QOCS – Recent Developments

22 November 2024

Compass Chambers Conference 2024

Donald Mackay, Advocate

Aims of the Session

- Refresh on what principles are settling down as the established position.
- Updated position on findings of fraud and fraudulent misrepresentations.
- Case law on procedural manifestly unreasonably conduct, i.e., where legal representatives' conduct has been found manifestly unreasonable as opposed to pursuers themselves.
- Expenses awards outside of the context of unsuccessful proofs:
  - Abandonment
  - Amendment
  - Tenders
  - Non-personal injury claims.

Refresh on the Rules

- S. 8 (1) bars any expenses award being made against a pursuer in a personal injury claim where they have conducted proceedings in an appropriate manner.
- S. 8 (4)

'For the purposes of subsection (1)(b), a person conducts civil proceedings in an appropriate manner unless the person or the person's legal representative

> (a) makes a fraudulent representation or otherwise acts fraudulently in connection with the claim or proceedings or
>
> (b) behaves in a manner which is manifestly unreasonable in connection with the claim or proceedings, or
>
> (c) otherwise, conducts the proceedings in a manner that the court considers amounts to an abuse of process.'

Murray / Carty List of Principles

- Cases published the same day by Sheriff Campbell, identical passages at para. 11 of *Murray v Mykytyn* 2023 SC EDIN 32 and para. 16 of *Carty v Churchill Insurance* 2023 SCLR 724. Principles:
  - Each case must be considered on its own facts and circumstances (*Lennox*, para. 61, *Gilchrist*, para. 27).
  - 'Manifestly unreasonable' means 'obviously unreasonable' (*Lennox*, para. 60)
  - Circumstances in which proceedings were not conducted in an appropriate manner are likely to be exceptional (*Lennox*, para. 61)
  - Where it is found the pursuer is incredible on a core issue, the issue of manifestly unreasonable conduct may arise, but does not invariably arise (*Gilchrist*, para. 27)
  - The court preferring the defender's witnesses over the pursuer's account does not of itself give rise to disapplication (*Gilchrist*, para. 28)
  - Unusual circumstances may or may not be exceptional, it is context-specific (*Love*, paras 56, 65)

Findings of Fraud

- *Manley v McLeese* (First Instance), ASPIC, 16 August 2023, unreported.
- Sheriff found against the pursuer.
- Issue with assessment of evidence criticised by Sheriff Appeal Court but not reversed. QOCS disapplication successfully appealed.
- Para. 17:

  'I accept the defender's submissions and reject those of the pursuer. I reject the pursuer's submissions this was a finely balanced case and that the pursuer lost because she failed to prove her case. The reason the pursuer failed to prove her case was because she was found to be incredible. I do not accept the submissions of counsel for the pursuer to the effect that averments of fraud required to be made by the defender, or that a finding in fact of fraud required to be made by the sheriff before expenses could be awarded with reference to section 8 (4)(a).'

Meta-Analysis

- *Gilchrist v Chief Constable* 2023 SLT (Sh Ct) 119 at para. 25

  > 'I preferred the account given by the two police officers…for the reasons set out in my judgment. Those are my reasons, and I do not consider it appropriate to engage in a meta-analysis of them. Not least because that would tend to undermine the important principle of finality in judicial decision making.'

- If a judge has written on a proof, they're reliant on the words, not their sense of the case by the time they get to the expenses hearing.
- Drawbacks – what if you're not dealing with a proof with a written judgment, or dealing with a motion for QOCS disapplication in a case that didn't go to proof?

Nelson v John Lewis plc 2023 SC EDIN 44

- Doubted *Manley* before it went to appeal.
- Sheriff Primrose agreed with position taken in *Manley* that there is no requirement for an averment of fraud by a defender before fraud can be established. (para. 36)
  - May only become apparent at proof.
- Disagreed with *Manley* that there does not need to be a finding of fact of fraud or a finding the pursuer was not credible before QOCS can be disapplied on basis of S. 8 (4)(a). (para. 37)

Manley v McLeese 2024 SAC (Civ) 16

- Endorsed *Nelson* and *Gilchrist* in that a finding in fact of fraud is required before court will consider QOCS disapplication under S. 8 (4)(a).

