OUTER HOUSE, COURT OF SESSION

2021 CSOH 79

PD359/19

OPINION OF LORD WEIR

In the cause

WOJCIECH KOSNO

Pursuer

against

DEAN ROBERTSON

Defender

Pursuer: Fitzpatrick; Digby Brown LLP
Defender: Love QC; DAC Beachcroft LLP

4 August 2021

Introduction

[1] On 30 September 2016 the pursuer's motorbike was in a collision with a car being driven by the defender at the junction of the Wisp and Edmonstone Road, south of Edinburgh. The pursuer sustained significant injuries as a consequence of the collision and seeks to recover damages from the defender as the person he claims to have been at fault. Liability is disputed. The defender pleads sole fault on the part of the pursuer for the collision, and, on an *esto* basis, contributory negligence. He also contends that the sum sued for is excessive.

Background

[2] On 4 June 2021 the pursuer's agents intimated to the defender's agents a motion seeking an award of interim damages in the sum of £80,000 under Rule 43.11 of the Rules of Court. The defender's agents confirmed opposition to the motion on the date it was intimated. I was informed that investigations were then made by agents for both parties regarding the availability of their respective senior counsel. Email correspondence lodged on behalf of the defender would appear to confirm parties' anticipation, by 9 June 2021, that senior counsel would be available to deal with an opposed motion on 25 June 2021. As a consequence of the extended period of intimation provided for in Rule 43.11(2), opposition to the pursuer's motion should have been intimated on behalf of the defender no later than 18 June 2021. By what was described as mistake or oversight, no Form of Opposition was formally intimated. The motion was therefore enrolled by the pursuer's agents as unopposed, and granted by the court, on 21 June 2021.

[3] On 22 June 2021 the defender's agents, having received the court's interlocutor, emailed the court, copied to the pursuer's agents, seeking "relief from sanctions in relation to the oversight in intimating the opposition" and requesting that the accompanying Form of Opposition be placed before me, for the motion (which had by then been granted) to be treated as opposed, and for the interlocutor to be treated as *pro non scripto*. The email and Form of Opposition were presented to me, together with an email from the pursuer's agents which, broadly, took issue with the competency of what was proposed. Having considered this material parties were advised that I did not consider that I could now treat the motion as having been opposed, and that it would be a matter for the defender to decide what further procedural steps should be taken in relation to the interlocutor of 21 June 2021, whether that be by motion, appeal or otherwise.

[4] In the result, on 2 July 2021, the defender enrolled two motions. The first motion sought leave to reclaim the interlocutor awarding interim damages. The second motion was expressed in the following terms:

> "(1) In terms of Rule of Court 2.1, for the court to exercise its discretion in favour of the defenders in respect of their failure to formally intimate opposition to the pursuer's motion for interim damages in the sum of £80,000; (2) To recall the interlocutor of court dated 21 July 2021; (3) To fix a hearing in respect of the motion."

[5] Both motions initially called for a hearing by WebEx conferencing facilities on 16 July 2021. The submissions not having been concluded in the time available, I heard further argument on 21 July 2021. In the course of submissions I was also advised that the defender no longer insisted on his motion for leave to reclaim the interlocutor of 21 June 2021. Accordingly, this opinion is concerned only with the second of the two motions, the submissions in relation to which I now turn.

Submissions for the defender

[6] By way of preliminary observation it is necessary to record that senior counsel for the defender, initially at least, took issue with the manner in which the court responded to the defender's agents' email of 22 June 2021. He emphasised that the court had not been asked to "correct" the interlocutor awarding interim damages. Rather, the purpose of the email had been to intimate the defender's wish to mark late opposition to the pursuer's motion, pursuant to Rule 23.1D(3). For the avoidance of doubt the court was not under any misapprehension as to the purpose of the email (even although it did invite the court to hold the interlocutor as *pro non scripto*). However, nothing turns on this issue. It was acknowledged on behalf of the defender that it was too late for the court to entertain an

application for leave to allow late opposition to a motion which had, by then, already been granted.

[7] That said, senior counsel disavowed any suggestion that the defender was seeking either "correction" of the interlocutor under Rule 4.15(6) or to have it held as *pro non scripto* (cf. the email from the defender's agents to the court on 22 July 2021). Rather, he submitted that Rule 2.1 provided the court with an overriding discretion to excuse a failure to comply with the requirements of the Rules of Court where justice in the circumstances demanded. Each case fell to be considered in light of its own facts and circumstances. In the instant case there was nothing to suggest that the failure by the individual solicitor for the defender formally to intimate opposition to the motion for interim damages was a consequence of wilful non-observance of the Rules.

