SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2022] SC EDIN 42

EDI-PN2964-21

NOTE

by

SHERIFF ROBERT D M FIFE

in causa

HELEN LENNOX

Pursuer

against

ICELAND FOODS LTD

Defender

Edinburgh, 13 December 2022

Introduction

[1] On 19 January 2021, Ms Lennox ("the pursuer") was a customer in premises operated by Iceland Foods Ltd ("the defender") at Auldhouse Retail Park, Glasgow ("the store"). As she was shopping, the pursuer tripped over several shopping baskets ("baskets") which had been stacked on the floor near the store-side ("head") of checkout 3. The pursuer fell sustaining injury. The proof was restricted to liability and contributory negligence. Following proof, decree of absolvitor was granted in favour of the defender. The defender lodged a motion for the expenses of the action.

Opposed motion

[2] There was a hearing on the defender's opposed motion, 7/5, which was in the following terms:

> "… the defender moves the court, in terms of OCR 31A.2(1)(a) to grant expenses of process against the pursuer in favour of the defender.
>
> The defender submits that an award of expenses should be made on grounds contained in sections 8(4)(b) and (c) of The Civil Litigation TCL (Expenses and Group Proceedings) (Scotland) Act 2018 ('the 2018 Act').
>
> It is submitted that the pursuer in bringing and proceeding with the litigation behaved in a manner, which was manifestly unreasonable. Further, the pursuer conducted the proceedings in a manner that amounted to an abuse of process".

Submissions

[3] Both parties lodged written submissions, expanded upon at the hearing.

Submissions for defender

The Law

[4] Prior to the 2018 Act, the general rule in personal injury litigation was that expenses followed success. The 2018 Act introduced a departure from the general rule with the advent of Qualified One-Way Cost Shifting ("QOCS") into personal injury actions.

[5] In terms of sections 8(1) and 8(2) of the 2018 Act, the default position is that the court must not make an award of expenses against a person bringing proceedings for a claim for damages for personal injury where the person conducts the proceedings in an appropriate manner.

[6] Section 8(4) of the 2018 Act provides for 3 categories of conduct which are not conduct of an appropriate manner. The conduct covers both that of the person or the person's legal representative.

[7] For the purposes of this motion, the defender relied on sections 8(4)(b) and (c):

> "…
>
> (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."

[8] The defender was not aware of any reported decisions from a Scottish Court in which section 8 has been interpreted, defined or applied.

Manifestly unreasonable

[9] This test was considered during Stage 1 of The Civil Litigation (Expenses and Group Proceedings) (Scotland) Bill ("the Bill"). There were consultation responses and evidence before the Justice Committee as to whether the 2018 Act ought to have been amended to include a Wednesbury test for reasonableness (as had been envisaged by Sheriff Principal Taylor in his Review). The Stage 1 Report recommended such an amendment. No such amendment was tabled by MSPs to the Bill before the 2018 Act received Royal Assent.

[10] The term "manifestly unreasonable" ought to be defined by applying the conventional rules of statutory interpretation. The words should be given their plain and ordinary meaning. The Oxford English Dictionary defines the word "manifestly" as "as is manifest, evidently, unmistakably". It was accepted that what is manifestly unreasonable is clearly something which is more than just unreasonable. Applying the plain and ordinary meaning of the words, section 8(4)(b) relates to behaviour of a manner which is clearly or unmistakably unreasonable in connection with the claim or proceedings.

Abuse of process

[11] Abuse of process is a well understood concept, see Macphail Sheriff Court Practice 4th Edition at para 2.23.

[12] In *Shetland Sea Farms Ltd* v *Assuranceforeningen Skuld* 2004 SLT 30 at para 144, Lord Gill said:

> "There are many diverse ways in which a litigant can abuse the process of the court; for example, by pursuing a claim or presenting a defence in bad faith and with no genuine belief in its merits (eg *Lonrho plc* v *Fayed* (No 2), [1992] 1 WLR 1); or by fraudulent means (*Levison* v *Jewish Chronicle Ltd, supra*; *Arrow Nominees* v *Blackledge, supra*); or for an improper ulterior motive ..."

[13] In relation to the responsibility on a pleader, Macphail at para 9.13 states:

> "It follows that the drafting of pleadings is a responsibility which must be carefully discharged. Before commencing the drafting exercise pleaders must be satisfied that they understand both the facts and the legal basis of their case. They must identify the facts which they require to prove, and the legal arguments which they will have to present, in order to succeed, and then decide on the most precise, clear and effective method of presenting their case in accordance with the rules, forms and language of pleading. It is of cardinal importance that they should draft the pleadings in good faith, with candour and honesty. They should state matters as facts only if they have before them evidence to support their averments, and they should never make averments for which they have no evidence 'in the hope that something may turn up in the course of the case to justify them'.
>
>> 'It will be assumed that a party will only make an averment once he has satisfied himself that he can prove it. It is not a matter of a party making averments that he would like to be able to prove or hopes he might be able to prove; a party is expected to have prepared his case and that includes finding out from potential witnesses exactly what they are able to say in response to specific questions. It is what potential witnesses say that they will say if required to give evidence that provides the basis for properly made averments.'"

