputed question of expenses.

[2] This is a personal injury action arising out of a collision between two motor cars in the forecourt of a Tesco petrol filling station on Kingsway in Dundee on 22 May 2011. Liability was admitted. Some matters were agreed by joint minute. Everything else was fiercely disputed. The case eventually came before me for proof. Having heard the evidence over many days, I gave my decision in my opinion dated 24 May 2017. I can refer to that published opinion ("my opinion") for its full terms.

[3] In short, I found the pursuer entitled to reparation from the defender and I pronounced decree for payment by the defender to the pursuer of the sum of £7,321.32 inclusive of interest. *Quoad ultra* I refused the pursuer's claim.

[4] The defender subsequently enrolled a motion for the expenses of process as taxed. That motion was opposed by the pursuer. The pursuer also moved at the bar for the expenses of the action. That motion was opposed by the defender. In the result both parties moved for the whole taxed expenses of process in two opposed motions.

[5] By way of background, the defender had lodged a tender of £30,000 on 15 April 2014 but that was withdrawn on 31 October 2014.

[6] The defender produced a written note of argument (as a paper apart) and a separate timeline in support of the defender's motion. The pursuer's grounds of opposition were that the defender's motion for expenses was unwarranted in circumstances where the pursuer's claim was successful and where there was no valid Minute of Tender in process for the defender. The pursuer also prepared a timeline. I was also provided with certain items of correspondence between agents.

[7] During the submissions of counsel, I was referred to the case of *Helen McGlone* v *GGHB* [2013] CSOH 44, at paragraphs {17] to [41], to *Summers* v *Fairclough Homes Ltd* [2012] 1WLR 2004, at paragraphs 52 to 54, and to Foskett on *Compromise* (8th ed) at paragraph 18-06. Those items can all be taken as read. So too can my Note dated 29 September 2016 (which is with the court minutes) relating to the defender's motion to dismiss the action *in limine*.

[8] I have considered all those materials, the history of the case, the evidence led, the authorities mentioned, the submissions of counsel and my opinion dated 24 May 2017.

[9] There is no dispute that the question of expenses is a matter for the exercise of my discretion. Clearly the presence or absence of a tender is an important factor (often the

decisive factor) – but it is not the only consideration. The conduct of the parties is also a relevant consideration. I agree that expenses should not be micro-analysed. Every case requires to be considered on its own particular facts and circumstances.

[10] In the present case, I am not prepared to ignore the fact that the pursuer, Grant Grubb, presented various parts of his case with a significant lack of candour. As can be seen from my opinion, there were several areas where I was unable to accept the pursuer's evidence as credible or reliable. The defender's criticisms of the pursuer were sufficient to result in the pursuer's claim being restricted to a principal sum of only £6,000.

[11] Had the pursuer been candid and forthright throughout, this case would probably have concluded after a relatively short proof (if it had not settled for a modest sum earlier).

[12] In the result, however, both parties advanced some propositions which proved to be unfounded (as appears from my opinion). A recurring theme was the pursuer's lack of candour with a focus on his lack of credibility and reliability. That undermined most of his case, including his position on causation.

[13] That lack of candour on the part of the pursuer was not enough to warrant depriving him of a finding on liability but it did play a material part in the pursuer obtaining only a modest award by way of damages. The sum sued for was £500,000. The pursuer's "Statement of Valuation of Claim" was for a total of £382,268.27 (as revised at 10 October 2014). After proof, his claim was said to be worth £182,880.80. In that context, the pursuer achieved very limited success - approaching, it could be said, almost complete failure. He was ultimately awarded only £6,000 exclusive of interest (a fraction of the sum sought) but it was an award of damages nevertheless.

[14] Having regard to the whole circumstances, I have stopped short of making a finding of "fundamental dishonesty", or contempt of court, or referral to the criminal authorities.

However, the court can and should mark its disapproval of a claim presented with such a lack of candour on the part of the pursuer. That disapproval can be reflected in a finding on expenses.

[15] In the result, the defender achieved a substantial measure of success by restricting the pursuer's claim to only £6,000. However, the defender was found liable and he also advanced propositions which were unfounded - as appears from my opinion.

[16] In the whole circumstances, under reference to my opinion and in the exercise of my discretion, I have reached the conclusion that the appropriate way to deal with the two opposed motions for expenses in this case is as follows:

1. I shall refuse the pursuer's motion for expenses. Despite an award in his favour and the absence of an effective tender, I am not prepared to make a finding of expenses in favour of the pursuer given his lack of candour and his insistence on propositions which proved to be unfounded. I have also borne in mind his comparative lack of success.
2. I shall find the defender entitled to the taxed expenses of process to date (except in so far as already dealt with) but I shall restrict that award to two-thirds of those taxed expenses. That award reflects the defender's substantial success after proof. The restriction (by one-third) reflects broadly the extent to which the defender advanced propositions which proved to be unfounded. It also reflects the fact that the pursuer succeeded to some limited extent.
3. *Quoad ultra* there will be no expenses found due to or by either party.

[17] Meantime, I shall reserve and continue consideration of all questions of certification of skilled witnesses – as was suggested by both parties at the hearing on expenses.

[18] Parties can enrol for further procedure, and provide skilled witness details, if that is necessary.