[8] It was readily accepted that the Rules of Court were designed to regulate the general conduct of Court of Session business. But what had occurred here was nothing more than a genuine oversight. It came to light as soon as the court intimated the electronic interlocutor, and immediate steps had been taken in an endeavour to remedy the situation. There was no Rule of Court, or any other rule, precluding the court from recalling the interlocutor of 21 June 2021, if it was otherwise persuaded to exercise the discretion available to it in terms of Rule 2.1. The interlocutor was not a final judgment or decree of the court but rather an interim order which was capable of adjustment at the time when final decree was pronounced (Rule 43.12). It was both competent, and appropriate in the circumstances, for the court to excuse the failure to intimate opposition to the motion with a view to doing justice between the parties (*Semple Cochrane plc* v *Hughes* 2001 SLT 1121, paragraph [8]; *Little Cumbrae Estate* v *Rolyat 1 Ltd* [2014] CSOH 163, paragraphs [15]-[16]), to recall the

interlocutor of 21 June 2021, and to fix a hearing on what would then be an opposed motion for interim damages.

Submissions for the pursuer

[9] Counsel for the pursuer submitted that the Rules of Court provided a mechanism by which the interlocutor of 21 July 2021 could be reviewed. That was, with leave of the court, by way of reclaiming motion. However, the defender had dropped the motion for leave to reclaim. Any fresh motion seeking leave to reclaim the interlocutor of 21 June 2021 would now be out of time (Rule 38.2(6)). The dispensing power under Rule 2.1 could not competently be invoked in such a way as to permit recall of what was, in the Outer House, a final interlocutor (Court of Session Act 1988, section 18(4)). The court had no power either to alter the substance of its own interlocutor or to recall or revoke it except where the rules permitted, and they did not. The authorities relied on by the defender were both concerned with recall of decrees in absence, for which a specific power existed (Rule 19.2). Both cases were readily distinguishable on that basis, and on their individual factual circumstances.

[10] The reality was that, although disavowed on his behalf, the defender was seeking to have the interlocutor of 21 June 2021 held as *pro non scripto.* The power to do so was restricted to a very narrow category of situations, and was a course normally only adopted of consent of the parties or where it was instantly verifiable that an interlocutor had been pronounced as a result of clear error on the part of the court, induced by a party (*MBR (Iran)* v *Secretary of State for the Home Department* [2013] CSIH 66, paragraph [21]). The circumstances of the instant case did not fall within any of the situations in which the power to treat an interlocutor thus had been recognised. In the circumstances the defender's motion should be refused as incompetent.

[11] It was further submitted that, even if the motion were competent, the court should not in any event exercise its discretion in favour of recalling the interlocutor awarding interim damages. It is unnecessary for me to attempt to summarise the numerous factors advanced by counsel for the pursuer for why the motion for relief should be refused. It is sufficient to note that they are enumerated at pp 10-11 of the written outline argument for the pursuer. The factors relied on appeared, at times, to conflate two different issues, namely (i) the reasons why the court's exercise of discretion, if competent, should result in refusal of the defender's motion, and (ii) the reasons why leave to reclaim any such exercise of discretion in favour of the defender should be refused – an application which, for obvious reasons, has not yet been made. Broadly, however, the pursuer's submission was that there were ample reasons to refuse to recall the decree of 21 June 2021. Moreover, the pursuer's agents were entitled, notwithstanding the underlying correspondence, to consider that the motion was unopposed. There was no obligation on them to look beyond the lack of any formal opposition and the primary duty of his agents was to advance the pursuer's interests, while doing so in conformity with both the Rules and their professional duties to the court. That had been done.

[12] Finally, counsel submitted that the pursuer should be entitled to an award of interest on the sum awarded in the interlocutor of 21 June 2021 on the basis that it remained outstanding and no provision had been made for excusing the defender from compliance with its terms (cf. Rule 38.4(7)).

Analysis and decision

Court of Session Act 1988 ("the 1988 Act")

[13] Section 18 of the Court of Session Act 1988 provides *inter alia* as follows:

"**18. Lord Ordinary's judgment final in the Outer House.**

…

(4) Every interlocutor of the Lord Ordinary shall be final in the Outer House, subject to review of the Inner House in accordance with this Act."

Section 28 of the 1988 Act provides as follows:

"**28. Reclaiming.**

Any party to a cause initiated in the Outer House either by a summons or a petition who is dissatisfied with an interlocutor pronounced by the Lord Ordinary may, except as otherwise prescribed, reclaim against that interlocutor within such period after the interlocutor is pronounced, and in such manner, as may be prescribed."