The pursuer's case

[14] In terms of the averments on record the crux of the pursuer's case, and what she offered to prove, was:

i) the defender ought to have kept the baskets in basket holders;

ii) the defender did not follow their packing policy and procedures; and

iii) the defender ought to have removed the baskets and placed them in a designated area.

The pursuer's evidence

[15] The pursuer and her daughter gave evidence. The pursuer had no other witnesses to liability.

[16] No positive evidence was led in support of the following averments:

a. In the 14 minutes prior to the index event, no checks were carried out.

b. Basket holders have rubberised feet that prevent the baskets from slipping.

c. Placement of a basket holder allows for safe and planned placement of baskets.

d. The defender's policy was that customers should keep groceries in baskets and trollies, thereafter packing at a packing station.

e. The defender's employees did not implement this policy.

f. There were no signs that indicated this policy applied to baskets as well as trolleys.

g. Staff members did not direct customers to adhere to the store's packing policy.

h. Staff members did not give advice to customers on where to pack shopping.

i. Staff members did not give advice to customers on where to leave empty baskets.

j. Customers routinely left baskets in a pile with no basket holder.

k. Baskets were routinely left in an undesignated location.

l. The defender failed to comply with their own identified control measures.

m. Staff members were aware or ought to have been aware that customers were placing baskets at or near the end of till 3 in an undesignated area in a manner that would foreseeably cause a trip hazard.

n. The baskets ought to have been obvious to a staff member operating under a "See it, Sort it" policy.

o. The baskets ought to have been removed and placed in a designated area.

p. Staff members ought to have indicated to customers where the designated basket area was located.

q. Since the accident, the defender has placed a basket holder at the head of the tills.

[17] The pursuer may suggest that the CCTV footage ("CCTV"), 5/2 and 5/3 of process, was positive evidence in support of some of the averments. There was no agreement on the substantive content of the CCTV and the pursuer led no witness evidence to speak to the CCTV. The court rejected an attempt by the pursuer to suggest that it showed on one occasion an employee of the defender failing to remove a discarded basket as mere speculation. At its highest, the CCTV was evidence from which only the first averment above could be determined (regarding timing) and the court ultimately concluded that averment was not proved, it being held that a check was carried out around 10 minutes prior to the accident, as opposed to 14 minutes.

[18] No other evidence was led in relation to the other averments above. In particular, the pursuer did not lead any evidence which sought to prove that:

1. There was a packing policy;
2. Such a packing policy established "designated areas" for baskets;

3. Baskets were stored in basket holders in those designated areas;

4. Basket holders had rubber feet and allowed for safe and planned storage of baskets;

5. The defender's staff did not follow such a policy.

[19] In addition, no factual or opinion evidence was led on the exercise of reasonable care. The Sheriff's Note dated 10 October 2022 stated at para [29]:

> "No expert witness on health and safety was led on behalf of the pursuer. Any propositions put to Mr Dean [the defender's health and safety expert] were not evidence. There was no contrary expert evidence on risk assessment, health and safety policies, systems of or frequency of inspection, the use of the basket holders or where customers leave baskets".

[20] The absence of witnesses being called, or on the pursuer's list, to speak to the averments on Record called into question the original evidential foundation for the averments listed above. The pursuer or her daughter could not speak to the averments. Further, the pursuer did not cross-examine the defender's witnesses on most matters contained within their averments and in any event, where they did, the court did not find them proved.

[21] Finally, during cross-examination, it should be noted that the pursuer gave evidence that she was only in court because someone was rude to her.

Conduct of claim and proceedings

[22] The defender submitted the following timeline:

Date	Action
09/04/2021	Letter of Claim – initial utterance of claim. Pursuer alleged defender failed to take reasonable care for customers and that they failed in their duties under the Occupiers Liability (Scotland) Act 1960.

17/06/2021	Denial of claim – explained that there was no evidence of negligence or breach of duty. Advised pursuer of "clean as you go" system and routine hourly checks. Advised pursuer that staff were trained in "see it, sort it" and that the basket had been placed there moments earlier.
13/07/2021	Challenge to denial.
02/08/2021	Denial maintained – Pursuer was advised that baskets are where customers would expect them to be. Pursuer was advised that "it is unreasonable for you to say that in a 7 minute window, the area should have been checked".
04/08/2021	Further challenge from pursuer. Pursuer suggests that staff may not have followed "see it, sort it".
09/08/2021	Denial maintained.
18/08/2021	Pursuer challenged disclosure.
01/09/2021	Pursuer was advised that defender was satisfied they had addressed allegations and provided all appropriate documents.
03/12/2021	Date of service of Initial Writ.
07/01/2022	Defences lodged by defender maintaining pre-litigation denial.
12/04/2022	Record Lodged.
15/08/2022	Pursuer enrols Minute of Amendment.
31/08/2022	Pre-Trial Meeting – Pursuer invited to abandon action.
06/09/2021	Interlocutor allowing Minute of Amendment.
28/09/2022	Pursuer offered £5,000 in settlement of damages and expenses.
04/10/2022	Proof commenced.

