OUTER HOUSE, COURT OF SESSION

[2018] CSOH 82

A133/16

OPINION OF LORD BRAILSFORD

In the cause

JAMES CARR AND OTHERS

Pursuers

against

R H INDEPENDENT HEALTHCARE LIMITED

Defenders

First to Fourth Pursuers: Sutherland QC; Drummond Miller LLP
Fifth to Eighth Pursuers: Bain QC, Wray; Bonnar Accident Law
Defenders: Crawford QC, Watt; Dentons UK and Middle East LLP

3 August 2018

Procedural background

[1] Dorothy Carr died on 13 August 2009. At the time of her death she was resident in a care home. The pursuers signetted a summons in an action for damages arising from the circumstances of Mrs Carr's care against the defenders, who operated the care home on 3 August 2012, shortly prior to the expiry of the triennium[1]. On 7 August 2012 solicitors then acting for the pursuers wrote to the defenders by Recorded Delivery letter enclosing a copy of the summons and requesting them to pass the same to their insurers or solicitors. On 31 August 2012 the pursuers arranged for the summons to be lodged for calling and, if no

[1] Bearing court reference PD1564/12

defences were lodged to minute for decree. Defences were not lodged and by interlocutor dated 21 September 2012 decree in absence was pronounced against the defenders in the sum of £1,100,000 with interest thereon from 7 August 2012 until payment. The decree was extracted on 8 October 2012. On 10 October 2012 the pursuer's solicitors wrote to the defenders, reminded them of their earlier correspondence and advised them of the decree.

[2] On 26 October 2012 a summons at the instance of the defenders seeking, inter alia, reduction of the decree granted in the action PD1564/12 on 21 September 2013, suspension and interim interdict preventing enforcement was signetted[2]. The pursuers by their solicitors gave an undertaking not to take steps to enforce the decree. The summons for suspension averred that the reason for the defenders lack of knowledge of the proceedings raised against them was by actings on the part of a disgruntled employee. On 26 November 2012 the pursuer's agents advised the defender's agents that they had instructions to defend the action of suspension. The pursuers applied for legal aid to enable them to defend the action of reduction and the cause was suspended pending determination of that application. The pursuer's legal aid application was refused. By interlocutor dated 19 June 2013 in the action A485/12 the decree in absence dated 21 September 2012 in the action PD1564/12 was reduced.

[3] In early 2014 the pursuers changed solicitors and by letter dated 26 March 2014 the new agents wrote to the solicitors who had represented the defenders in 2013 advising them of their involvement on behalf of the pursuers. On 30 May 2014 those solicitors responded saying they were no longer instructed in the matter. By letter dated 26 November 2014 the defenders former agents wrote to the pursuer's agents informing them that they were instructed once more.

---

[2] Bearing court reference A485/12

[4] During 2014 and into 2015 agents for the pursuers had been pursuing various enquiries relative to their clients claim. They believed the action PD1564/12 to be sisted. On the basis of the pleadings it is accepted that the pursuers understanding as to the procedural status of that action was shared by agents acting for the defenders. The joint understanding of the agents was erroneous. The pursuer's agents contacted the General Department of the court with a view to seeking recall of the sist and proceeding with the action PD1564/12, but were advised that this course was procedurally impossible. Agents then wrote to the Offices of Court who, by letter dated 18 November 2015 advised them that having referred the issue to the Administrative Judge it had been decided that since a final extract had been issued in the action PD1564/12 that process was at an end and the court was *functus*. As authority for that proposition reference was made to McKay "Practice of the Court of Session"[3]. The view was further expressed that "[T]he fact that the decree was reduced in an action of reduction does not mean that the original action is resurrected".[4]

[5] The pursuer's position was that following the decision reflected in the letter of 18 November 2016 they were not permitted access to the process in the action PD1564/12 and, effectively, had no means to bring that action before the court. In light of these circumstances the pursuers progressed matters on the basis that there was no other option but to proceed with a new action. In April 2016 the pursuers raised fresh proceedings against the defenders on similar grounds to those in the 2012 action[5].

[6] The defender's agents initial response to the new action was to write to the pursuers agents maintaining that since the action PD1564/12 had not been dismissed the "….lis pendens rule applies – and would provide a complete defence to the present action." This

[3] At page 163
[4] Letter from Supreme Courts to Drummond Miller dated 18 November 2015 number 7/7 of process.
[5] Bearing court reference A133/16

position was subsequently altered and a time bar plea stated in the defences to action A133/16.

