FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2017] CSIH 74
XA50/17

Lord President
Lord Brodie
Lord Malcolm

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the application for leave to appeal to the Court of Session
under section 113(2) of the Courts Reform (Scotland) Act 2014

in the cause

GABRIEL POLITAKIS

Pursuer and Applicant

against

JOHN DESPENSER SPENCELY

Defender and First Respondent

and

JAMES SCOTT LIMITED

Party Minuters and Second Respondents

Pursuer and Applicant: Party
Defender and First Respondent: Manson; BTO Solicitors LLP
Party Minuters and Second Respondents: Howie QC; MacRoberts LLP

29 November 2017

Introduction

[1] This is an application for permission to appeal from a decision of the Sheriff Appeal Court refusing an appeal from a determination of the sheriff granting decree of absolvitor. In the course of the initial hearing, the respondents raised an objection to it being determined by a single procedural judge, in terms of RCS 40.2. It was contended that, as a consequence of the operation of section 115 of the Courts Reform (Scotland) Act 2014, which introduced section 31A into the Court of Session Act 1988, a *quorum* of three judges was required. The procedural judge remitted the issue of competency, and the merits of the application, for consideration by such a *quorum* in terms of RCS 37A.2(3).

Background

[2] This is the latest in a series of litigations involving either the applicant or Apollo Engineering Ltd, a company in which he held a controlling interest, and the second respondents. The disputes stem from a sub-contract between Apollo and the second respondents, under which Apollo agreed to supply specialist services for pipework required in the construction of a jetty at Coalport. The value of the work was about £4 million. On 25 September 1991, Apollo went into liquidation and, by the end of 1991, the sub-contract was at an end. The second respondents raised an action in the Court of Session against the liquidator for the recovery of certain materials. The liquidator counterclaimed for £2 million, in respect of unpaid work and damages for breach of contract.

[3] In June 1993, the action was sisted for arbitration (see *McGruther* v *James Scott* 2004 SC 514 at paras [1] and [22]). In July 2005, the first respondent was appointed as arbiter. In September 2006, he awarded the expenses of an amendment procedure in favour of the second respondents. The taxed expenses amounted to almost £195,000. In May 2007,

following a debate, the first respondent issued a "final draft opinion" which excluded substantial parts of Apollo's case from probation. He dismissed almost the entire case. Apollo sought a judicial review of the first respondent's decision, but this was dismissed because of the availability of the stated case procedure (*Apollo Engineering* v *James Scott* 2009 SC 525).

[4] Apollo then proceeded by stated case. The applicant sought to represent Apollo as a party litigant. He was not permitted to do so (*Apollo Engineering* v *James Scott* [2012] CSIH 88). Apollo attempted to appeal to the United Kingdom Supreme Court. In November 2014, the application for leave to appeal was dismissed, as no question of general public importance was raised and Apollo had been unable to obtain certification by two counsel of the appropriateness of the appeal. In April 2015, Apollo applied to the European Court of Human Rights, complaining that the inability of the applicant to present Apollo's case amounted to a disproportionate interference with their right of access to the courts, and that the proceedings breached the reasonable time requirement of Article 6 of the European Convention on Human Rights. That application remains pending.

[5] Meantime, the applicant raised an action in the sheriff court seeking declarator that the first respondent had acted in bad faith in substantially dismissing Apollo's claims, and in making an award of expenses against them. He sought: (i) repayment of £40,000, representing the fees and outlays paid to the first respondent; and (ii) damages of £250,000, being the legal expenses incurred by Apollo in the arbitration. The second respondents entered the process as minuters. On 6 April 2016, following a lengthy debate, the sheriff granted decree of absolvitor. She considered that: the applicant did not have title to sue; the action was incompetent; the claim by the applicant had prescribed; and the pleadings were irrelevant and lacking in specification.

Sheriff Appeal Court's reasoning

[6] The applicant sought unsuccessfully to challenge the sheriff's decision in an appeal to the Sheriff Appeal Court. The SAC reasoned broadly as follows. First, the applicant had made repeated "bold and serious" averments of "bad faith", "malicious representation" and "false pretences" on the part of the first respondent. The averments alleged that the first respondent had permitted the amendment procedure, knowing that it would generate enormous expense. This had denied Apollo a fair hearing. During the subsequent stated case, the first respondent had been "only interested in inflicting serious, substantial and substantive injustice on Apollo in total collusion with the [second respondents]". The SAC held that the sheriff had been correct to hold that the averments of bad faith were mere assertions and had no proper foundation. The applicant had failed to provide the necessary clear and concise averments of the basis upon which the allegations stood. As an arbiter was immune from suit, unless he had acted maliciously or in bad faith, the applicant could not succeed.

