FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2017] CSIH 70
CA137/14

Lord President
Lord Brodie
Lord Malcolm

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the reclaiming motion

PROSPECT HEALTHCARE (HAIRMYRES) LTD

Pursuers and Respondents

against

KIER BUILD LTD

Defenders and Reclaimers

and

CARILLION CONSTRUCTION LTD

Third Parties

Pursuers and Respondents: Currie QC, MIH Hamilton; Harper MacLeod LLP
Defenders and Reclaimers: Lord Davidson QC, DM Thomson QC; Shepherd & Wedderburn LLP
Third Parties: Borland QC; Brodies LLP

17 November 2017

Introduction

[1] This is an objection to the competency of a reclaiming motion which is designed to review not the interlocutor reclaimed against but an earlier interlocutor. The latter refused a motion by the defenders to find, *inter alia*, the pursuers liable for the expenses which the

defenders were required to pay to the third parties. The motion therefore concerns the scope of RCS 38.6(1), which submits all interlocutors, previous to that reclaimed, under review. This in turn requires an analysis of the full bench decision in *McCue* v *Scottish Daily Record and Sunday Mail* 1998 SC 811 and *dicta* in two more recent determinations (*John Muir Trust* v *Scottish Ministers* 2017 SC 207 and *Clark* v *Greater Glasgow Health Board* 2017 SC 297).

Background

[2] In March 1998, the pursuers entered into a contract with a National Health Service Trust to design and construct Hairmyres Hospital and thereafter to make it available to the Trust for a period of about 30 years. At about the same time, the pursuers contracted with the defenders, whereby the defenders were to design and construct the hospital. This contract provided that the defenders would be liable to repair, replace or remedy "structural defects" which appeared in a ten year period following, in short, the expiry of one year following the hospital's commissioning. The defenders sub-contracted certain elements of the construction, notably the installation of the hot water system, to the third parties. The sub-contract imposed an obligation on the third parties to carry out the works as required by the main contract. The third parties were liable to make good defects which the defenders would require to remedy.

[3] In July 2014, the pursuers raised an action against the defenders averring that the pipework of the hot water system was defective and required to be replaced. The problem was said to amount to a structural defect for which the defenders were liable. The pursuers sought replacement of the pipework or payment of £11 million in damages. The pursuers' case was that the pipework had become "embrittled". That was not itself disputed. In pleadings, which are best described as intricate, the pursuers maintained that fire collars,

which are small circular cuffs used when the pipes were located through fire walls, contained certain esters which penetrated or contaminated the pipes and caused the embrittlement. The defenders (and in due course the third parties) maintained that, on the contrary, the embrittlement was caused by natural aging. It was not a structural defect.

[4] In November 2014 the defenders introduced the third parties, claiming relief from them in the event that the pursuers succeeded in the main action. The pursuers did not direct their claim against the third parties. In September 2015 the pursuers' expert noted problems with the cold water pipework. This could not have been caused by the esters. The problems were attributed to poor manufacturing. A proof, which had been scheduled for the following month, was discharged to enable the pursuers to amend and the defenders and third parties to respond to this change of tack. A new diet was fixed for 14 June 2016. Meantime, the defenders and third parties advanced an alternative cause of the embrittlement; being the degradation of a rubber toughening agent and the loss of calcium carbonate. Shortly before the new diet, the pursuers' expert expressed agreement with that cause. The pursuers' case thus fell apart. The new proof was discharged.

[5] On 8 June 2016, the pursuers intimated that they intended to abandon, but seek dismissal rather than absolvitor, in terms of RCS 29.1(1)(b). The inevitable result of such an application, if granted, would be that the next interlocutor would not dispose of the action but would require further procedure. The pursuers duly lodged a Minute of Abandonment and enrolled for: the minute to be received; the pursuers to be found liable to the defenders in the "full judicial expenses" of the action; and for the defenders to lodge an account. None of this was opposed.

[6] The third parties, rather than the defenders, enrolled for "disposal" of the proceedings against them "on the same basis as is set out in [RCS] 29.1(1) – (3)". This

unusual motion was thus that the third parties sought "dismissal" of the third party notice with full judicial expenses to be paid to them by the defenders. The reason for proceeding in this way is not clear; given that dismissal of the main action, at least in the circumstances of this case, would automatically end the third party proceedings. The third parties sought an award of expenses against the defenders only. This motion was opposed by the defenders on the general basis that the pursuers should be directly liable for all the expenses, including those of the third parties. As enrolled, the opposition read that no award should be made against the defenders in favour of the third parties "without the pursuer ultimately being held liable to meet those expenses".