[23] In respect of the conduct of the claim, the defender submits that:

1. the claim was denied pre-litigation on the grounds that *inter alia* the defender did not consider that there was evidence substantiating negligence;

2. the court action was defended on the same grounds;

3. the pursuer did not seek a court order for the recovery of evidence (beyond the standard form at the outset of the litigation);

4. the pursuer amended the pleadings in relation to risk assessment at a relatively late stage in the litigation;

5. at the pre-trial meeting, the pursuer was invited to abandon the action on the basis that it had no merit; and

6. in the final days before proof, the pursuer received a settlement offer which was made given the risks introduced by QOCS.

Submissions on sections 8(4)(b)

[24] The pursuer behaved in a manner which was manifestly unreasonable in that she:

1. included a substantial number of averments on which she did not and could not have had any basis;

2. having amended failed to address the material issues with her pleadings;

3. failed to remove the averments for which she had no basis;

4. failed to add new averments which may have allowed her to found a case;

5. having made those averments failed to lead any evidence to support them;

6. having been afforded the opportunity, in cross examination, failed to raise or otherwise address the essential elements of her case;

7. did not have sufficient evidence which would have allowed the sheriff to find in her favour;

8. failed to lead any positive evidence to prove her case;

9. knew or ought to have known that the evidence available to her could not prove her case; and

10. continued the action despite an offer to abandon and a settlement offer being made.

Submissions on sections 8(4)(c)

[25] The pursuer conducted the proceedings in a manner which amounted to an abuse of process in that she:

1. knew or ought to have known that she did not have sufficient evidence to prove her case;
2. made substantial averments on record for which there was no evidential foundation;
3. continued the action in the awareness that it had no or substantially no chance of success; and
4. had an improper ulterior motive for the litigation.

Conclusion

[26] In light of all of the above, the defender's motion was to find the pursuer liable to the defender in the expenses of the cause as taxed.

[27] *Esto*, the court was not minded to grant expenses of the cause in the defender's favour, then the defender ought to be awarded expenses from the date of the Pre Trial Meeting ("PTM") in the exercise of the court discretion in terms of OCR 31A.3. At the PTM, the pursuer was invited to abandon the action. The pursuer knew or ought to have known they had no positive evidence to lead and that the action had no prospect of success. It was unreasonable for the pursuer to proceed to proof in this knowledge.

Submissions for the pursuer

Motion

[28] Sections 8(1) and 8(2) of the 2018 Act provide that the court shall not make an award of expenses against a pursuer bringing personal injury proceedings in respect of any expenses which relate to a claim for personal injury, where that pursuer conducts the proceedings in an "appropriate manner".

[29] Exceptions to that general rule are contained within section 8(4) of the 2018 Act. The defender sought to rely upon those exceptions and seeks an award of the expenses of process. The defender sought to rely on sections 8(4)(b) and (c).

Manifestly unreasonable?

[30] There was little or no guidance from the Scottish Courts as to what amounts to "manifestly unreasonable". Accordingly, it was illuminating to consider the development of section 8 of the 2018 Act to ascertain what was meant by those drafting the legislation and the author of the review of expenses and litigation funding which led to its introduction, see Taylor Review – Review of Expenses and Funding of Civil Litigation in Scotland – Report.

[31] At paragraphs 78 to 79 of his report, Chapter 8, pages 181-182, Sheriff Principal Taylor opines:

> Paras 78 and 79 - "… Pursuers should not be so concerned that they will lose the benefit of QOCS that they require to take out ATE ('After the event') insurance to cover a risk that the court will find their conduct of the litigation to have been unreasonable. On the other hand, an unreasonable litigant should not receive the benefit of being able to pursue a litigation without the risk of having to pay the defender's judicial expenses. In my opinion the balance can be struck by removing the benefit of QOCS from a pursuer who conducts the litigation in an unreasonable manner but <u>requiring the court to apply a high test when considering the reasonableness of the pursuer's conduct. I expect that it will be unusual for the benefit to be lost on the ground of unreasonable conduct. I recommend that where a pursuer conducts the litigation in an unreasonable manner, the pursuer should lose</u>

> the benefit of one-way costs shifting. For the avoidance of doubt, the test of unreasonableness should be that set out in the case of *Associated Provincial Picture Houses Ltd.* v *Wednesbury Corporation*. If it were a lower test, the benefits of QOCS might well be lost as pursuers may not have the confidence to litigate without the benefit of an ATE insurance policy … The test of unreasonableness in the conduct of the litigation should be the Wednesbury test. A finding by a court that the pursuer is incredible should not, in itself, warrant the removal of the benefit of QOCS."