[7] After sundry procedure action A133/16 was, by interlocutor of 7 June 2017, ordered to be put out By-Order on 19 July 2017, by which date the parties were to have produced written statements and proposals for the future conduct of that action. At the By Order on the latter date the parties had reached no common ground on future procedure for action A133/16 and that because they remained at issue as regards the status of action PD1564/12. In short, the pursuers maintained that the action PD1564/12 remained current and the defenders declined to state, at that point, a view on that issue. Parties were granted time to attempt to resolve the issue of the status of action PD1564/12. By November 2016 it had been agreed that the pursuers continued to maintain that action was current, the defenders wished to argue that the action was not extant. The matter then came before the court By Order on 15 November 2017 on the issue of whether or not PD1564/12 remained current.

[8] At the By Order on 15 November 2017 there was separate representation for the first to fourth pursuers and the fifth to eighth pursuers.

Submission for pursuers

[9] Counsel for the first to fourth pursuers submitted that a decree in absence may not be reclaimed against[6] but may be recalled or reduced in an action of reduction. It was submitted that the fact that a decree has been extracted is not a bar to recall of that decree.[7] The effect of recall of a decree is to put the action back to the procedural position immediately before decree was granted. In relation to reduction of a decree in absence it

[6] RCS 19.2(1)

[7] *Little Cumbrae Estate Limited* v *Rolyat 1 Limited* [2014] CSOH 163

was submitted that the court requires to look at the whole circumstances of the case in order to determine whether or not to grant reduction of the decree. The overriding consideration should be to ensure that substantial justice is done.[8]

[10] In relation to the decree in absence in the action PD1564/12 granted on 21 September 2012 the defenders had not sought recall of the decree. The fact that decree had been extracted would not have been an impediment to the recall of the decree. The procedure elected by the defenders was to seek reduction of that decree. That decision was taken by the defenders without input from the pursuers. The submission on behalf of the first to fourth pursuers was that the effect of the action of reduction could only be to reduce the decree granted on 21 September 2012. The action of reduction could not dispose of the action PD1564/12 in its entirety. This was said to be clear from consideration of the terms of the conclusion of the summons and pleas in law in the action of reduction, A485/12. It was contended that all that was sought in that action was reduction of the decree in absence granted against the defenders. A decree in an action so pled should, it was said, have the same effect as recall of a decree.

[11] So far as the second action by the pursuers was concerned, A133/16, the position of the first to fourth pursuers was that following the decision taken by the Offices of Court and intimated on 18 November 2015, these parties had no alternative but to proceed with a new action. They were denied access to the process in PD1564/12 and, as a consequence, had no procedural means of reviving that action. It was noted that the decision was of an administrative nature, that although the administrative judge had been consulted and had expressed views which were summarised in the letter of 18 November 2015 such views were not expressed in the exercise of a judicial function. There was no hearing in court and no

[8] *Robertson Executor* v *Robertson* 1995 SC 23

interlocutor of the court which would have enabled the pursuers to reclaim against that decision. Agents acting on behalf of the first to fourth pursuers only obtained access to the process in PD1564/12 when this was ordered by the court at the By Order hearing in the action A485/12 on 19 July 2017.

[12] The submissions on behalf of the first to fourth pursuers were adopted by counsel for the fifth to eighth pursuers. In addition thereto counsel developed the argument by submitting that the effect of the decree in the action of reduction was to reduce the decree dated 21 September 2012 in action PD1564/12 but that action remained in dependence before the court and this primarily by reason of the fact that expenses had yet to be dealt with in that action. The effect of the decree of reduction was no more than to annul the impugned interlocutor granting decree, the action in which it was granted now stood at the stage it would have done if that interlocutor had never been granted. It followed that it remained open to the court to adjudicate upon that action in the normal fashion. Authority for this proposition was said to be found in the case of *Saudi Distribution Services Limited* v *Kane.*[9] Support for the views expressed by the learned sheriff in *Saudi Distribution* (supra) was to be found in *Royal Bank of Scotland Plc* v *Matheson.*[10]

[13] On the basis of the foregoing authorities it was submitted that action PD1564/12 remained extant, that that action now stands at the stage it would have done if the decree had never been granted and, further, that substantial justice would be better served by allowing the issues between the parties to the present action to be determined in the original action, PD1564/12.

---

[9] 1985 SLT (Sheriff Court), Sheriff Kelbie at page 13

[10] [2012] CSIH 64, Opinion of the Court delivered by Lord Philip and paragraph [42]

Submission for defenders

[14] In response to these submissions counsel for the defenders initially made submissions in relation to an "extract". It was submitted that an extract is a written instrument signed by the Extractor of the Court in a form which reflects the interlocutor of which extract is sought. It enables execution of that interlocutor.[11] The extract is a certificate that the interlocutor exists in the records of the court.[12] It provides authority of the court in doing diligence and when capable of enforcement contains a warrant for all lawful execution.