Rules of Court

[14] Rule 2.1 provides:

"(1) The court may relieve a party from the consequences of a failure to comply with a provision in these Rules shown to be due to mistake, oversight or other excusable cause on such conditions, if any, as the court thinks fit.

(2) Where the court relieves a party from the consequences of a failure to comply with a provision in these Rules under paragraph (1), the court may pronounce such interlocutor as it thinks fit to enable the cause to proceed as if the failure to comply with the provision had not occurred."

[15] Rule 38.1(2) provides:

"Any party to a cause who is dissatisfied with an interlocutor pronounced by-

(a) the Lord Ordinary."

[16] Rule 38.2(6) provides *inter alia* as follows:

"An interlocutor (other than a decree in absence or an interlocutor mentioned in paragraph (2), (3) or (5) of this rule) may be reclaimed against, with leave, within 14 days after the date on which the interlocutor was pronounced."

[17] Rule 43.11 provides *inter alia* as follows:

"(1) A pursuer may, at any time after defences have been lodged, apply by motion for an order for interim payment of damages to him by the defender.

…

(3) On a motion under paragraph (1), the court may ordain-

(a) any defender who has admitted liability to the pursuer in the action; or

(b) where the court is satisfied that, if the action proceeded to proof, the pursuer would succeed on the question of liability without any substantial finding of contributory negligence on his part … and would obtain decree for damages, any defender who has not admitted liability to the pursuer in the action,

to make an interim payment to the pursuer of such amount as it thinks fit, not exceeding a reasonable proportion of the damages which, in the opinion of the court, are likely to be received by the pursuer.

…

(6) Notwithstanding the grant or refusal of a motion for an interim payment, a subsequent motion may be made where there has been a change of circumstances…"

[18] Rule 43.12 provides *inter alia* as follows:

"Where a defender has made an interim payment order under rule 43.11(3), the court may make such order, when final decree is pronounced, with respect to the interim payment as it thinks fit to give effect to the final liability of that defender to the pursuer-

(a) repayment by the pursuer of any sum by which the interim payment exceeds the amount which that defender is liable to pay the pursuer; or

(b) payment by any other defender or a third party of any part of the interim payment which the defender who made it is entitled to recover from him by way of contribution or indemnity or in respect of any remedy or relief relating to, or connected with, the claim of the pursuer."

[19] Under reference to section 18 of the Court of Session Act 1988 counsel for the pursuer emphasised, in his submissions, the finality of an interlocutor awarding interim damages. I am not convinced that that is an entirely accurate way to characterise an award of interim damages. As Lord Carloway has observed (Macfadyen: Court of Session Practice, Division K, Ch 1, paragraph K[1]):

"Although there is still a tendency to use words ['decree', 'judgment' and 'interlocutor'] in their original senses, the distinctions have become blurred. The

> Rules of Court 1994 refer to final pronouncements on the merits as interlocutors. The Court of Session Act 1988 itself sometimes refers to judgments and interlocutory judgments as distinct from decrees and interlocutors. It refers to interlocutors, when these may be final, and to decrees, when these are granted during the dependence of a cause. It is best to read each use of the words in the context in which it appears, and against any historical background, before deciding whether a particular word is intended to have the original restrictive meaning or the wider one now in general use."

[20] Awards of interim damages in personal injury cases fall into that category of interim decree where the court pronounces a decree dealing with part of the merits of the case (although with the peculiarity that there might in certain circumstances be an adjustment made upon final decree (Rule 43.12)) (Court of Session Practice, *supra.,* Division K, Ch 1, paragraph K[21]). A final decree is one which, taken with any previous interlocutors, disposes of the whole subject matter of a defended action. In that sense at least, I agree with senior counsel for the defender that the interlocutor pronounced by the court was not a final judgment or decree.

