SHERIFF APPEAL COURT

[2016] SAC (Civ) 11
SAC/2016/XO113/16

OPINION OF THE COURT

delivered by SHERIFF N C STEWART

in appeal by

S & P PROPERTY COMPANY LIMITED

Pursuers & Appellants

against

TAYLOR & FRASER LIMITED

Defenders & Respondents

4 November 2016

Introduction

[1] This appeal arises from the sheriff's decision in the Ordinary Court at Paisley on 6 June 2016 to grant the defenders' opposed motion in the following terms: to fix a one day preliminary proof before answer restricted to the question of interpretation of the Compromise Agreement dated 7 and 11 June and 14 October 2013 and to allow the preliminary proof before answer to be heard by Sheriff Robert D M Fife.

[2] The defenders enrolled a motion in these terms following upon the issuing of an interlocutor of the sheriff principal dated 15 April 2016, allowing an appeal against interlocutors of 14 October and 7 December 2015 dismissing the action and allowing,

"parties a proof before answer on their averments and reserves parties pleas-in-law...". The sheriff principal also issued a written judgment. It is central to this appeal whether or not that interlocutor of 15 April 2016 should be properly understood, having regard to the accompanying note, as providing for a restricted proof before answer in the terms set out in the interlocutor of 6 June 2016, or whether that subsequent interlocutor was both incompetent and involved an unreasonable and inappropriate exercise of discretion.

[3] The pursuers were successful in their argument at appeal that the sheriff had erred in dismissing their claim for payment of sums due under a compromise agreement entered into by the parties and dated 7 June and 14 October 2013 on the basis that the pursuers had failed to direct a claim against an individual, Scott Taylor, whose exercise of discretion was responsible for the denial of that payment. The debate had focused primarily on the interpretation of certain clauses of the Compromise Agreement. The sheriff concluded that it could not be implied that Mr Taylor was an agent for the defenders and that Mr Taylor having determined that the lump sum provided for on certain conditions should not be paid, a decision he was entitled to take at his sole discretion, there was no obligation on the defenders to make payment of the lump sum to the pursuers and that the defenders were not in breach of contract. The pursuers challenged that determination before the sheriff principal.

[4] At paragraph 32 of his note, the sheriff principal summarises the argument before him in the following terms:

> "The question to be answered in this appeal is straightforward: do the words "at the sole discretion of Scott Taylor" as they occur in clause 2.3 of the Compromise Agreement bear a meaning which may give S & P a right of action against the defenders, where Mr Taylor decides that the lump sum should not be paid?"

Again, at paragraph 41:

> "As discussed the question to be resolved is whether the sheriff was correct to find that the phrase "at the sole discretion of Scott Taylor" is plain and unambiguous in granting the discretion to him as an individual to determine if the conditions for the payment of the lump sum are met or not. If so, that obviates the need to consider other interpretive tools"

[5] He concludes at paragraphs 42 and 43:

> ".... But here it is necessary to identify who Scott Taylor is, for he is not designed. To ascertain who Scott Taylor is requires background knowledge. His name on its own does not allow for the contract to be clear and unambiguous. The only reference to him is in clause 2.3. The lack of full specification of Scott Taylor requires evidence of the parties' background knowledge to enable him to be identified. The court requires to consider background knowledge to identify Scott Taylor....."

> "...Once it becomes necessary to have regard to the parties' background knowledge simply to identify Scott Taylor, the court will be assisted by evidence of the parties' background knowledge to interpret the contract. This will enable the court to resolve in what capacity Scott Taylor is being asked to exercise his discretion"

He goes on to consider whether the pursuers have sufficient averments on record to allow the court to find that Scott Taylor was acting as an agent of the defenders in exercising his discretion. He concludes that: "There are clearly difficulties ahead for the S & P in this action but they are entitled to a proof before answer".

[6] The defenders thereafter enrolled a motion in the terms set out above. It is clear from the note provided by the sheriff that his initial concern that he might not have the power to vary the sheriff principal's interlocutor was overcome by his reference to and interpretation of the sheriff principal's note. He agreed with the submission made by Mr Garrity, who also appeared before him, that it was clear from paragraph 42 of that note that the sheriff principal accepted that the interpretation of the phrase "at the sole discretion of Scott Taylor" was the crux of the case and could only be determined by the court hearing evidence on the question of interpretation of the said agreement. As the sheriff sets out at page 3:

> "The Sheriff Principal, at paragraph 5 of his judgement, clearly identifies that the issue to be determined at Proof is the interpretation of clause 2.3 of the Compromise Agreement".