[32] Following the publication of Sheriff Principal Taylor's report, the Scottish Government responded. That response agreed with the proposal to introduce QOCS, and the recommendations that there be cases where the conduct of the pursuer was such that they should lose the benefit of QOCS. The Scottish Government accepted the report's recommendation that conduct amounting to fraud or an abuse of process ought to see said benefit lost. In respect of the question of "unreasonableness", the response (Report page 14) simply stated that "The exact nature of the unreasonable conduct and the test that should be used to determine when it has taken place should be subject to further consideration." The Bill when originally published did not refer to "manifestly unreasonable" behaviour in respect of the proposed section 8, however the "further consideration" referred to by the Scottish Government took place in the course of the passage of the Bill through the Scottish Parliament. That consideration provides useful insight into what is meant by "manifestly unreasonable" and the extent to which it reflects Sheriff Principal Taylor's original recommendation.

[33] An amendment (36) to the wording of section 8 was proposed in a Justice Committee meeting of 27 February 2018. That amendment took the form of the wording which now appears in the 2018 Act:

> "Amendment 36 makes it clear that the test of reasonableness in section 8(4)(b) is tantamount to that of Wednesbury unreasonableness. The original drafting was intended to reflect the Wednesbury test, but it was clear that stakeholders wished the Government to revisit its drafting approach. Amendment 36 broadly follows the wording that was suggested to the committee on 26 September by Simon di Rollo QC

of the Faculty of Advocates and that Sheriff Principal Taylor endorsed in his evidence to the committee on 31 October. It means that any 'manifestly unreasonable' behaviour by the person bringing the proceedings, or a legal representative will result in QOCS protection being lost. The concept of manifest unreasonableness delivers in substance the Wednesbury test. Sheriff Principal Taylor said in his review that there has to be a high test, because otherwise the benefits of QOCS might be lost as pursuers might not have the confidence to litigate."

[Annabelle Ewing MSP, page 46 of the Official Report of the Justice Committee of the Scottish Parliament, dated 27 February 2018 See also page 52 where the Amendment is agreed]

[34] The references to Simon di Rollo KC and Sheriff Principal Taylor refer to the evidence they gave to the Justice Committee, in which both outlined that the proposed section 8 contained within the Bill did not properly implement or reflect the recommendations of Sheriff Principal Taylor's review. Simon di Rollo KC opined that:

> "… the wording does not seem to reflect what was suggested. It was suggested to the committee by another witness earlier in the month that the wording be the same as Wednesbury unreasonableness, but I am not sure that I agree with that suggestion. The Faculty of Advocates has suggested that in terms of reasonableness, the wording should be, 'if in the opinion of the court that person's behaviour is so manifestly unreasonable that it would be just and equitable to make an award of expenses against him.' That is stronger wording than is in the Bill."

[35] On 31 October 2017, Sheriff Principal Taylor agreed:

> "…. I am in line with them in their criticism of 8(4)(b), because I do not think that that bar is high enough. Wednesbury unreasonableness was what I recommended, and I think that the formula that Mr di Rollo suggested to you came very close to being what I would choose to have there. I tweaked his formula ever so slightly. I suggest that, as an alternative, it should read, 'if, in the opinion of the court, the pursuer's decision to raise proceedings, or their subsequent conduct, is so manifestly unreasonable that it would be just and equitable to make an award of expenses against the pursuer'". [Official Report of the Justice Committee dated 31 October 2017 page 11].

[36] It could be seen that the eventual wording of the 2018 Act largely reflected the proposed wording of both Mr di Rollo KC and Sheriff Principal Taylor, and, as per Annabelle Ewing, on 27 February 2018, the reason for that was to ensure that the concept of

manifest unreasonableness delivered in substance the Wednesbury test proposed in Sheriff Principal Taylor's review. The Bill was passed following the final stage 3 debate in the Scottish Parliament on 1 May 2018.

Principles underlying the section 8(4) exception re manifestly unreasonable

[37] The test of "manifest unreasonableness" in section 8(4)(b) is tantamount to that of Wednesbury unreasonableness.

[38] A finding by a court that the pursuer is incredible should not, in itself, lead to the conclusion their conduct has been "manifestly unreasonable".

[39] That is a high test, because otherwise the benefits of QOCS might be lost as pursuers will not have the confidence to litigate.

What is an "abuse of process"?

[40] Sheriff Principal Taylor took the view that what was meant by an "abuse of process" was where a litigant has "<u>deliberately set out to deceive the Court</u>" and has "<u>compromised the integrity of the Court's procedures</u>." (Report page 21)

[41] Abuse of process is misuse of the procedure of the court in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to the litigation, or would otherwise bring the administration of justice into disrepute among right-thinking people (MacPhail para 2.23). It is an abuse of process for a pursuer unreasonably to initiate or continue an action when it has no or substantially no chance of success see *Stewart* v *Stewart* 1984 SLT (Sh Ct) 58, at page 61 and *Scottish Ministers* v *Stirton* [2013] SCLR 209, per Lady Stacy at para [29]

[42] The essential question is whether the action compromises the integrity of the court's procedures. It might do so if it wastefully occupied the time and resources of the court in a claim that was obviously without merit, see *Clarke* v *Fennoscandia Ltd* 2005 SCLR 322, per the Lord Justice Clerk (Gill), at para [17].