[7] The defenders' own motion proceeded upon a narrative concerning the progress of the action and a statement that it would be "entirely inequitable for the defender to be obliged to meet the third party's expenses". They sought a direct award of the third parties' expenses against the pursuers or an alternative finding that the pursuers should pay to the defenders "a sum equivalent" to those expenses of the third parties for which the defenders were found liable. The defenders proposed a third option whereby there would be a finding that some of the third parties' expenses, such as those caused by the discharge of the proofs, should be the subject of a direct award against the pursuers.

The Interlocutors of 15 June 2016 and 14 July 2017

[8] By interlocutor dated 15 June 2016, the commercial judge, on the pursuers' unopposed motion, allowed the pursuers to seek dismissal of the action in terms of RCS 29.1(1)(b) on condition that they paid "full judicial expenses" to the defenders. The pursuers were found liable to the defenders in those expenses. The interlocutor records (para 2) that the motion, to find the pursuers liable to pay the defenders the expenses (or any part

thereof) which the defenders would require to pay to the third parties, was refused. There was no separate treatment of any motion for a direct finding of expenses against the pursuers in favour of the defenders. The interlocutor records (para 3) that the defenders were allowed to "abandon" the action against the third parties, and to seek dismissal only, on condition that the defenders pay full judicial expenses to the third parties. The defenders were found liable to pay these expenses. The interlocutor records that this was on the unopposed motion of the defenders "made at the bar"; albeit that it had initially been the third parties' motion. The action was "*quoad ultra*" continued for the lodging of accounts and "for final disposal of the action and the third party proceedings".

[9] The commercial judge records that he applied *Alfred Bartlett & Sons (Airdrie)* v *Gilchrist & Lynn* [2010] CSIH 33, in which it was said (at para [12]) that it followed, from the general rule that the cost of litigation falls on the person who has caused it, that an unsuccessful party's liability is limited to paying the expenses of the party against whom he has directed his cause. He could not ordinarily, and in the absence of some unreasonable behaviour, be liable for the expenses of others. The judge rejected the contrary approach adopted in England (*LE Cattan* v *A Michaelides & Co* [1958] 1 WLR 717 at 720) and the related contention that the principles set out in *Alfred Bartlett & Sons (Airdrie)* acted as a discouragement of defenders introducing third parties. Rather, he considered that *LE Cattan* would discourage litigation in general, if pursuers ran the risk of having to pay the expenses of parties further down the contractual chain, against whom they had directed no claim.

[10] The commercial judge refused leave to reclaim the interlocutor of 15 June, partly on the basis that the general principles were not in doubt and partly because the defenders would have an opportunity to reclaim when the final interlocutor was pronounced. As matters transpired, the pursuers were to argue that the latter was incompetent.

[11] By interlocutor dated 14 July 2017, the commercial judge dismissed the action and the third party claim; the respective accounts of expenses having been paid. The third parties' expenses had been taxed at a somewhat astonishing £2.1 million.

The Reclaiming Motion

[12] The defenders have enrolled a motion for review of the final interlocutor of 14 July 2017. They have, helpfully, lodged draft grounds of appeal explaining the basis for the review. It is clear from this that the principal purpose of the reclaiming motion is, first (grounds 3 and 4), to challenge the commercial judge's refusal to find the pursuers liable to the defenders in respect of the defenders' liability to the third parties. The broad contention remains that the reasoning in *Albert Bartlett & Sons (Airdrie)* (*supra*) is wrong and that in *LE Cattan* (*supra*) is correct.

[13] In the fifth ground of appeal, however, there is a more radical, albeit alternative, contention that the commercial judge erred "in finding the defender liable to the third party in the entirety of the expenses incurred by the third party in that [he] ought to have found … the pursuer liable to the third party in" the expenses caused by the discharge of the proofs and the relative amendment procedure. This appears to be a somewhat oblique attempt to re-introduce the idea of a direct finding of expenses against the pursuers for payment of the third parties' expenses, albeit that the primary contention is directed towards the commercial judge's failure to find the pursuers liable to the defenders in respect of the third parties' expenses.