He accordingly ordered proof before answer restricted to the interpretation of the Compromise Agreement.

[7] Mr Thomson on behalf of the pursuers attacks both aspects of the interlocutor of 6 June 2016. Firstly, he maintains that the interlocutor is manifestly incompetent insofar as it seeks to allow a proof before answer on a restricted issue and, secondly, he challenges it as involving an unreasonable and inappropriate exercise of discretion insofar as it directed that the proof before answer was to be heard before Sheriff Fife. On behalf of the defenders, Mr Garrity, whilst defending the sheriff's allocation of a restricted proof before answer, recognised that this court need only consider the challenge to the remit to the named sheriff if it determined that the appeal directed towards the allowance of a restricted proof before answer be refused, since it was a matter of agreement that any benefit arguably achieved by such a move would not apply if an unrestricted proof before answer was allowed.

[8] I am grateful to counsel for their very careful submissions which I found of great assistance. I hope I do no disservice to either if I describe the submissions of Mr Garrity as reflecting a desire that the court adopt a more pragmatic approach to a situation for which he was unable to pray in aid much by way of legal authority. In essence, his position, as I understood it, was to refer me to the whole terms of the sheriff principal's note and to invite me to take the view that the sheriff principal's clear intention was for parties to lead evidence restricted to those aspects which formed the subject of the debate only. The interlocutor should therefore be understood as giving effect to the decision of the sheriff principal as discerned from his note. He underlined the length and cost of hearing an unrestricted proof before answer which would include evidence in relation to clause 13 of

the Compromise Agreement and necessarily involve consideration of the history of contracts all as set out in article 5 and 6 of condescendence. None of this featured in the sheriff principal's note which was solely concerned with averments in articles 3 and 4. He pointed out the potential for much of such evidence to be unnecessary were the court to come to the view that there was no evidential support for the pursuers' contention that Scott Taylor was in fact the agent of the defenders. During the hearing of the motion, when the pursuers were asked to state what evidence they might lead in support of their bold averment that Scott Taylor was acting as an agent of the defenders, no information was provided. He urged me to consider the very close connection between the wording of the sheriff principal's note and that of the interlocutor. He submitted that there was nothing incompetent about a sheriff using his discretion to give effect to his understanding of the sheriff principal's interlocutor. It had been left up to the defenders to enrol a motion to seek further procedure following upon the issuing of the sheriff principal's interlocutor.

[9] Mr Thomson was able to refer the court to a number of cases which generally supported the basic proposition set out in McPhail, Sheriff Court Practice, (3rd edition) at para 5.86.

> "The note is not part of the interlocutor. While it may explain the interlocutor, it cannot control or limit its effect except in very special circumstances".

[10] It was not suggested by either party that special circumstances of the type sufficient to control or limit the interlocutor of 6 June 2016 existed in this case.

[11] He referred to the obiter comments of Lord Guthrie in *Forbes* v *Forbes Trustees* 1957 SC 326 (at 337) who rejected a submission that he was bound, as the Lord Ordinary hearing a proof before answer, by the opinion expressed by the Lord Ordinary who had allowed that proof after debate, in the following terms:

> "In my opinion, the submission is unsound. The decision of a Court is contained in its interlocutor. The opinion of the Judge is merely explanatory for the reasons for his decision"

[12] In the present case, he submitted, the decision of the sheriff to dismiss the action was made on the basis that he determined that the pursuers were bound to fail because their construction of the Compromise Agreement was faulty. That was the only issue the sheriff decided and the appeal to the sheriff principal was taken against that. It was therefore not tenable for the defenders to place reliance on the fact that the sheriff principal does not address wider aspect of any proof as being indicative of some intention to restrict proof, since the absence of any discussion of the wider issues simply reflects the fact that he was not asked to consider the wider position. The sheriff principal was asked to allow a proof before answer and did so. No express or implied request was before him seeking a restricted proof.

[13] Further, the interlocutor of the sheriff principal was in proper form. *McPhail* (supra) at para 8.55 sets out:

> "If certain averments are to be excluded from probation, or if the proof is to be before answer or a preliminary proof restricted to certain averments, that should also be specified in the interlocutor allowing proof. Where both parties make averments and are allowed a proof, the interlocutor in modern practice is "Allows both parties a proof of their respective averments ".

