OUTER HOUSE, COURT OF SESSION

[2024] CSOH 95

CA67/23

NOTE BY LORD RICHARDSON

In the cause

ROCHE DIAGNOSTICS LIMITED

Pursuer

against

GREATER GLASGOW HEALTH BOARD

First Defender

ABBOTT LABORATORIES LIMITED

Second Defender

Pursuer: Lord Keen of Elie KC, Breen; Addleshaw Goddard
First Defender: Lindsay KC, D Blair; NHS Central Legal Office
Second Defender: Lord Davidson of Glen Clova KC, E Campbell; CMS Cameron McKenna LLP

8 October 2024

Introduction

[1] On 20 September 2024, I issued my opinion ([2024] CSOH 90] dealing with issues between the parties arising out of the ongoing document recovery procedure. That opinion followed a hearing on 5 August 2024 at which I heard submissions from the parties on a number of issues arising out of that procedure. On 8 October 2024, I then heard the parties as to the detail of the orders I would make implementing the decision I had reached.

[2] Following the pronouncement of those orders, both of the defenders sought leave to reclaim my decision dated 20 September 2024 in terms of Rule of Court 38.3(6). At the same time, both defenders also sought leave to reclaim my earlier decision ([2024] CSOH 55) which had been issued following debate.

[3] The defenders indicated that they sought leave to reclaim the following aspects of my opinion dated 20 September 20204:

- First, the first defender sought leave to reclaim my decision that the first defender had waived its right to resist the disclosure of documentation on the grounds that the documentation contained details of legal advice insofar as the details of that advice had been voluntarily disclosed by the first defender in two briefing papers dated 6 July 2023 and 1 August 2023.
- Second, both defenders sought to reclaim my decision as to the correct approach to be taken to the defenders' plea of "without prejudice" privilege.

In the event leave were granted, both defenders indicated that they would also seek to reclaim my earlier decision in respect of the relevancy of the pursuer's averments relating to unlawful means and unlawful means conspiracy. On 18 June 2024, both defenders had previously sought leave to reclaim on this point which I had refused.

[4] I refused leave to reclaim and gave my reasons orally very shortly after I had heard the parties. This note sets out the reasons I gave.

Procedural background

[5] As a starting point, I consider that it is important to recognise that in a commercial action the Rules of Court require the grant of leave in respect of all reclaiming motions other than those which concern a decision which disposes of the whole merits of case (RoC 38.3(6)

and 38.2(1)). That is to enable the commercial judge effectively and pro-actively to case manage the cases before him or her and to take the need to do so into account in weighing up when any reclaiming motion ought to take place.

[6] On this basis, in the present case, it is worth reflecting that the preliminary hearing in the present case took place more than a year ago on 15 September 2023. The document recovery process which led to the hearing on 5 August 2024 was in respect of specifications which were granted on 22 August and 7 September 2023. The commissioner appointed in terms of those interlocutors, has, having heard extensive submissions from all parties, provided two reports to the court on 20 November 2023 and 23 February 2024. However, to date, as I understand it, very little if anything has in fact been recovered by the pursuer as a result of the issues which have been raised by the defenders resisting recovery. I should also record that the position of the pursuer in respect of these issues has also significantly narrowed during the course of the process with significantly fewer arguments being advanced before me than were made to the commissioner (see, for example, [18] below).

[7] In the meantime, essentially pursuant to a joint position among the parties, I heard the parties at debate on 6 December 2023. At that hearing, both defenders challenged the relevancy of the pursuer's cases against each of them based on unlawful means and unlawful means conspiracy. Following the debate, I repelled the defenders' pleas seeking to exclude certain of the pursuer's averments from probation.

Decision

[8] Against this background, in considering the motion for leave, I agree with the submission made on behalf of the second defender, that it is necessary in deciding whether to grant leave to reclaim to have regard to both the public and the private aspects of the

points raised. In other words, the issue requires to be considered both from the perspective of the particular case as well as, more generally, if it raises a question of particular importance.

[9] Considering each of the three aspects of my decisions which the defenders seek to reclaim, my opinion is as follows.

Waiver

[10] Senior counsel for the first defender sought to argue that my decision on waiver raised an important issue of principle. This was because the case concerned the issue of waiver of legal and professional privilege as it arose in the particular context of a procurement exercise. The procurement process carried with it particular duties of transparency and the need to provide reasons.