> 'The Sheriff erred in concluding there was no need to make a finding in fact that Ms Manley had made a fraudulent representation. The sheriff required to make such a finding in fact as the basis for disapplying QOCS under the exception in section 8 (4)(a). The failure to make such a finding in fact would mean a sheriff required to apply section 8 (2) and not make an award of expenses against a pursuer.' (para. 58)

Scope of *Manley*

Potential Defender Criticisms

- Is the absolute need for a finding in fact too prescriptive?
- What occurs when a defender has made submissions that inferences of fraud ought to arise?
- What if the Sheriff is vague on whether such a finding has been made, or it hasn't been written on?
- What if case hasn't got to proof?

Potential Pursuer/Court Responses

- No.
- Defenders need to be conscious of specifically asking for findings in fact of fraud if they want them.
- May need to suggest that writing on proofs is required when finding a pursuer fraudulent/limitations re meta-analysis.
- Untested law at present particularly re Tenders.

Example Problems

- Example A
- Proof in Sheriff Court.
- Sheriff finds pursuer incredible on core issues and finds for defender but doesn't write on the case to any extent despite defender's urging to do so.
- Does *Manley* prevent QOCS disapplication in those circumstances?

- Example B.
- Tender of £4,000 in Court of Session action for over 18 months, sum sued for £2 million.
- Surveillance disclosed sinking pursuer's case and Tender is grabbed the next day.
- Can court infer without proof that pursuer has been fraudulent or does defender just get £3,000 in expenses?

Procedural Manifestly Unreasonable Conduct

- Four Cases to Look At:
  - *Carty v Churchill Insurance Co Ltd* 2023 SCLR 724
  - *GS v Kincardine and Clackmannan Medical Practice* (ASPIC, unreported, 13 September 2024)
  - *Harvie v Avrameoru* 2023 SC EDIN 41, compared with
  - *Nelson v John Lewis plc* 2023 SC EDIN 44

Carty v Churchill Insurance Co Ltd 2023 SCLR 724

- If it's sufficiently bad procedural conduct by agents, can still get expenses against the pursuer even if the pursuer 'wins' the case.
- Early Tender same as pre-litigation offer of £3,700 lodged during adjustment periods.
- Not accepted, multiple deadlines missed, then Tender accepted late only a few days before proof.
- Manifestly unreasonable to persistently fail to comply with the timetable (para. 22-23)
- Sheriff Campbell stopped short of also holding QOCS disapplication on basis of abuse of process.

GS v Kincardine and Clackmannan Medical Practice

- First case to address issue of QOCS disapplication in context of amendment procedure.
- Philosophical problem – can an amendment by a pursuer both be allowed and still constitute inappropriate conduct?
- Chapter 36A – defenders sought debate on relevancy at Procedural Hearing.
- Pursuer's counsel conceded the writ had not been adjusted and there were insufficient averments re breach of duty and causation, sought leave to amend.
- First amendment procedure insufficient to put the case into a relevant state, which included discharges of diets of debate.

GS v Kincardine and Clackmannan Medical Practice

- QOCS disapplication on grounds of manifestly unreasonable conduct, for similar logic to that of *Carty*.

> 'Against a lengthy history of apparent inactivity, it appears to me it was manifestly unreasonable of those representing the pursuer to seek to discharge a debate on the basis of a proposed amendment which did little to address the well flagged problems with the pursuer's action, and to come to a debate with a case which everyone, including it would appear those representing the pursuer, have all along recognised as being fundamentally deficient. In these circumstances, I have found the first and third and the second defenders entitled to their expenses in respect of their opposition to the discharge of the debate and the debate itself.' (Sheriff Noble at para. 27)

Harvie v Avrameoru 2023 SC EDIN 41

- Pursuer had sued two motor insurers on basis it was unclear which was indemnified.
- Third defender had asked at an early stage to be released from the action and did not receive any response.
- Motion by pursuer was for abandonment with no expenses due to or by – refused, found liable for third defender's expenses from point pre-litigation where issue was raised and not addressed.
- Interesting definition of manifestly unreasonable conduct by an agent at para. 22.