[21] But applications for interim payments of damages are regulated by the Rules of Court. Rule 43.11 provides not only for an order for the payment of interim damages. It also defines the circumstances in which a pursuer may return to court to seek an award (or further award). Rule 43.12 regulates the situation at the point of final decree, and confers a wide discretion on the court in giving effect to the final liability of the defender to the pursuer. That, however, is the only rule which enables an earlier payment to be in any sense revisited. In particular, and unlike the rules relating to decrees in absence (against which there can be no reclaiming motion), no provision is made within chapter 43 for recall of an award of interim damages. Absent such a power it is the Rules of Court which regulate the competency of reclaiming against an interlocutor of the Outer House. They prescribe what interlocutors may be reclaimed against at all, which interlocutors require leave of the

Lord Ordinary, and the various time limits for the enrolment of reclaiming motions. It is clear that an order for interim payment of damages may be reclaimed against, albeit with leave, within 14 days after the date of the interlocutor (Rule 38.2(6)). In the absence of an express power to do so within the Rules of Court, I do not consider that Rule 2.1 can be invoked as an alternative means to secure recall of the interlocutor of 21 June 2021, where an application for leave to reclaim that interlocutor would otherwise be competent.

[22] In reaching that view I immediately recognise that Rule 2.1(2) provides for the court to pronounce such interlocutor as it thinks fit to enable the cause to proceed as if the failure to comply with the provision concerned had not occurred. However, it makes no sense to interpret that rule as an unlimited power. In submitting that the use of the dispensing power under Rule 2.1 was competent in the present circumstances senior counsel could point for assistance only to the two authorities mentioned above (*Semple Cochrane plc* v *Hughes*; *Little Cumbrae Estate Ltd* v *Rolyat 1 Ltd*). Both cases were concerned with motions for recall of a decree pronounced in absence. Both involved a failure by the defender to observe the seven day time limit for recall under Rule 19.2(2). To that extent, both cases were concerned with the circumstances in which the court might, in its discretion under Rule 2.1, exercise a power which, under Rule 19.2(4), it undoubtedly had. For obvious reasons, the circumstances in the instant case are different. Despite the defender's motion having been enrolled and then dropped, it was not (as I understood it) disputed that it would have been competent to seek leave to reclaim the interlocutor of 21 June 2021. Conversely, it appeared to be accepted by the defender that there was no rule within the Rules of Court, akin to Rule 19.2(4), which *expressly* permits this court to recall an award of interim damages after issue of the interlocutor.

[23] The conclusion I have reached also seems to me to be consistent with the fact that the interlocutor of 21 June 2021 decerns against the defender for payment of a specific sum of money. Subject only to what is provided for in Rule 43.12 in relation to adjustment on final decree, that decerniture does indicate finality, at least as far as concerns the subject matter of the interlocutor, and militates against the notion that the court could entertain an application for recall of its own interlocutor. In short, there is no such power to do so and Rule 2.1 cannot properly be invoked, by a side-wind if you will, to create one.

[24] For completeness, senior counsel made it clear in his submissions that he was not inviting the court to hold the interlocutor of 21 June 2021 as *pro non scripto.* I would not, in any event, have been prepared to do so. In *MBR* v *SSHD, supra.,* at paragraph [21], the court, under reference to a passage in *Lees: Interlocutors* (2nd edn.), at p 35, drew attention to the very limited circumstances to which the power to hold interlocutors *pro non scripto* has been confined. None of those circumstances arise in the instant case. Indeed, it might be thought instructive that the text to which the court referred is silent on any common law power of the court to *recall* (my emphasis) its own interlocutor. Indeed, reference to the word "recall" in the index leads one directly to commentaries under the heading "Appeal".

[25] Since I do not consider that the defender's motion is competent the issue of how the court would have exercised its discretion does not strictly arise. However, had it been necessary for me to come to a view on that matter, I would have preferred the submissions of the defender. Clearly, the motion for interim damages should have been opposed. That it was not was due to simple oversight. But that oversight occurred against a background of correspondence, unseen by (and unknown to) the court when it considered the motion, from which it is plain that parties were arranging their affairs such that an opposed motion could be heard at a time when parties' respective senior counsel were both available. A date had

been identified for only a few days after the motion was actually enrolled. Prompt steps were taken to address the consequences of the mistake of the solicitor. Those steps included correspondence with the court in which the form of opposition to the motion, which had been prepared but inadvertently not intimated, was exhibited. The error was a human one which I would have been prepared to excuse.

Interest

[26] Finally, counsel for the pursuer submitted that I should award interest on the sum awarded to reflect the passage of time which has now elapsed since the interlocutor complained of was pronounced. I am not prepared to do so. The motion for interim damages, unsurprisingly, sought no award of interest. There remains the possibility of adjustment on final decree, and I was not addressed in any detail on when, in the ordinary course, it would have been reasonable to expect payment to have been made.

Conclusion

[27] For the foregoing reasons, however, the motion of the defender must be refused. The motion seeking leave to reclaim the interlocutor of 21 June 2021 was dropped. I have reserved meantime any question of expenses arising from the matters which were raised before the court.