[11] I am not persuaded by this argument. I do not consider that my decision in respect of the pursuer's plea of waiver raises any particular issue of more general importance. During the submissions at the hearing on 5 August 2024, the parties were agreed that the law on the issue of waiver had been authoritatively set out in *Scottish Lion Insurance Co Ltd* v *Goodrich Corp* 2011 SC 534. At that time, the first defender did not seek to advance any argument to the effect that a different approach should be taken to the question of waiver in the procurement context. I consider that my decision was simply an application of the pre-existing law to the present circumstances.

[12] Considering the issue from the perspective of this case, the first defender sought to argue that leave should be granted so that the issue of waiver could be dealt with before the documents concerned were disclosed to the pursuer. As senior counsel for the first defender put it, once the genie was out of the bottle, it could not be put back.

[13] Bearing in mind the particular circumstances of the plea of waiver by the pursuer, I am not persuaded by the first defender's argument. The pursuer's argument, which I upheld, was that by releasing two briefing papers detailing the content of legal advice it had received, the first defender had waived its right to resist the disclosure of documentation on the grounds that the documentation contained details of that advice. In these circumstances, I consider that, to borrow the first defender's metaphor, insofar as the genie is out of the bottle, it was the first defender itself who opened it.

Without prejudice privilege

[14] In relation to the issue of so-called "without prejudice" privilege, I accept the submissions on behalf of both defenders that there are clearly differences between the approach in Scotland, on the one hand, and England and Wales, on the other. It is also true that there is an absence of more recent Scottish authority on this point. In particular, there is no Inner House authority addressing any apparent differences between the approach in Scotland and the more recent English cases of the highest authority (*Rush & Tompkins* v *Greater London Council* [1989] 1 AC 1280; *Bradford & Bingley* v *Rashid* [2006] 1 WLR 2066; *Ofulue* v *Bossert* [2009] 1 AC 990; and *Oceanbulk Shipping & Trading* v *TMT Asia* [2011] 1 AC 662).

[15] However, I consider that the differences of approach relate more to practice and procedure than principle. In both jurisdictions, there is a recognition that parties to negotiations should not be discouraged in trying to resolve their disputes by the knowledge that anything said in the course of those negotiations could be used to their disadvantage – see *Cutts* v *Head* [1984] Ch 290, 306 per Oliver LJ. Equally, there is a recognition that there is a public interest in the open administration of justice. As I

understand it, the difference in approach relates to the process whereby those two competing interests are balanced.

[16] In the present case, having considered the documents in respect of which without prejudice privilege was asserted, it is clear to me that there are likely to be potential arguments by all parties both as to whether the documents can properly be said to be covered by without prejudice privilege and, if so, whether and to what extent, the contents of those documents are admissible as being an unequivocal admission or a statement of fact. Accordingly, I considered that the balance I referred to above will best be achieved by the release of the documents to the pursuer. This approach will enable those issues, insofar as any of the documents are in fact founded upon, to be resolved in the context of evidence as to the surrounding circumstances and with the benefit of informed submissions from all sides.

[17] Both defenders sought to argue that leave to reclaim ought to be granted in order to avoid what they characterised as the irretrievable prejudice which would arise were the contentious documents to be released to the pursuer. In the circumstances of this case, I am not persuaded that the risk of prejudice to the defenders at this stage requires a different outcome. The defenders' right to challenge the use by the pursuer of any of the documents released is, of course, preserved and, potentially, enhanced by their being able to vindicate those rights against the background of evidence of the surrounding circumstances.

Unlawful means and unlawful means conspiracy

[18] I recognise why, in the context of their motions seeking leave to reclaim my decision of 20 September 2024, the defenders indicated that were such leave to be granted, they would also seek to reclaim my earlier decision. In advance of the hearing on 5 August 2024,

it appeared that the pursuer was advancing arguments for the recovery of documents based upon its claims of unlawful means and unlawful means conspiracy (see Minute of Proceedings dated 18 June 2024, which records "The court noted, insofar as this may be relevant to any subsequent reclaiming motion made in this case, that the issues addressed in the debate which culminated in the interlocutor dated 05 June 2024 were closely linked to the issues arising from the document recovery process to be addressed on 05 August 2024 at 10.00 a.m.."). However, in the event, those arguments were not insisted in.

[19] In the event, for the reasons I have explained above, I have refused the defenders leave to reclaim my decision dated 20 September 2024. I also remain of the view that it would not be appropriate for my decision as to the relevancy of the pursuer's pleadings in respect of unlawful means and unlawful means conspiracy to be reclaimed at this time. It is true that there is an absence of Inner House authority on these two remedies. However, I also consider that the issue in this case is one which turns on the particular facts and therefore requires proof.

Disposal

[20] Accordingly, in light of the above both individually and cumulatively, I do not consider that allowing the defenders to reclaim at this stage represents the most effective way of resolving the parties' dispute.