The pursuer's conduct in the present case

[43] The defender in the narrative to their motion does not provide any detail of the conduct which they say was manifestly unreasonable or amounted to an abuse or process. In prior correspondence (and, at submission at the conclusion of the proof) the following has been suggested:

> "The Pursuer offered to prove that: - i) The Defender's ought to have kept the baskets in basket holders; and ii) The Defender's did not follow their own procedures. As such, the Pursuer did not lead <u>any positive evidence</u> on either point. In the circumstances, it follows that the Pursuer's case <u>had no prospect of success</u>."

[44] The pursuer's case was that on 19 January 2021, she was in the defender's store (of which they were occupiers for the purposes of the Occupiers Liability (Scotland) Act 1960) and she tripped over baskets which were stacked 3 or 4 high near the end of till 3. Her evidence was that they were around 1 metre from the end of the till and in a walkway. They were obstructing the walkway. The evidence of her daughter was broadly supportive of the number of, and position of, the baskets. The pursuer's primary position was that the presence of the baskets was one which in the ordinary course of events does not happen, and which, in the absence of explanation, was more consistent with fault on the part of the defender than the absence of fault.

[45] Reference was made in submission to the cases of *Ward* v *Tesco Stores Ltd* [1976] 1 WLR 810 and *Murray* v *Marks & Spencer Plc* unreported Edinburgh Sheriff Court, 29 July

2016. The pursuer's agent considered those cases were applicable to the circumstances of the pursuer's case on the evidence of the pursuer and her witness. The pursuer was therefore seeking to establish that the circumstances of the her case were such that once she had pled and proved that the defender was responsible for the management including inspection of the store (matters which were in fact not disputed) then she had to plead and prove only that there occurred an event which was unusual, or which in the ordinary course of events does not happen, and which, in the absence of explanation, was more consistent with fault on the part of the defender than the absence of fault – in this case, that she had fallen on baskets which were around one metre from the checkout and in an area where people walked. Once she had done so, then some explanation required to be forthcoming from the defender to show that the accident did not arise from any want of care on their part. In other words, an inference of negligence was established and so the burden to plead and prove the evidence which rebuts that inference was with the defender. It was therefore for the defender to plead and prove they had a system of inspection which was reasonable in the circumstances of this particular case, which included leading evidence about the store itself, the system, and that said system was properly implemented or carried out on the day in question, ie, it was complied with by their employees.

[46] The pursuer also pled and submitted that even if the defender had, as they averred in their defences, a reasonable system of inspection, that system was not properly implemented as the defender's employees ought to have been aware of the presence of the baskets from their positions at the checkout and taken steps to remove the baskets and/or prevent them being placed there in the first place by customers. Reliance was placed on the CCTV lodged in process to establish that the defender's employees would, or ought to have been able, to see the baskets being left allegedly in the area where customers walked, as the

checkout assistants were not witnesses to whom the pursuer had been allowed access either prior to, or at the proof.

[47] The submission was founded on i) the CCTV showing the checkout assistant, Gail, having been in the area at the end of checkout 3 where the pursuer fell, prior to her fall, at a time when a basket would have been present; ii) the checkout assistant Robert could see the area where baskets were being left; and iii) both checkout assistants could see customers making their way to the end of the checkouts to leave their baskets.

[48] The pursuer also made averments and submissions about:

i) The defender's failure to follow their own policies: The evidence as to the existence and terms of the policies came from the agreement of various documents lodged in process, which outlined the terms of the policies, as set out in the Joint Minute of Admissions. The evidence as to the failure to adhere to these policies came from the CCTV. If it was accepted that the defender's employees ought to have been aware of the presence of the baskets from their positions at the checkout and taken steps to remove the baskets and/or prevent them being placed there in the first place, then their failure to do so was a failure to adhere to the defender's policies. The pursuer did not actually require evidence of what the nature and extent of the policies were to succeed, nor even that said policies had not been properly followed or implemented. What was required was only, as has been submitted, to establish the pursuer had tripped on baskets which were one metre from the end of a checkout/in the walkway; and that was an unusual event, which, in the absence of explanation, was more consistent with fault on the part of the defender than not. It was then for the defender to establish they had a

reasonable system by leading evidence about it, as they did. If the defender successfully did so, then the pursuer could seek to point to the failure, as she saw it, of the checkout assistants to remove the baskets when they could, or ought to have been able, to see them and regardless of whether that failure was a failure to follow procedures or not.

ii) That the use of basket holders would have signified to customers where baskets were to be placed and reduced the risks of baskets being stacked, as the pursuer said they were, so far from the checkout and in a walkway. That the defender utilised basket holders was evident from the CCTV and from the agreed productions. It was also <u>not</u> disputed by the defender's witnesses. The pursuer sought to elicit from the defender's health and safety witness in cross examination that the use of basket holders would have reduced the risk of baskets being left in random areas, and so customers tripping on them. That said evidence was not forthcoming was not disputed, but a witness was led at proof from whom evidence realistically could have been obtained that the use of a basket holder reduced the risk of incidents such as the pursuer's occurring (assuming the court accepted the pursuer's evidence as to the location of the baskets over which she tripped). That argument was not fundamental to the success of the pursuer's claim. It was simply one line of argument by which the pursuer sought to establish there was a lack of reasonable care on the part of the defender, i.e., the lack of a designated place to put a basket increased the risk of random basket placement in areas where people may be walking, and so the failure to utilise basket holders amounted to a lack of reasonable care. No special evidence was required as to what a

basket holder was, and what its function was. The proposition is a simple one. And even if such special evidence was required, the failure to lead it was not in and of itself fatal to the pursuer's claim.