[14] The pursuers and third parties have lodged notes of objection to the competency of the reclaiming motion in terms of RCS 38.12(1). In view of the importance of the matter, it was determined that these objections should be heard by a *quorum* of three judges.

Submissions

Pursuers and respondents

[15] The pursuers maintained that it was clear that the true intention of the defenders was not to review the interlocutor of 14 July 2017, which disposed of the whole subject-matter of the cause, but that of 15 June 2016. RCS 38.3(6) provided that an interlocutor pronounced on the Commercial Roll, other than an interlocutor disposing by itself or taken along with previous interlocutors of the whole subject-matter or merits of the cause, could be reclaimed only with leave. Although RCS 38.6(1) provided that the general effect of reclaiming was to submit to the review of the Inner House all previous interlocutors, that was subject to certain exceptions.

[16] The first exception was where the prior interlocutor was "immune" from review by virtue of another rule (*McCue* v *Scottish Daily Record and Sunday Mail* (*supra*) at 820). In the absence of leave to reclaim, the prior interlocutor became final and was not subject to review. This interpretation was consistent with the purpose of RCS 38.3(6) and RCS 38.6(1) as indicated by their origins in section 52 of the Court of Session Act 1868. The latter had provided that the opening up of prior interlocutors was to allow the court to review the interlocutor reclaimed without hindrance from the terms of any prior interlocutor. If *McCue* had been a commercial cause, the reclaimer in that case would have failed.

[17] The second exception was that it was not competent to seek to challenge an interlocutor which had nothing to do with the merits of the interlocutor reclaimed (*John Muir Trust* v *Scottish Ministers* (*supra*) at para [57]; *Clark* v *Greater Glasgow Health Board* (*supra*) at para [39]). Although the defenders had formally opposed the granting of the final interlocutor, they had advanced no substantive grounds for doing so. The defenders were

using the reclaiming motion as a device to seek a review of a prior interlocutor for which leave to reclaim had been sought and refused. The defenders' only objection was to the manner in which the court had dealt with expenses. That was not a matter connected to the final disposal of the action.

Third parties

[18] The third parties adopted the terms of the pursuers' objection. In addition, they argued that the court would not normally entertain a reclaiming motion in respect of an interlocutor pronounced on a reclaimers' own motion (*Jongejan* v *Jongejan* 1993 SLT 595 at 597). That part of the interlocutor, which had found the defenders liable to the third parties for the full judicial expenses, was recorded as being on the "unopposed motion of the defender made at the bar". It was not now open to the defenders to seek a review of that finding. The interlocutor of 15 June had been acted upon by the defenders and the third parties. It had been fully implemented. There had been a contested taxation and the Auditor had fixed the liability, which had now been paid. The idea that this process could be unwound defied "good sense" (*Watson* v *Russell* (1894) 21 R 433).

Defenders and reclaimers

[19] The defenders countered that the competency of a reclaiming motion had to be determined in the light of the whole circumstances of the case (*McCue* v *Scottish Daily Record and Sunday Mail* (*supra* at 821). The liability of the defenders to pay the third parties' expenses totalled £2.1 million. It would be an affront to logic and common sense that it could not be subject to review. It was said initially that the defenders were only challenging that part of the interlocutor (para 2) of 15 June 2016 which refused to find the pursuers liable to pay to the defenders those expenses which the defenders were liable to pay the third

parties. They were not challenging that part (para 3) which made the defenders liable in expenses to the third parties. However, this position appeared to vary in that, at least at one point, it was said that the contention had been that the pursuers ought, on the defenders' motion, to have been found directly liable to pay the expenses of the third party.

[20] In *McCue* v *Scottish Daily Record and Sunday Mail* (*supra at* 820 *et seq*), the court had rejected any argument that reclaiming, with a view to bringing earlier interlocutors under review, was incompetent. The only aspect of the interlocutor of 15 June, which could not competently be brought under review, was the part involving the refusal of leave to reclaim.