[7] Secondly, the applicant purported to derive his title to sue from an assignation, dated 8 January 2015, signed by himself and his wife in their capacity as directors of Apollo. The SAC held that the sheriff had been correct to hold that the assignation was beyond the powers of Apollo. The right to sue the second respondents had been an asset. All assets of Apollo had fallen within the terms of the relevant Creditors Voluntary Arrangement. It would offend against the purposes of the CVA if the directors were entitled to assign a claim for damages. The applicant therefore had no title to sue.

[8] Thirdly, the SAC determined that the sheriff had been correct to hold that, in order to establish that the first respondent had acted in bad faith, the applicant first had to show that

the decisions in the arbitration had been wrong. This would necessarily involve consideration of the merits of the claims. This was incompetent in the sheriff court. Unless reduced, the decision of an arbiter was binding on the parties. It was equivalent to a court decree. The only way to review the merits of the decision had been by stated case. The challenge by stated case had failed.

[9] Fourthly, the SAC held that the sheriff had been correct to hold that the applicant's claim had prescribed. The action had been raised on 6 February 2015. The applicant accepted that the claim for damages was subject to the five year prescriptive period (Prescription and Limitation (Scotland) Act 1973, section 6). That period had commenced when the obligation had become enforceable, which was when the loss, injury or damage had occurred (1973 Act, s 11). The applicant accepted that the alleged wrong in relation to the part award flowed from: the finding of liability and expenses made in 2006; the taxed report of the Auditor of the Court of Session issued in May 2007; and the first respondent's decerniture of 30 June 2009. No case for an extension under section 11(3) of the 1973 Act had been averred.

Competency

Respondents' submission

[10] The respondents argued that, as a consequence of section 115 of the Courts Reform (Scotland) Act 2014, the Rules of the Court of Session, which provided for permission to appeal to be determined by a single judge, were *ultra vire*s. A *quorum* of three judges was required. Section 115 had inserted section 31A into the Court of Session Act 1988. It conferred a discretionary rule making power to make provision by Act of Sederunt for applications for permission to appeal to the "Inner House" to be determined by a single

judge. It prescribed that any rules promulgated under the power had to have a mechanism for review by a Division of the Inner House (s 31A(3)(a)(ii)). The power had not been exercised. Some amendments had been made to the Rules to accommodate the creation of the Sheriff Appeal Court. These had involved including the SAC within the definition of "inferior court" in RCS 40.1(2)(c)(ii) (Act of Sederunt (Rules of the Court of Session ... (Sheriff Appeal Court) 2015, SSI 2015/419, rule 7(3)). This made appeals from the SAC subject to the existing procedures for permission, including those authorising a *quorum* of one for permission applications as procedural business (Chapter 37A).

[11] There were two aspects to the argument. First, any attempt to modify the existing rules to accommodate applications for permission to appeal from the Sheriff Appeal Court had to comply with the requirements of section 31A of the 1988 Act. The rule making power in section 115 was a *lex specialis*, which qualified the general rule making power under section 103 of the 2014 Act (replacing section 5 of the 1988 Act). Any rules, which sought to regulate applications for permission to appeal, had to conform to section 31A, including the review provisions. The Act of Sederunt did not acknowledge this. This was so even if the Act of Sederunt had been made under the general power. As a consequence of the failure to provide a mechanism for review, the Act of Sederunt was *ultra vires*.

[12] The second aspect was more radical. The rule making power in section 31A of the 1988 Act not only imposed conditions on the future exercise of that power, but also meant that all existing court rules, which did not meet the criteria in section 31A, were impliedly repealed. Article 7 of the Courts Reform (Scotland) Act 2014 (Commencement No. 2, Transitional and Saving Provisions) Order 2015, which purported to save all of the rules promulgated under the repealed section 5 of the 1988 Act, could not save rules which were themselves inconsistent with the requirements of primary legislation. Section 19(4) of the

Interpretation and Legislative Reform (Scotland) Act 2010 provided that, when an Act was repealed and re-enacted, any instrument made under the repealed Act, which could have been made under the re-enacted Act, was to have effect as if it was made under the re-enacted Act. This required all existing court rules to be given effect as if they had been made under section 31A. All existing rules, which conflicted with section 31A, were not saved by the savings provisions. This included Chapter 37A, which provided for a single judge to sit as a *quorum* of the Inner House on procedural matters. Any application for permission thus required a *quorum* three judges.