Conclusion

[49] The defender's motion in respect of both sections 8(4)(b) and (c) was ill conceived. It appeared to rest on the contention that the pursuer had no chance, or substantially no chance of success, ie, that her claim was without merit and that bringing proceedings, and continuing with them, was manifestly unreasonable and/or an abuse of process, compromising the integrity of the court. The defender had misunderstood i) how high the test is to establish either of the exceptions under section 8(4), and ii) the essence of what the pursuer sought to prove and required to prove in order to succeed with her claim.

[50] It was said there was a requirement to lead "positive evidence". Putting to one side the question of what is actually meant by "positive evidence" the pursuer did not require evidence beyond that of her own evidence and her daughter's evidence to succeed with her claim. Thereafter, the CCTV was more than sufficient to allow the pursuer to make the submissions she wished to and did make, see *Gabitas and Radavicius* v *HM Advocate* [2017] HCJAC 59. The provenance of the CCTV was agreed in the Joint Minute. The CCTV was real evidence equivalent to a witness speaking to events. As fact finder, the sheriff could make what he wanted of the CCTV. Furthermore, witnesses were led by the defender and so the opportunity to elicit from those witnesses, potentially supportive evidence which established the nature and extent of the defender's system of inspection and/or the function and utility of basket holders, for example, was there for the pursuer. Even if the defender had a system in place, the defender had to lead evidence that this was implemented on the

day in question. The pursuer's case would not inevitably fail. The pursuer was entitled to test the defender's case.

[51] On the specific averments where the defender said no positive evidence was led by the pursuer:

a. in the 14 minutes prior to the index event, no checks were carried out, but that could be inferred from the CCTV;

b. it was accepted there was no evidence led of basket holders having rubberised feet and that averment should have been deleted;

c. placement of a basket holder allowed for safe and planned placement of baskets: placement at the head of the checkout was a recognised control measure and the pursuer was entitled to test that. The court may have accepted the evidence of the pursuer that the baskets were one metre away from the head of the checkout and a basket holder would have avoided the accident. Mr Deans gave evidence that would not have avoided the accident. That evidence from Mr Deans was accepted by the sheriff;

d. the defender's policy that customers should have kept groceries in baskets and trolleys, thereafter packing at a packing station: while the photograph of a sign was not agreed (a minor oversight) it was unlikely to be disputed there was a sign in the premises articulating that policy or seen in the CCTV; this was not proceeded with at proof as the pursuer's agents had put that to one of the defender's witnesses who denied there was such a policy;

e. the defender's employees did not implement the packing policy: that could be inferred from the CCTV;

f. there were no signs that indicated this policy applied to baskets as well as trolleys; see d. above.

g. staff members did not direct customers to adhere to the store's packing policy: that could be inferred from the CCTV;

h. staff members did not give advice to customers on where to pack shopping: that could be inferred from the CCTV;

i. staff members ought to have indicated to customers where the designated basket area was located: that could be inferred from the CCTV;

j. staff members did not give advice to customers on where to leave empty baskets: there was the evidence of the pursuer and her daughter, and that could be inferred from the CCTV;

k. customers routinely left baskets in a pile with no basket holder: there was the evidence of the pursuer and her daughter that there was no basket holder, and that could be inferred from the CCTV;

l. baskets were routinely left in an undesignated location: that can be inferred from the CCTV and the photo of the locus taken by the pursuer's daughter about one year later of a basket on the floor, production 5/9;

m. the defender failed to comply with their own identified control measures: that could be inferred from the CCTV and the pursuer's evidence;

n. staff members were aware or ought to have been aware of customers placing baskets at or near the end of till 3 where a trip hazard was foreseeable: that could be inferred from the CCTV;

o. baskets ought to have been obvious to a staff member operating a "SEE IT, SORT IT!"policy: that could be inferred from the CCTV;

p. baskets ought to have been removed and placed in a designated area: that was more a submission but the defender was given notice of a line of argument about preventative measures to avoid the foreseeable risk of tripping;

q. since the accident, the defender had placed a basket holder at the store-side of the tills: there was no submission on that but the information was provided by the defender pre-litigation.