[15] Counsel then developed the argument by considering the nature of a decree in absence. It was submitted that a decree in absence concludes a cause and is a final decree. Consideration was then given to the nature of an extract. The distinction between an interim extract and a final extract was noted. In that regard the submission was that a final extract is an extract of an interlocutor which concludes the cause, leaving nothing to be done. At this stage it was submitted that the court was functus, except for the possible rectification of errors.[13]

[16] Authority for the proposition that a final extract is an extract of an interlocutor which concludes the cause leaving nothing further to be done was said to be found in "a consensus among the textbook writers about the effect of extraction of a final decree". Reference was made to McKay, "*Manual of practice of the Court of Session*"[14]; MacLaren "*Court of Session*

[11] RCS 7.9 and 7.10
[12] See the note to RCS 7.1 at paragraph 7.1.1
[13] RCS 7.1.2
[14] (1893) at page 319

Practice"[15], Thomson and Middleton "*Manual of Court of Session Procedure*"[16] and Maxwell "*Practice of the Court of Session*".[17]

[17] A number of authorities were advanced for authority for the proposition contended for by senior counsel. These were either single judge decisions or obiter dicta in the Inner House. The cases were *Douglas* v *Elphinstone*[18], *Burgh of Rothesy* v *MacNeil*[19], *Taylor* v *Jarvis*[20], *Taylors Trustees* v *McGavigan*[21] and *Smith* v *Smith*[22].

[18] Senior counsel paid particular attention to one case, *Officers of State* v *Alexander*[23]. This case had a complex procedural history but for present purposes it is sufficient to note that on 2 June 1840 the Lord Ordinary had pronounced decree of reduction conform to the conclusions of the action and that interlocutor was subsequently extracted. The case proceeded to the House of Lords who adjourned the appeal so the status of the interlocutor of 2 June 1840 could be resolved by means of an appeal against it in the Court of Session. After further procedure in the Court of Session a reclaiming motion was heard in 1845 in which the Lord Justice Clerk (Hope) expressed doubts about the competency of wakening of the cause after extract on the basis that the court was functus[24]. The matter was remitted again to the House of Lords who in February 1846 again remitted the case to the Court of Session. The case then languished, for reasons which are not germane to the present discussion, for many years until revived and reported again as *Officers of State* v *Alexander*[25].

---

[15] (1916) at page 1104
[16] (1937) at page 210
[17] (1980) at page 622
[18] F.C iv, 132, no 76 (10 March 1768)
[19] F.C x, 164, no 90 (17 November 1789)
[20] (1860) 22 D 1031
[21] (1896) 23 R 945
[22] (1927) SLT 462
[23] (1845) 7 D 884
[24] 1845 7 D 884 at 885
[25] (1864) 2 M 1294

In the Second Division on this occasion difficulties that might have been presented by the extract of the decree were, in the view of the Lord Justice Clerk (Glencorse) overcome by the remit from the House of Lords which the court stated that they were bound to obey. Notwithstanding these reservations it was noted that the textbook authors previously cited treated the decision from 1845 as supporting the proposition that the extraction of a final decree rendered the court functus.

[19] Counsel dealt finally with the case of *Royal Bank of Scotland* v *Matheson* (supra) which she submitted did not address or seek to challenge the authorities to the effect that extract of a final decree renders the court functus. She submitted that that issue had quite simply not been before the court in the case. It was therefore submitted that the case did not provide authority for the proposition made by counsel for both sets of pursuers.

[20] Having regard to the foregoing considerations the court was invited to find that extract of the decree in absence in the cause PD1564/12 rendered the court functus and that reduction of the the decree in that case did not effect that and following therefrom that the action was not extant.

Critical examination and determination

[21] The only issue for determination is the status of the extracted decree dated 21 September 2012. The approach taken by the pursuers to this question was, relying on dicta in two modern cases, to concentrate on practical considerations in seeking to determine where substantial justice lay. The argument may be summarised as being that the circumstances of the present case demonstrated that a party, the pursuers, who has erred in no respect and proceeded in compliance with the rules of court may be subsequently prejudiced if an extracted decree in absence brought proceedings to an end and the only

method of seeking to vindicate an alleged right was by raising fresh proceedings. Prejudice would occur, as has been the case here, if following the reduction of an original decree and before a fresh action was raised a time limit has passed which makes available, essentially fortuitously, a preliminary plea to the party who has occasioned the delay which caused, or contributed to, a time limit passing. That situation was plainly appreciated by the sheriff in *Saudi Distribution Services Limited* (supra). In that case, and faced with arguments broadly similar to those I heard in the present action, the sheriff (Kelbie) concluded;

> "Despite the cogent argument of counsel for the pursuers and despite his reference to authority I find that I prefer the argument of counsel for the defender grounded though it was on nothing more authoritative than common sense. All that the Lord Ordinary's interlocutor purports to do is to reduce the decree in the earlier action. It would require clear authority to convince me that it ought to be seen as doing more than that. The authorities quoted by counsel for the pursuers do not do that."