Decision

[13] In enacting section 115 of the Courts Reform (Scotland) Act 2014, and thus introducing section 31A(1) into the Court of Session Act 1988, Parliament did not require the court to adopt the procedure prescribed by that section. At the same time, it did provide (s 113) that appeals from the Sheriff Appeal Court required permission from the SAC or this court on certain limited grounds. The reasonable inference to be drawn is that, pending any exercise of the rule making power in section 31A(1), such appeals and applications for permission would be dealt with within the current regime of procedural rules. The background material (*infra*) indicates that Parliament's intention was simply that if the new sifting mechanism referred to in section 31A(2) for reclaiming motions or appeals which did not require leave was introduced by the court, it would be desirable for all leave applications to be dealt with in a similar manner.

[14] Even if the respondents were correct in the first aspect of their argument, namely that the Act of Sederunt is *ultra vires* in so far as it amends the Rules of Court to include the Sheriff Appeal Court as an inferior court in RCS 40.1(2), it does not follow that there are

thereby no rules which govern the determination of an application for permission to appeal. Chapter 41 makes provision for appeals from a decision of any tribunal, which is not included in Chapter 40. The definition of "tribunal" includes a court (RCS 41.1(2)). RCS 41.2(1) sets out the procedure for applications for leave to appeal. Applications for leave to appeal, which proceed under RCS 41.2(1), are procedural business (RCS 37A.1(2)(d)). The *quorum* for procedural business is one judge (RCS 37A.1(1)). Even if the amendment made by the Act of Sederunt is disregarded, the *quorum* for deciding permission to appeal is one judge. There has been no exercise of the power to make rules about permission to appeal which does not comply with section 31A.

[15] The more radical approach suggested in the second aspect of the argument requires the court to hold that the true intention of section 115 was to repeal all of the existing Rules of Court on the commencement of the 2014 Act, if they did not conform to the rule making power in section 31A. It is helpful to look at the material which was considered prior to the passing of the Act. The Policy Memorandum to the Bill set out (para 213) the intention in relation to the rule making power of the court in general terms:

> "The policy is that very general powers are given to the Court of Session which are intended to remove any doubt that that Court has the *vires* to make any rules relating to the procedure and practice in civil proceedings, including ancillary and incidental matters, and particularly those flowing from the Scottish Civil Courts Review."

In the Explanatory Notes to the Bill, the decision to confer the rule making power in section 115 (section 109 in the Bill) was discussed, under reference to *R* v *Secretary of State for the Home Department* 2013 SLT 1108, in the following terms:

> "172. New section 31A(1), therefore, provides the Court of Session with a new power relating to applications for leave or permission. *When the act of sederunt is made under this new power the existing provisions that deal with the leave or permission process in Chapter 37A (as considered by the Court in the MBR case) will be removed"* (emphasis added).

Parliament was aware that the existing rules of court provided that applications for permission to appeal could be determined by a single judge (*R* v *Secretary of State* (*supra*)). The power to reduce the *quorum* of the Inner House had been exercised. The Explanatory Notes specifically stated that the exercise of the power to make rules under section 31A would require the existing rules to be amended. Parliament was aware that the power conferred by section 31A would, when exercised, cause a change in practice in relation to whether an application for permission could be determined by a single judge without review by a bench of three.

[16] The respondents' argument requires an extraordinarily wide interpretation to be given to the effect of section 31A. It erroneously equiparates the discretionary rule making power, conferred by section 31A, with the status of a mandatory requirement in primary legislation. It runs contrary to the savings provisions in article 7 of the Commencement No. 2 Order (*supra*). It ignores the Parliamentary materials, which do not support the proposition that the intention of Parliament, in passing section 115, was to return certain rules to the position which they were in prior to 2008, when a *quorum* of the Inner House on procedural matters was three judges. If Parliament had wished to repeal the existing rules relating to permission to appeal, it would have done so expressly. It did not do so, because that would be inconsistent with the conferral of a discretionary rule making power.

[17] The respondents accepted that the court had a discretion as to whether to exercise the power. It did not require to exercise it. The inference then is that, meantime, the existing regime is unaffected. If the power is exercised, the existing rules will require to be amended to reflect the requirements of the new section. If the power is not exercised, the existing rules cannot be said to be impliedly repealed; not least given the savings provisions. In

general, repeal by implication does not find favour with the courts (Maxwell: *Interpretation of Statutes* (12th ed) 191). The primary purpose of section 19(4) of the Interpretation and Legislative Reform (Scotland) Act 2010 is to save existing rules. It does not create any conflict between the terms of the 2014 Act and the savings provisions in Article 7 of the Courts Reform (Scotland) Act 2014 (Commencement No. 2, Transitional and Savings Provisions) Order 2015 which apply to Chapter 37A of the Rules. For these reasons, the respondents' objection to the competency of an application for permission to appeal being determined by a single procedural judge is repelled.