[52] There is clearly in the authorities a distinction between advancing an argument or arguments which the court does not accept and advancing an argument that is bound to fail. This case was a clear example of where the former occurred. The pursuer was simply not found to be reliable, and the defender was found to have a reasonable system of inspection. Those two findings were fatal to the pursuer's claim, but were not inevitable. They were the inherent risks of almost all litigations, and so risks which are faced, and absorbed, by almost all pursuers. Even had the pursuer, or more accurately her agents, assessed the prospects of success at less than 50% that would not meet the test of being bound to fail or being without merit. The test was high – "manifestly unreasonable" or "no, or substantially no chance of success." It was not "is the pursuer likely to lose?"

[53] If the court considered that the failure had been inevitable the court was invited to consider that the defender ought to have made a motion for Summary Decree for dismissal. That motion could have been made prior to the proof or even at the proof, following the close of the pursuer's case. That the defender made no such motion was instructive, and the defender's failure to do so militated against their motion for the application QOCS exception succeeding. If there was so obviously no prospect of success for the pursuer, to the extent that the pursuer's raising and continuing with the claim amounted to an affront to the integrity of the court, then surely the defender would have moved for dismissal?

[54] In the Report at para 76, Chapter 8 pages 181-182 Sheriff Principal Taylor recommends that

> "… the pursuer should be entitled to found on the defender's failure to move for summary decree should the defender subsequently argue that the benefit of one way costs shifting should fly off."

[55] The court should consider the suggestion that the pursuer and so in reality her agents have acted manifestly unreasonably or to the extent that they have abused process by making averments when there was no factual basis, was a significant allegation, which ought not to be taken lightly. It was all the more surprising it had been made in this case, on the basis of an apparent failure to lead "positive evidence" in respect of the defender's systems and policies and their failure to follow them, when the defender's own conduct of the case was scrutinised. To do so was not "tit for tat", but provided the context within which the pursuer's agent's conduct ought to be viewed:

i) The pursuer's agents initially advised the defender that CCTV would be sought on 27 January 2021, 8 days after the pursuer was injured. A formal request was made for CCTV on 10 February 2021 under the GDPR as enacted by the Data Protection Act 2018. After initially providing only an excerpt, on 22 June 2021 the defender's agents provided the CCTV lodged in process. On 13 July 2021, the pursuer's agents contacted the defender's agents, noting the limitations of the angles in the CCTV which had been produced and queried whether there were better angles. On 2 August 2021, the defender's agents advised "no further footage" was available. Despite this, the evidence at proof of the Deputy Manager of the store, Stephen Findlay, was that there were "multiple better angles" available.

ii) Prior to litigation, a request was made by the pursuer's agent for precognition facilities with the defender's checkout assistant employees shown in the CCTV. This request was refused by the defender's agent apparently without the request being put to the employees themselves. That request was repeated at the pre-trial meeting and in the weeks leading up to the proof, but despite both employees appearing on the defender's witness list those requests continued to be refused. Furthermore, the names of those two employees were not identified, despite requests to do so ie, the pursuer's agent was unaware of which of the witnesses on the list were those shown on the CCTV working on the checkouts.

[56] The aim of section 8 was to improve access to justice and to address the concern for potential litigants that should they lose a court action not only would they require to pay their own legal costs but also those of their opponents. Quite appropriately, exceptions had been inserted into section 8 to allow recovery of expenses in certain situations. Those exceptions contained within section 8(b) and (c) were deliberately designed to be "high tests", otherwise the legitimate aims of the section would be undermined. The court should consider that the conduct of the pursuer in the present case fell well short of meeting those "high tests" and that these proceedings were in no way exceptional. The pursuer's claim was finely balanced and not without difficulty – many are. It depended on her own evidence being accepted about a crucial aspect, and/or the court agreeing that in light of her evidence and what was shown in the CCTV that the defender's employees could see what the pursuer said was there when she tripped. The court did not agree. That was all. Nothing more. That falls far short of the circumstances which the defender needs to

establish were present to succeed with their motion and for that reason the court should refuse the motion.

Decision and reasons

Manifestly unreasonable

[57] As is acknowledged, there was little guidance from the Scottish Courts as to what amounts to manifestly unreasonable conduct. On any view, this is a high test. The pursuer submitted considerable weight ought to be attached to the views expressed by Sheriff Principal Taylor and the Justice Committee and that the test is tantamount to the Wednesbury test.

[58] In the event, however, the Scottish Parliament was not persuaded to adopt the wording of the Wednesbury test in section 8(4)(b).

[59] The defender submitted the term ought to be given its plain and ordinary meaning. The Oxford English Dictionary defines the word "manifestly" as "as is manifest, evidently, unmistakably".

[60] The Shorter Oxford English Dictionary defines "manifest" as "easily noticed, obvious". The Oxford Dictionary of English defines the word "manifest" as "clear or obvious to the eye or mind". In my view, there is nothing complicated about the term manifestly unreasonable. It means obviously unreasonable.

[61] The Scottish Parliament recognised the circumstances where proceedings were not conducted in an appropriate manner were likely to be exceptional and that each case would be considered on its own facts and circumstances.

[62] Manifestly unreasonable has to be distinguished from abuse of process, otherwise there would have been no necessity for the alternative of abuse of process under section 8(4)(c).