[22] Similar practical considerations underlie the reasoning of the Inner House in *Royal Bank of Scotland* (supra) where inferentially the decision of the court[26] makes it clear that reduction of a decree in absence would not be considered an impediment to a continuance of the action in which decree was reduced.

[23] In my opinion these practical considerations are important in determining where substantial justice rests. I would however be further of the view that there would be difficulties in this pragmatic approach if there were clear and binding authority that a final extract is conclusive of an action and renders the court functus. In considering that issue I accept, as was advanced by counsel for the defenders, that the view of all the major textbook writers on the practice of the Court of Session is that a final extract of a decree is conclusive of a process. The language of the authors in each of these texts is similar and appears to be derived from the view expressed in the oldest by date of publication, McKay (supra).

---

[26] At paragraph [42]

Despite this unanimity of view, no doubt expressing the prevalent view of procedure at the time each author wrote his work, being plainly to the effect that extracted decrees are conclusive, it is in my view noteworthy that none of the authors cite any binding authority to the effect they contend for, indeed only the chronologically earliest author, McKay, cites any authority for the proposition[27]. On consideration of the authorities cited by McKay it is apparent that they do no more than assert that this is the applicable rule, no reasoned explanation is offered. It follows in my view, with respect, that the views of the textbook writers appear to state no more than, as already noted, was the prevailing practice at the time of publication.

[24] Equally, in what I accept was a full search of relevant authority, counsel for the defender cited a number of authorities vouching the proposition she advanced. Whilst it is correct that the authorities she cited were supportive of the proposition she made it is to be noted that, in my view, none of the cases explained the proposition in a way based upon recognised principle. The authorities relied upon appear to do more than reflect what seems to have been the practice prevalent, for whatever reason, at the time of the decision, an observation which may be regarded as unsurprising given that those were all works addressing the practice of the court.

[25] Having regard to these considerations it does appear to me that the long standing practice of treating extracted decrees as final and rendering the court functus in the process is itself no more than an example of a practice which has developed, no doubt for reasons of expediency and certainty, but one which has no basis in principle. It is to be noted in this

---

[27] McKay's proposition at page 319 para 23 is: "As extract of a final decree terminates the process, which henceforth is for all purposes, except correction of clerical errors or accidental omissions, out of court…" Authority is cited as *Marquis of Louvre* v *Denny*, 28 Dec 1796, Hume's Decisions 14; *Buchanan* 5 Feb 1814, FC; *Officers of State* v *Alexander* (*supra*).

regard that the only Institutional writer who deals with extracts, is Stair who treats them as no more than probative writs which "prove what was done by the judge".[28] It may be that practice at the time when Stair "Institutions" was published regarded an extracted decree as rendering the court functus in that process, but if so he chose not to mention that in his work. That may be because he would have regarded such a matter, if the practice was then prevalent as merely procedural and having no place in his work on legal principle. An alternative explanation, admittedly speculative, is that sometime between 1693 and 1768[29] the practice of treating final extract of decree as rendering the court functus emerged. It does however seem to show that the proposition founded upon by counsel for the defender is only a matter of practice and not an established principle of Scots law.

[26] Having regard to these considerations I have concluded that an extract cannot be regarded as anything more than a document evidencing that which a court has done or ordered. As a matter of principle there is nothing which can justify treating extract as bringing a process to an end. In a practical sense an extract proves or evidences a final decree but that situation can be overcome by a subsequent judicial act as in a reduction of the decree extracted. This conclusion is, in my opinion, not only consistent with such authority as there is but is practically sensible for the reasons anticipated in the decisions founded upon by the pursuers. I accordingly conclude that in the circumstances of the present case action PD1564/12 remains extant. Procedurally it rests where it was immediately prior to the granting of the decree on 21 September 2012. It would be a matter for the pursuers to determine what procedure they took in seeking to revive this action.

---

[28] Stair "Institutions of the Law of Scotland" iv. Xlii. 10

[29] 10/3/1768 *Douglas* v *Elphinstone* (supra), earliest case cited by senior counsel for the defenders.