SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 17
P133/18

Lord Justice Clerk
Lord Malcolm
Lord Glennie

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Petition

by

THE LORD ADVOCATE

Petitioner

for

An order in terms of section 100 of the Courts Reform (Scotland) Act 2014

against

MOHAMMED ASLAM

Respondent

Appellant: Miss Thomson; Scottish Government Legal Directorate
Respondent: Party

22 March 2019

Introduction

[1] Section 100 of the Courts Reform (Scotland) Act 2014 provides that, on the application of the Lord Advocate, the Inner House may make a vexatious litigant order. In terms of section 100(2) such an order may have either or both of the following effects:

> "(a) the vexatious litigant may institute civil proceedings only with the permission of a judge of the Outer House,
>
> (b) the vexatious litigant may take a specified step in specified ongoing civil proceedings only with such permission."

Background

[2] In this petition the Lord Advocate seeks a vexatious litigant order against the respondent by which he would be prevented from (i) raising proceedings in the Court of Session, Sheriff Court, or any other inferior court, without first obtaining permission to do so from a judge of the Court of Session, in terms of section 101 of the Act; and (ii) appealing any future decision, judgment or interlocutor in certain specified proceedings without such permission.

[3] In 2008 the respondent was sequestrated, apparently for failing to pay council tax. It is clearly the respondent's belief that the charge upon which his sequestration proceeded was wrongfully obtained. As counsel for the Lord Advocate submitted, this matter has been the trigger for a decade of litigation, largely on the theme that the sequestration was unlawful or improper. The petition contains a long list of proceedings either initiated by the respondent, or in which he has asked the court to make certain orders, and which are said to establish the respondent as a vexatious litigant.

The litigations

[4] The proceedings included:

(i) Initial writ at the instance of the respondent seeking suspension of the charge; dismissed as incompetent, 12 June 2009.

(ii) Summary application at the instance of the respondent under the Administration of Justice (Scotland) Act 1972, for recovery of documents relating to his sequestration; dismissed as incompetent, 13 August 2009.

(iii) Action at the instance of the respondent for damages from Glasgow City Council for unlawful diligence; action dismissed as incompetent 2 November 2009; with the comment that even had the remedy sought been competent, the pleadings were hopelessly irrelevant. The sheriff in his judgment stated that he took the opportunity at some length to explain to the respondent the difficulty in the action, and to point out the processes which might be open to him to seek to set aside the sequestration, including reference to an action of reduction in the Court of Session.

(iv) The decision referred to in para (iii) was appealed to the Sheriff Principal who confirmed the decision of the sheriff, stating that:

> "The decree which awarded sequestration of the pursuer's estate remains valid and must be treated as such by a Sheriff or Sheriff Principal, unless recalled in terms of the statute or reduced or otherwise set aside by the Court of Session. The Sheriff Court could not therefore make an award of damages said to flow from the award of sequestration if the award of sequestration remains in force." [Para 5]

The appeal was refused (11 May 2010), as was a further appeal to the Court of Session.

(v) A further summary application at the instance of the respondent for recovery of documents, this time raised against his trustee in sequestration ; the application was dismissed as "hopelessly irrelevant", 4 September 2013.

(vi) Summary application at the instance of the respondent for orders in terms of s 3(7) of Bankruptcy (Scotland) Act 1985; dismissed as hopelessly irrelevant, 12 October 2012.

(vii) An appeal against the decision referred to at (vi); refused, 25 October 2013.

(viii) Action of reduction of the decree of sequestration, raised May 2011 in the Court of Session at the instance of the respondent; procedure roll diet April 2012 discharged at the instance of the respondent for legal aid application; a week prior to a further procedure roll diet, January 2013, counsel moved a minute of amendment changing the action to one of damages, namely in the same format as had been dismissed in the Sheriff Court in November 2009; a further procedure roll diet was fixed, and the respondent ordered to find caution of £17,000, which he did; a further amendment at the next procedure roll hearing (June 2013) changed the basis of the action to one based on breach of undertaking. The respondent's agents withdrew from acting in December 2013. A proof before answer was fixed for January 2015, but on 4 November 2014 the court made a further order for caution of £20,000. That order was reclaimed unsuccessfully, causing the proof to be discharged. A further attempt to amend was refused. A further order for caution in the sum of £20,000 was made on 24 June 2015, on the basis that standing the reclaiming motion the sum consigned was insufficient. The respondent having refused to obtemper this order, decree of absolvitor was granted, 29 July 2015.