Harvie v Avrameoru 2023 SC EDIN 41

'The pursuer's agent had not only received the correct insurance details and had failed to take cognisance of them resulting in an action being raised against the wrong insurance company, they persisted in the action despite various e-mails being sent to them from the third defender's agent chasing a response to the e-mail of 12 May 2022. This is not a situation, in my opinion, which falls within what might be termed reasonable professional judgment on the part of the pursuer's agent as to how to conduct a litigation. There was a positive obligation to act upon information which stated that American Insurance Group were not the vehicle insurers. The failure to do so has clearly resulted in the third defender being needlessly sued and remaining in process for almost a year. As such I am satisfied that based on the Section 8 (4)(b) ground, the third defender is entitled to an award of expenses.' (Para. 22)

Nelson v John Lewis plc 2023 SC EDIN 44

- On reasonable professional judgment, which was a factor that ultimately fell in pursuer's agents' favour in this case.
- 'The decision by the pursuer's advisers not to deal with the letter themselves in evidence may not have been the most advisable tactic given the strength of Dr Oliver's evidence, but it was, nonetheless, a course reasonably open to them. Ultimately, the tactic failed…I do not think it can be said, as the defenders asserted, that the pursuer's failure to do more in respect of the letter meant that his conduct or that of his advisers was manifestly unreasonable.'

Abandonment

- *McRae v Screwfix Direct* – abandonment a separate ground for awarding expenses against a pursuer to inappropriate conduct, per Rule 31A.2 (2)(d).
- Sheriff Nicol went further than required in *Harvie* in assessing if conduct was manifestly unreasonable.
- *Paterson v Topek Ltd* – court still indicating it has a discretion to hold expenses none due to or by if one of several defenders is abandoned against (para. 26)
- In *Paterson*, both defenders had provided reasoned denials and disclosure under CPPS, pursuer's agents had not investigated further before raising against both despite having time to do so.
- If defenders haven't engaged properly pre-lit in multi-defender accident scenarios, probably on risk of not getting their expenses if they do get convened and then let out.

Tenders

- Rule 31A.2 (2)(b)
- If interpreted in line with *McRae*, a defender can get capped expenses for failure to beat or unreasonable delay in accepting a Tender.
- Probably same as pre-QOCS position on late acceptance, etc., but capped expenses.
- Capped at 75% of damages received – so if Tender is £10,000, pursuer actually gets £4,000 at proof, defender entitled to £3,000 contra-account.
- However, open to defender to seek uncapped contra-account by arguing that there is relevant inappropriate conduct in the realm of fraud, manifestly unreasonable or abuse of process.

Murrie v Royal & Sun Alliance

- (Airdrie Sheriff Court, 2 August 2024, unreported)
- First proof diet had been discharged on the opposed motion of the pursuers because they had failed to lodge sufficient evidence to support the credit hire claim in time.
- S. 8 (3) – 'Subsection (2) does not prevent the court from making an award of expenses which relate to any other type of claim in the proceedings.'

Murrie v Royal & Sun Alliance

‘I was addressed on expenses. The defender moved for the expenses of the procedure in relation to the incidental application dealt with on 1 July 2024 including the discharged diet of proof. Mr Mackay submitted that Qualified One-Way Costing (QOWC) [*sic*] did not apply to that with the application relating to credit hire rather than personal injury. Mr Oltean [*pursuer’s agent*] did not demur either regarding the award or the view about QOWC. The pursuer having mainly been successful there was no issue about the assessed expenses being awarded to her.’ (Para. 43)

Parliament House

Edinburgh

EH1 1RF

DX 549302, Edinburgh 36

LP 3, Edinburgh 10

www.compasschambers.com

Donald Mackay

Advocate

donald.mackay@compasschambers.com

Gavin Herd

Practice Manager

Phone: 0131 260 5648

Fax: 0131 225 3642

gavin.herd@compasschambers.com