Abuse of process

[63] There is no dispute about what is meant by abuse of process, Macphail at para 2.23:

> "… misuse of the procedure of the court in a way which … would nevertheless be manifestly unfair to a party to the litigation, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied. It is an abuse of process for a pursuer unreasonably to initiate or continue an action when it has no or substantially no chance of success … The concept of an abuse of process would include the making of false statements of fact based on fabricated documents, but it is not confined to fraud … The essential question is whether the action compromises the integrity of the court's procedures. It might do so if it wastefully occupied the time and resources of the court if the claim was obviously without merit."

Section 8(4)(b) failure to lead positive evidence in support of averments etc

[64] The defender has criticised the pursuer for failing to lead positive evidence in support of the averments set out at para [16], and for leading no witness evidence to speak to the CCTV see para [17].

CCTV

[65] The pursuer relied on the CCTV to support the evidence of the pursuer and her daughter Julie Irvine that the defender's employees should have seen where baskets were left by customers and that they did not comply with the "See it, Sort it" policy.

[66] Contrary to the submission for the defender, there was no need for the pursuer to lead any witness to speak to the CCTV. The case of *Gubitas* is authority that once provenance of the CCTV is established, as was agreed in the Joint Minute, the CCTV

becomes real evidence and the content is available as proof of fact. As the fact finder, I was able to form my own view of what to make of the CCTV.

[67] While I did not accept the pursuer's submissions on what was shown in the CCTV, I acknowledge there could be different interpretations of what could be seen or inferred from the CCTV. On a different interpretation by the pursuer, the averments criticised by the defender had a factual basis or could at least be inferred from viewing the CCTV. The pursuer and the pursuer's solicitors have not behaved in a manner which is manifestly unreasonable. I reject the submission that there was no evidence led to support the averments criticised by the defender. The averment that basket holders have rubberised feet was of no significance. It was accepted by the pursuer there was no factual basis, and that this averment ought to have been deleted. The motion in respect of section 8(4)(b) of the 2018 Act is refused.

Section 8(4)(c) abuse of process

[68] This was a straightforward tripping claim in a store. In the note of my decision, I said the pursuer was doing her best to tell the truth, but she was very resistant to any questions that contradicted her recollection of the circumstances of the accident. It is of note the pursuer was aged 80 at the time of her accident and 82 when giving evidence.

[69] The pursuer was very unhappy about what happened to her and how she felt she was treated by one of the staff, whom she said was rude to her. The defender submitted the pursuer had an improper ulterior motive for the litigation by stating she was only in court because someone was rude to her. The pursuer was in court on the advice of her solicitors. I rejected that submission as being of no merit.

[70] The pursuer's evidence was that she tripped over a stack of baskets around one metre from the head of checkout 3 or in the middle of the aisle. On looking at the CCTV and considering all the evidence before the court including other witness evidence, I concluded the pursuer was unreliable and that it could reasonably be inferred the baskets were near to the head of checkout 3. This is not a case where the pursuer was not credible. Had I concluded the stack of baskets was one metre from the head of checkout 3 or in the middle of the aisle on the balance of probabilities that may have pointed to an inference of negligence on the part of the defender.

[71] The pursuer averred the defender's system of inspection, packing procedures and safety procedures were not properly implemented. The defender led evidence there was a reasonable system of inspection and the system was properly implemented. That evidence had to be tested against the evidence of the pursuer and her daughter and what was seen in the CCTV, including what could reasonably be inferred. I concluded, on the evidence, that the defender had a reasonable system of inspection and that all safety procedures had been implemented. Again, the CCTV was open to different interpretation and had the pursuer's interpretation been accepted this may have led to liability being established on the balance of probabilities.

[72] On the evidence before the court, this is not a case where the pursuer had no chance or substantially no chance of success. There has been no abuse of process. The motion in respect of section 8(4)(c) of the 2018 Act is refused.

Expenses and sanction for counsel

[73] I find the defender liable to the pursuer in the expenses of the motion as taxed. I have rejected the *esto* motion for the defender for expenses from the date of the PTM as

having no merit. Sanction for junior counsel was opposed by the defender. The defender suggested the motion should properly have been opposed by the pursuer's solicitor who conducted the proof and, by inference, there was no requirement to instruct counsel who had undertaken a desktop review. I did have an impression the defender did not appreciate the gravity of the motion. I rejected the defender's submission as having no merit.

[74] The defender was alleging not only the pursuer but also her solicitors had behaved in a manner which was manifestly unreasonable and, further, in a manner which amounts to an abuse of process. An allegation of abuse of process by solicitors is of a very serious nature, attacking the professional conduct and actions of the solicitors. Further, the motion raised matters of novelty, difficulty and complexity in how the court should interpret and apply section 8(4) of the 2018 Act. In all the circumstances of the case, it is reasonable to sanction the employment of counsel. The test for sanction of counsel in terms of section 108 of the Courts Reform (Scotland) Act 2014 has been satisfied.