Again, under reference to *Dobie, Law and Practice of the Sheriff Courts in Scotland* (1952) page 182:

> "If an open proof is not allowed the particular restriction of the inquiry should be set forth in the interlocutor, whether the restricting is as regards the subject matter or the form of the proof".

Finally, at page 248: "It is not competent to issue a second interlocutor modifying or explaining an earlier one".

[14] How can it be, asked Mr Thomson, that we have two interlocutors in this case ordering a proof before answer? Either the sheriff principal's interlocutor had effect or it didn't. If it did not order proof before answer, then the second interlocutor must necessarily be modifying the first.

[15] I have considerable sympathy for this view. I was not impressed by the suggestion made on behalf of the defenders that the sheriff was not engaging in a restriction or amendment of the earlier interlocutor but simply ordering a proof before answer as he is entitled to do in terms of OCR 29.6(1). It is self-evident that in pronouncing a second interlocutor restricting the proof before answer ordered in terms of the earlier interlocutor, a modification is being effected. I understood Mr Garrity's position to be that the second interlocutor was rather an implementation of the earlier one, "to give it proper effect". I do not accept that. No such implementation was required by law or by practice. The competency, or clarity, of the interlocutor of 15 April 2016 was not challenged. Central to his thesis is, must be having regard to the authorities set out above, that the sheriff principal failed in his interlocutor to give effect to the intention to be gleaned from his accompanying note, yet the defenders fail to take any steps to correct or set aside that interlocutor. The defenders' position, in my view, lacks coherence.

[16] The case of *BP Exploration Operating Company Limited* v *Chevron Shipping Company*, unreported 13 November 2002 is of assistance. It arises directly out of the implementation of a judgement of the House of Lords by interlocutor of the Inner House that parties be allowed a proof before answer of all their averments. A motion was enrolled by the defenders in the action seeking a separation of proof in respect of certain issues from others and was heard by the Lord Ordinary (Hamilton). In rejecting the defender's submissions that an order separating issues in the actions into separate proofs would be a mode of

implementing the order of the House of Lords, not an addition to or variation of it, Lord Hamilton took the view that the motions were incompetent, that the interlocutor of the Inner House implementing the disposal of the House of Lords "is essentially administrative in character. The Inner House cannot vary or add to the House's disposal. *E fortiori* a Lord Ordinary cannot do so."

The Rule of Court in question (36.1) is in similar terms to OCR 29.

[17] Whilst recognising that decisions of the House of Lords require to be given effect to by an interlocutor of the Inner House, in a way that is not always required of interlocutors of a sheriff principal, Mr Thomson recommended Lord Hamilton's rejection of the argument that a lower court could modify or alter the interlocutor of the higher court as a particular example of a broader principle – that it was incompetent for a sheriff to enact a sheriff principal's interlocutor by pronouncing an interlocutor in similar terms. All that was required of the sheriff when faced with the sheriff principal's interlocutor was to fix dates for the proof before answer provided for in the interlocutor.

[18] He also gained support from the comments of the Lord Ordinary at paragraph 8 of his Note:

> "In the present case, while no question of separate proofs was apparently raised before the House of Lords, their Lordships' disposal dealt with future procedure including the making of an order allowing the parties..... a proof before answer of all their averments. That order cannot, in my view, be regarded simply as a finding that the pursuer's averments are... habile for inquiry. It determined the form of that inquiry, namely, by a proof before answer of all these averments. That on a fair reading in my view, imports a single inquiry by way of proof before answer. The form of inquiry cannot be said to have been outwith the scope of the Lordships' order, even though any question of separate proofs was not expressly addressed before them. If the defenders had wished to keep open the possibility of separate proofs, it was incumbent on them, in my view, to raise that matter in the House of Lords".

[19] It was a matter of agreement that no such request had been made by either party in the present case to the sheriff principal in either written or oral submissions. I was not impressed by the argument advanced on behalf of the defenders that in submitting in written arguments placed before the sheriff principal, " a proof before answer in order to lead evidence as to how the Compromise Agreement is to be construed (by reference to the pursuer's averments of fact)", the defenders were "in effect.. inviting..." him to award a restricted proof before answer.

[20] Mr Thomson submitted that his researches had not uncovered any case in which a sheriff or Lord Ordinary has pronounced an interlocutor which has restricted the interlocutor pronounced by the appellate court. He invited me to take the view that that was because the proposition founded on by the pursuers was elementary.