(ix) Reclaiming motion against the decision at (viii); dismissed, it being an insurmountable obstacle that the original decision to order additional caution had been the subject of a prior unsuccessful appeal, 11 October 2016. Permission to appeal to the UKSC was refused by the Court of Session, 23 December 2016, and again by the UKSC 15 February 2018.

(x) Action for damages for negligent administration of the sequestration at the instance of the respondent against his trustee in sequestration, in the sum of £10.5 million. Action raised January 2012 and sisted until February 2017, when the respondent's 60 page minute of amendment was refused. A revised minute of amendment was refused in September

2017, and after debate in October of that year the action was dismissed as irrelevant, 17 November 2017.

(xi) Summary application at the instance of the respondent seeking recall of sequestration; first order refused 5 December 2017, the application being incompetent through being out of time.

(xii) Associated with the summary application referred to at (xi), was a further application for disclosure of documents, warrant refused as incompetent, 5 December 2017.

(xiii) Appeal against the decisions at (x) and (xi), dismissed as incompetent, 8 March 2018. The Sheriff Appeal Court commented that any further application for recall was likely to fail for the same reasons.

(xiv) Summary application for recall of sequestration in which again a warrant was refused for the same reasons as given on 5 December 2017, and upheld by the Sheriff Appeal Court in March 2018, with the warning noted at para (xiii).

(xv) Appeal against the decision at (xiv); refused for want of insistence, 21 June 2018.

(xvi) Action for damages at the instance of the respondent against the Royal Bank of Scotland, which had called up securities over certain properties owned by the respondent. In the pleadings he averred collusion between the Bank, the Council and the trustee in sequestration with the intention of damaging the respondent's business or committing fraud. Action dismissed as irrelevant, 17 October 2017. Appeal to the Sheriff Appeal Court refused 18 January 2018. Permission to appeal to the Court of Session refused 27 June 2018.

The submissions for the petitioner

[5] In support of the proposition that the respondent has habitually and persistently instituted vexatious legal proceedings and made vexatious applications to the court without

any reasonable ground for doing so, counsel for the petitioner submitted that there were certain themes which could be discerned from the various litigations or applications:

1. None of the actions raised, applications made or appeals taken by the respondent has been successful. They have all had related subject matter but have been refused as incompetent or irrelevant.

2. Repeated awards of expenses have been made against the respondent, some on the agent and client scale. No awards of expenses made against the respondent in favour of Glasgow City Council have been satisfied.

3. The respondent has demonstrated a refusal to accept judicial decisions which are unfavourable to him, by repeatedly attempting to re-litigate matters already judicially determined. He has wasted the time and resources of the court on claims which are without merit.

4. The actions or applications have involved allegations of an increasingly scandalous tone, directed towards a widening circle of individuals.

The court should be satisfied that the statutory test has been met, and should exercise its discretion in favour of granting the prayer of the petition.

Submissions for the respondent

[6] It was clear that the respondent was intent on addressing matters relating to the merits of the actions previously litigated, and in laying before the court in full his grievances against Glasgow City Council and others. We refused to allow him to address various productions which related to the merits of the various claims made in the litigations which were the subject of the petition. We declined to view these documents on the basis that they were not relevant to the issue before us. We indicated that it would be of more benefit to the

respondent to address the decisions in the cases which were listed in the petition and seek to explain to the court why they should not be viewed as vexatious, and without any reasonable grounds; and why the court should not exercise its discretion in making the order sought. The respondent did not do so.

Analysis and decision

[7] The basis upon which such an order may be made is set out in section 101(1) of the Act, namely where the Inner House is satisfied that the person in question

> "... has habitually and persistently, without any reasonable ground for doing so—
>
> (a) instituted vexatious civil proceedings, or
>
> (b) made vexatious applications to the court in the course of civil proceedings (whether or not instituted by the person)."

This test is similar to that which applied under the Vexatious Actions (Scotland) Act 1898, section 1, where the Inner House could make an order on the application of the Lord Advocate where the court was satisfied that the person in question

> "… has habitually and persistently instituted vexatious legal proceedings without any reasonable ground for instituting such proceedings."

The primary difference is that the addition of the words in section 101(1)(b) expands the type of proceedings of which cognisance may be taken in determining an application, and the restrictions referred to in *Lord Advocate* v *McNamara* 2009 SC 598 do not apply. In our view each and all of the litigations or applications listed at [4] (i) – (xvi) above come within the ambit of section 101.