[21] The statement in *John Muir Trust* v *Scottish Ministers (supra)* that it was not competent to challenge a prior interlocutor, which had nothing to do with the merits of that reclaimed, was not supported by *McCue* v *Scottish Daily Record and Sunday Mail* (*supra*). In any event, the interlocutor of 15 June 2016 had made abandonment conditional on payment of the expenses. In that respect, it was related to the interlocutor of 14 July 2017 in which the court gave effect to the abandonment with dismissal procedure.

Decision

[22] RCS 38.3(6) provides that an interlocutor pronounced on the Commercial Roll, other than one disposing, "either by itself or taken along with a previous interlocutor, of … the whole subject matter … or merits of the cause" (RCS 38.2.(1)), may be reclaimed only with leave of the commercial judge. The purpose of this rule is to enable commercial actions to progress efficiently to a conclusion in the Outer House without undue interruption; not to confer a general immunity from review following final judgment.

[23] RCS 38.6.(1) provides that a reclaiming motion shall have the effect of submitting to review all previous interlocutors. The intention of this rule, as with its origins in section 52

of the Court of Session Act 1868, is to allow the appellate court "to do complete justice". This does not mean that, where there is a competent motion for review of a final interlocutor, every prior interlocutor can be opened up. The scope for review is limited (*Clark* v *Greater Glasgow Health Board* 2017 SC 297, LP (Carloway), delivering the Opinion of the Court, at para [37], following *McCue* v *Scottish Daily Record and Sunday Mail* 1998 SC 811, LJC (Cullen), delivering the Opinion of the Court, at 814-5). There are limits in relation to procedural interlocutors where there has been acquiescence or the interlocutor has been acted upon as a basis for further proceedings (eg *Clark* (*supra*)). Subject to the qualification that, in certain respects, the issue may not be one of pure competency (*McCue* (*supra*) at 824), as a generality it is not competent to seek to challenge an interlocutor which "has nothing to do with the merits of the interlocutor which is subject to the reclaiming motion" (*John Muir Trust* v *Scottish Ministers* 2017 SC 207, LP (Carloway), delivering the Opinion of the Court, at para [57]). This has to be read, however, along with the caution against making general statements about the ascertainment of the relevant determinative facts in *McCue* (*supra* at 821). Importance requires to be attached to the relationship between the prior interlocutor and the final judgment (*ibid*).

[24] In this case, there is a competent reclaiming motion against the interlocutor of 14 July 2017 which dismissed the action, and the third party claim, "in respect that the defender's [and third party's] expenses have been paid". That interlocutor was dependent upon, and interlinked with, that of 15 June 2016 which determined the liability of the parties for the expenses of the cause. There is a direct relationship between the two interlocutors. As distinct from the position in *John Muir Trust (supra*), the earlier interlocutor was a precursor to the later one. For reasons similar to those in *McCue* (*supra*), where an interlocutor competently reclaimed against is dependent upon an earlier one, it will be competent, in

terms of RCS 38.6.(1), to review that earlier decision. For these reasons, the pursuers' note of objection is repelled.

[25] It is clear that, despite some variation in stance (*supra*), the defenders moved at the bar for the court to "dismiss" their third party notice upon payment by them of the third parties' full judicial expenses. The defenders stated in terms that they did not challenge paragraph 3 of the interlocutor of 15 June 2016 which made that decerniture expressly "on the unopposed motion of the defender". Since that part of the interlocutor was ultimately made upon their own motion, it is not competent for the defenders to seek to review it (*Jongejan* v *Jongejan* 1993 SLT 595, LP (Hope), delivering the Opinion of the Court, at 597, following *Watson* v *Russell* (1894) 21 R 433, LP (Robertson) at 434). It follows that the third parties' objection to the reclaiming motion will be sustained in so far as it relates to a challenge to paragraph 3 of that interlocutor. In reaching the conclusion, the court has not overlooked the *dictum* in *McCue* v *Scottish Daily Record and Sunday Mail* (*supra* at 824) that there may be abnormal features which would allow the court to review an interlocutor pronounced on the motion of a reclaimer. No such features are present in this case.

[26] The reclaiming motion will proceed as between the pursuers and defenders in relation to the challenge by the defenders to the Lord Ordinary's refusal, in paragraph 2 of the interlocutor of 15 June 2016, to find the pursuers liable to the defenders in the expenses found due by the defenders to the third parties.