[21] Some support can be taken for that view from Lord Hamilton's insistence, in the context of dealing with the merits rather than the competency of the motion before him, that the appropriate stage at which to apply for an order for a restricted or separated proof is when an order for proof is first made. Mr Garrity was certainly unable to point to any authority which was supportive of his position.

[22] Mr Thomson invited me to take the view that just as the Inner House was acting administratively to apply the House of Lords' decision, the function of a sheriff acting in implement of a sheriff principal's interlocutor is an administrative one. Conscious that the discussion before me centred on the specifics of the interlocutors pronounced in this case, I hesitate to express a view in more general terms. Nonetheless, I am persuaded that in the circumstances of this case that is the correct view.

[23] Mr Garrity took no issue with the incompetence of any variation of or addition to the interlocutor of a superior court as set out in *BP Exploration Operating Company Limited*. He

did however seek to distinguish it on the basis of differences in the terms of the interlocutors involved. The interlocutor pronounced after debate before the Lord Ordinary allowed a proof before answer of the parties averments on record in the three actions before him. That interlocutor was successfully reclaimed to the Inner House, but was reversed on appeal to the House of Lords. Lord Hope's speech deals most fully with the orders it is proposed to make. It is clear from paragraph 47 of his speech that he specified that parties would be allowed a proof before answer of **all** (my emphasis) their averments. (*BP Exploration Co Ltd* v *Chevron* 2002 SC (HL) 19 at 34). In the current case, he submitted, the sheriff principal's interlocutor does not include any such clarification as 'all' or 'entire' and in the present there is a clear connection between the wording of the sheriff principal's note and his interlocutor.

[24] I regret I was not impressed by that argument. The interlocutor pronounced by the sheriff principal is in standard form. The inclusion of any such quantification is unnecessary and would constitute an innovation in form. Lord Hope's reference to 'all' does not of course take place in an interlocutor but in a passage from his speech in which he contrasts the order he proposes should be made in two of the three cases before the House with the other in which he proposes to exclude certain averments from probation in the proof before answer he otherwise allows. That is, he allows proof before answer on all the remaining averments in both actions. Nothing, in my view, turns on his inclusion of 'all' which simply operates to distinguish one case from others in which no averments have been excluded. In particular, it places no additional requirement on the lower court which is bound to enact the disposal of the House of Lords. It is clear from a reading of the speeches, and from Lord Hamilton's analysis at para 8 of his opinion, that no question of separate proofs was raised before the House of Lords. So, 'all' is not used to distinguish the chosen disposal from a more restricted one mooted by one of the parties.

[25] The same situation pertains in the present case. Neither party sought a restricted proof at any stage in the appeal before the sheriff principal. That concession was made by Mr Garrity to this court. The issue was not live before the sheriff principal. Had it been, he would have dealt with it expressly. If he felt unable to for whatever reason then, just as mooted by Lord Hamilton at para 8, he could have reserved power to the sheriff to deal with such an application. He did not do so. On the contrary, Mr Thomson insists that he, on behalf of the pursuers, specifically requested a proof before answer on all averments. In the absence of any such reservation, the role of the sheriff was clear and was limited in the sense outlined by Mr Thomson, and he strayed beyond those limitations and in doing so, erred in law.

[26] Given my determination that the order for a restricted proof cannot stand and given the concession given by Mr Garrity that no advantage would attach to Sheriff Fife hearing an unrestricted proof before answer, I do not require to address at any length the submissions made by parties in respect of the appointment in the interlocutor of Sheriff Fife to hear that proof. I will however note the assurance given by Mr Thomson that there was no intention of suggesting that Sheriff Fife was in any way disqualified from hearing proof in this action. His criticism was directed solely at what he described as the "unprecedented" and unnecessary nature of the specific nomination.

[27] Accordingly, I shall allow the appeal. The interlocutor of 6 June 2016 shall be recalled and the cause remitted to the sheriff to proceed as accords. I am asked to make it clear that this will involve the fixing of dates for the diet of proof before answer allowed in terms of the sheriff principal's interlocutor of 15 April 2016.

[28] Mr Thomson sought an award of expenses in respect of this appeal, in respect of the motion heard on 6 June 2016 and in the expenses of the debate which expenses remain

outstanding after the recall of the sheriff's interlocutors of 14 October and 7 December 2015. Given the concession made by Mr Garrity that the pursuers would be entitled to the expenses sought, if successful in this appeal, I shall make such an order.