[8] The characteristics of litigation which could properly be described as "vexatious" remain the same as those described in *McNamara.* Giving the opinion of the court,

Lord Reed (para 3) referred to the observations of Lord Bingham of Cornhill in *Attorney General* v *Barker* [2001] 1 FLR 759, para 19, that:

> "The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceeding may be, its effect is to subject the defendant to inconvenience, harassment and expense out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the court, meaning by that a use of the court process for a purpose or in a way which is significantly different from the ordinary and proper use of the court process."

[9] The court (para 33) went on to refer to a passage in *Lord Advocate* v *Cooney* 1984 SLT 343 where the hallmarks of vexatious litigation were described:

> "[T]he nature of the actions the respondent has raised, the persons he has convened as defenders, his purpose in using or rather abusing the legal processes to carry on a war of attrition, the hopelessness of his actions yet his persistence in pursuing them to the limits which the law allows, and the damaging effects of this conduct on his victims."

[10] We emphasise the point also made in *McNamara* (paras 36-37) that it is not enough for an individual to be classed as a vexatious litigant that actions which he has instituted, or applications made, have not succeeded or been abandoned: it is not persistent failure which is the key, rather that the failure in question has been based on there being no merit even to commence the litigation or make the application. The critical finding will be that repeated litigations and applications have failed for reasons of competence, irrelevance and the like. It is the fact that repeated actions were commenced with there being no reasonable grounds for doing so which can render them vexatious. As the court noted in *McNamara* (para 36), the conclusion that an individual litigated without any reasonable or good ground for doing so may be founded on the opinions of the judges in the cases in question. An examination of the proceedings and applications enumerated in the petition shows that in the respondent's case such a conclusion is amply warranted. The majority of the proceedings initiated by the respondent have been dismissed as incompetent. Notwithstanding, he has on several

occasions simply attempted to re-litigate the cause on the same incompetent basis despite being advised by the court that dismissal would be the result. The observations made by the judges who have determined the proceedings or applications made by the respondent have certain common themes running through them. Dismissing the proceedings referred to at para [4] (iii), Sheriff Baird, describing the pleadings as "florid and verbose" said:

> "Article 1 of condescendence sets the tone; it describes the "harmful event" in consequence of which the Appellant and his family suffered consequences, which list includes financial hardship, emotional distress, discrimination, embarrassment and humiliation, and accuses the Respondents of abuse of and exceeding their power, violation of trust, campaigning, ganging up, victimising, prejudice, discrimination, blackmail, harassment, damage to the Appellant's present and future income, business credit, making false, misleading and fraudulent statements for financial gain, making false oaths and defective sequestration … Not one word of the remaining pleadings attempts to justify any of that claim". [Paras 13 and 14]

[11] In the application referred to at para [4] (vi), Sheriff Swanson (12 October 2012) noted that:

> "[T]he application is hopelessly flawed. It is irrelevant in law in that it fails to address the correct test against which the trustee's conduct should be measured … The application is wholly lacking in specification in relation to the conduct complained of. The remedies sought in the craves against that background are also lacking in specification and in any event are not those envisaged by the Act." [Para 63]

[12] In the application referred to at para [4] (v), the same sheriff conducted an examination of the pleadings trying to identify matters of relevance:

> "What averments are made in this application as to the substance and basis for the case the pursuer proposes to make? Averments are made that 'the defender having acted maliciously, fraudulently and abuse of his position of trust as an administrator financial benefit for himself and other in a manner contrary to natural justice a fraud upon the court and fraud on the pursuer and his multimillion pound estate' … Further on in the pleadings the potential claims are variously described as 'wrongful diligence or fraud on the court' and 'a fraud and extortion on his estate, title and defamation of character assassination'. None of these averments adequately describe the action proposed. The averments range across wrongful diligence, fraud, negligence and defamation without any proper specification of any of these remedies." [Para 14]

[13] A decision of the First Division in yet another litigation (at para [4] (ix)) referred to the "protracted and changing procedural meanderings" of the respondent. A description apt to cover many of the respondent's dealings with the court is given, again by Sheriff Swanson, in her decision of 17 November 2017 (at para [4] ix):