Merits

Submissions

[18] The applicant maintained that the sheriff and the SAC had erred in each of the four aspects of their decisions. He emphasised the background, which had caused him considerable distress and frustration. As a party litigant, he did not understand why the case had been dismissed as irrelevant by the first respondent. The first respondent's decision had been full of lies. The respondents had colluded in having the case dismissed. The sheriff had been wrong to hold that there had been a lack of specification. The case had been going on for 26 years and there had never been any proof. On the facts, the decision of the first respondent to dismiss the bulk of the applicant's claim was clearly wrong. The second respondents had repudiated the contract and caused him loss. The court should hear proof on that matter. The stated case ought to be reopened, as the applicant had been defrauded.

[19] The respondents countered that the application did not satisfy either branch of the test for permission to appeal, namely: (i) whether the application raised an important point

of law or practice; or (ii) whether there was some other compelling reason for the court to hear the appeal (Courts Reform (Scotland) Act 2014, s 113(2)). Both phrases were designed to restrict the scope for a second appeal (*Eba* v *Advocate General for Scotland* 2012 SC (UKSC) 1, at para 48). The case could not decide any important point of principle or practice. The "other compelling reason" element only arose once the court was satisfied that no important point of principle or practice had been raised (*Uphill* v *BRB (Residuary)* [2005] 1 WLR 2070, at para 20). Before it could grant permission, there had to be circumstances which showed that the decision had been "plainly wrong" or arose from unfair procedure (*Eba* (*supra*) at para 48). That was not the case.

Decision

[20] The court may grant permission to appeal from the Sheriff Appeal Court only where an important point of principle or practice is raised, or there is some other compelling reason for the court to hear the appeal (Courts Reform (Scotland) Act 2014, s 113(2)(a) and (b)). The purpose of the test is to restrict the scope for a second appeal (*Eba* v *Advocate General for Scotland* 2012 SC (UKSC) 1, Lord Hope at para 48). The language used mirrors the former test for obtaining leave, from the Court of Appeal in England and Wales, to appeal from an appellate decision of a lower court (Civil Procedure Rules, rule 52.13(2); see now rule 52.7(2), which includes a prospects of success test).

[21] In *Uphill* v *BRB (Residuary)* [2005] 1 WLR 2070, the Court of Appeal considered the circumstances in which permission for a second appeal should be granted. Raising an important point of principle or practice is a reference to one which has not yet been established (*ibid* para 18). It does not include a question of whether an established principle or practice has been correctly applied. The grounds of appeal in this application amount, in

essence, to a disagreement with the conclusions of the SAC and the sheriff. They do not identify any error of law on the part of either, nor do they advance any important point of principle or practice which has not already been established by precedent. The SAC followed well-known authorities in rejecting the four grounds of challenge to the sheriff's decision. The first part of the test in section 113(2) of the Act has not been met.

[22] The existence of some other compelling reason presupposes that no important point of practice or principle has been raised (*Uphill* v *BRB (Residuary)* (*supra*) Dyson LJ at para 19). In *Uphill*, the court explained (*ibid*) that, when considering whether some other compelling reason existed, it was important to emphasise the "truly exceptional nature of the jurisdiction" in relation to second appeals. "Compelling" is a "very strong word", albeit that the test is there to enable the court to deal with the case justly (*ibid* at para 23). A good starting point is a consideration of the prospects of success (*ibid* at para 24). The test can be met if it is clear that the court hearing the first appeal reached a decision which is "plainly wrong" because, for example, "it is inconsistent with authority". Alternatively, there may be "good grounds for believing that the hearing was tainted by some procedural irregularity so as to render the first appeal unfair" (*ibid*). The court agrees with this analysis. The tests will be satisfied only where the decision in the first appeal is clearly wrong, such as where it ignores established precedent, or where there is a procedural irregularity in that appeal which demonstrates that the applicant did not have a fair hearing (*Eba* v *Advocate General for Scotland (supra)* Lord Hope at para 48).

[23] The applicant's prospects of success, particularly in the face of the respondents' argument on the relevancy of his case based upon the bad faith of the first respondent, are poor. There is no element of the SAC's reasoning which can be categorised as "plainly wrong". There was no procedural irregularity or unfairness in the determination of the

appeal. There is nothing else which can be described as a compelling reason. The second part of the test in section 113(2) of the Act has accordingly not been met.

[24] For these reasons, the application is refused.