> "[11] Mr Aslam's submissions were lengthy, rambling and wholly irrelevant to the point at issue … He was afforded two and a half hours of court time and he used that time to re-iterate his grievances with Glasgow City Council, the defender, the defender's solicitors, the defender's staff and the sheriff officer who served the charges …
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> [21] A considerable amount of court time has been taken up with different actions and challenges, many of which replicate earlier actions which have been dismissed. The repeated attempts to raise the same issues again and again show both a lack of understanding of the law and a lack of respect for the court's decisions.
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> …
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> [23] The pleadings are voluminous, repetitious and rambling and in many respects completely incomprehensible … I recognise that there are close similarities between the pleadings which have been lodged by the pursuer over the last nine years.
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> [30] [I]n *Tods Murray* v *Arakin* [2010] CSOH 90 … Lord Woolman dismissed the counterclaim noting that the defenders were seeking to use the action to "air unfounded complaints". He saw that as a just and proportionate response as to allow it to continue would place an "undue" burden on the court and the pursuers who would require to commit "enormous" resources. Whilst he recognised that all litigation places burden on the parties it is unreasonable to expect parties to shoulder those if the claim is manifestly without substance. I would adopt those remarks and use them to describe the pursuer's case in this action as an abuse of process, being a case obviously without merit and without support from an expert which is wastefully occupying time and resources.
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> …
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> [43] The pursuer's pleadings are hopelessly irrelevant and fail completely to set out a case in negligence … The pleadings contain many scandalous averments relating to fraudulent practices, bigotry, discrimination, prejudice and malice … The averments are both scandalous and irrelevant and fall to be deleted.
>
> [44] The pursuer is using this action to "air unfounded complaints" which he has made in various forms over the last nine years without success … I have no hesitation in dismissing this action as irrelevant."

[14] The respondent's attitude when decisions have gone against him has frequently been to resort to abuse of the judicial office holders involved. In his opinion (25 October 2013) in the appeal at para [4] (vii) the Sheriff Principal recorded (Para 6) that:

> "... previous experience of the appellant has shown that he is singularly unable to refrain from advancing a tirade of abuse directed at the trustee, his solicitor, and also, I regret to say, the court itself. Ultimately, instead of confronting the Sheriff's approach to the relevancy and specification of the application itself, the appellant's oral submissions were reduced to allegations of fraud, complicity and criminality on the part of almost anyone associated with the sequestration proceedings taken against him. As it happens, such allegations themselves appear to be wholly lacking in specification."

[15] In several appeals the sheriffs at first instance are described as acting unfairly, abusing and misusing their positions and failing to carry out the responsibilities of their judicial oaths. One sheriff is said to have failed to take account of an authority, for "ulterior motives".

[16] The repeated flouting of court orders, and a failure to recognise the effect of decisions of the court in respect of the incompetent nature of certain applications, making repeat attempts of the same kind doomed to failure, are repetitive features of the respondent's conduct. The bringing of actions on exactly the same basis as one which has been dismissed for want of competence is an example. When ordered, in the Court of Session action which was appealed to the First Division, to find caution, the Lord Ordinary (para 17) noted that the respondent:

> "made it clear … that he did not have difficulty in putting up the required amount of caution … His position was simply that he was not willing to find caution."

Repeated awards of expenses against him remain unsatisfied.

[17] In New Zealand, in *Attorney General* v *Collier* [2001] NZAR 137, para 32, (referred to with approval in *McNamara)* the court noted that:

> "Vexatious litigation is frequently accompanied by complex pleadings, a widening circle of defendants as litigation proceeds, frequency of striking out of part or all of the statements of claim, inability to accept unfavourable decisions, escalating extravagant or scandalous claims (frequently involving allegations of conspiracy or fraud) and failure to pursue proceedings once instituted. The authorities cited to us from other jurisdictions demonstrate the consistency with which characteristics such as these are present in vexatious litigation."

These words might have been written to describe the present respondent.

[18] On the basis of the narrative we have given, and in particular the observations made by the judges in the respective cases, all as quoted above, we have no hesitation in concluding that the requirements of section 101(1) have been established. The only remaining question is whether we should exercise our discretion in the interests of justice to make the order sought. Again, we have no hesitation in doing so. The respondent has had no success in obtaining any of the remedies sought, in each case because the applications were irrelevant or incompetent. In several instances this must have been clear to him at the outset, given that prior applications on the same grounds had been refused as incompetent. The claims have been directed against an ever increasing circle, and the averments have become progressively more scandalous. The respondent has refused to accept judicial decisions which have gone against him, and has failed to pay awards of expenses. He has point blank refused to lodge caution when ordered to do so. In all the circumstances we are satisfied that it would be appropriate to grant the order sought by the Lord Advocate.