SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2018] CSIH 32
CA47/16

Lord Justice Clerk
Lord Brodie
Lord Malcolm

OPINION OF THE COURT

delivered by LORD MALCOLM

in the reclaiming motion

by

JAMES MICHAEL SHANLEY

Pursuer and Reclaimer

against

CLYDESDALE BANK PLC

Defender and Respondent

Pursuer and Reclaimer: Party
Defender and Respondent: Barne QC, MacGregor; CMS Cameron McKenna Nabarro Olswang LLP

27 April 2018

[1] Mr Shanley (the pursuer) has raised an action against the Clydesdale Bank plc (the bank) seeking damages running into several million pounds. The action was raised in 2014. In 2016 it was transferred, of consent, to the commercial roll. For present purposes the details of the action do not matter, but, essentially, the pursuer alleges that he relied upon negligent advice provided by a banking manager, and that this caused him substantial financial loss. A case is also made under the Financial Services and Markets Act 2000

(Regulated Activities) Order 2001. While the action, at least on the merits, appears to be relatively simple and straightforward, the pleadings are lengthy and detailed. We were told that the pursuer has been represented by seven different sets of agents. Whatever the reason for this, it is likely that this has contributed to the lengthy and complicated procedural history of the action, and to the more recent events which are at the heart of this reclaiming motion (appeal).

The recent procedural background

[2] In 2016 and the early part of 2017 there were numerous contentious hearings in the commercial court on various matters, all conducted by either Lord Tyre or Lord Doherty. Sometimes Mr Shanley was represented by counsel, sometimes he represented himself. On 3 May 2017 Lord Doherty allowed a proof before answer restricted to the issues of liability and causation, the proof starting on 24 October 2017. Amongst other things the parties were appointed to agree a joint bundle of productions (in chronological order, or such other order as would facilitate the efficient conduct of the proof). The bundle was to be made available to counsel by 21 July, and an inventory of it lodged in process by 28 July. The parties were also appointed to lodge in process by 22 August any joint admissions agreed by them and two encrypted USB flash drives, each containing the up-to-date pleadings, the joint bundle of productions, all witness statements (with references to productions annotated with hyperlinks to the relevant document in the joint bundle), and any other document to be referred to at the proof.

[3] The hearings continued unabated in June 2017 dealing with, amongst other things, the position of Mr Shanley's wife (who was a second pursuer, but who is now out of the picture) and also expenses awards against Mr Shanley. On 4 July Lord Tyre extended the

deadlines for various procedural steps, including preparation of the joint bundle and lodging of the inventory, to 18 August.

[4] On 3 August the case came before Lord Bannatyne for the first time. He made various procedural orders, including requiring the pursuer to intimate a draft joint minute of agreement to the defenders by 17 August. Thereafter all hearings in the case were conducted by Lord Bannatyne. For present purposes it is necessary to note only the following. On 22 August his Lordship heard a motion for the bank seeking dismissal of the action on the basis of various failures on the part of the pursuer, including that a draft joint minute was made available on 22 August, not 17 August, and that a joint bundle had not been lodged. Lord Bannatyne refused this motion, but awarded expenses against the pursuer from 3 March 2017 on an agent and client basis. He also appointed the pursuer to make available the draft joint bundle index to the bank's counsel by 23 August, and extended the date by which he was to lodge in process the inventory and the two USB flash drives to 25 August. It can be noted that, for whatever reason, this was now expressed as an obligation upon the pursuer, rather than, as per the original order, a duty of the parties.

[5] On 7 September Lord Bannatyne dealt with another application by the bank for decree of dismissal based on similar grounds, along with a motion for interim payment of expenses. Counsel for the bank said that the joint bundle was not in a fit state. The witness statements were neither referenced nor hyperlinked to the relevant productions. The defenders' third inventory of productions had not been included in the draft inventory. One hundred and sixty of the defenders' productions were missing from it. There had been a re-ordering of the pursuer's productions and there was considerable duplication between the pursuer's and the bank's productions. Counsel had been told that a fresh USB was

available, but it was not clear whether the productions had been updated. Previously the wrong version of the pleadings had been used. Furthermore there was no joint minute.

[6] In his note to this court Lord Bannatyne explains that at this time the solicitor for the pursuer "appeared to be overwhelmed by the preparation necessary for the proof", and "seemed to lack the necessary technical knowledge to comply with the orders of the court with regard to the preparation of the joint bundle." His Lordship considered that this was not an acceptable explanation, but, with some hesitation, he fixed a further timetable, and again awarded expenses on an agent and client basis against the pursuer. He also ordered an interim payment of expenses in the sum of £40,000. He continued the motion for dismissal to 13 September and, although counsel for the bank said that it was unachievable, on an undertaking given by the solicitor for the pursuer that he could complete the necessary work by the following Monday, he allowed the pursuer until 4.00pm on Monday 11 September to lodge two encrypted USB flash drives each containing the matters specified in the original order.

[7] In his note Lord Bannatyne records the events of 13 September as follows. Counsel for the bank said that the major issue was Mr Shanley's continuing failure to lodge the joint bundle. Despite the assurances given six days previously, the principal solicitor dealing with the case for the pursuer departed on holiday, handing the responsibility to another solicitor who was absent on leave on the Friday (8 September) and was in court the following week. She passed matters to Messrs McNeill & Cadzow. However they were unable to gain access to the existing USB, not having been given the password. In any event it was not possible for McNeill & Cadzow to work out the necessary hyperlinking for themselves. They had difficulties in merging the productions into one index. Another USB stick had been lodged, but it was simply scanned copies of the productions as lodged, a

copy of the record, and witness statements absent any hyperlinking. Further, there was still no joint minute. Counsel for the bank stated that it was clear that the scale of the task had not been appreciated by the solicitor acting for the pursuer.

[8] Counsel for the pursuer explained that the principal solicitor had assumed that his firm could carry out the necessary work, but the other solicitor realised that only McNeill & Cadzow had the resources to deal with such a large task. The pursuer responded to a request for payment of £2,000 to allow them to commence work. As at 13 September the indexing of the productions had yet to be completed. Until that was done there could be no hyperlinking. McNeill & Cadzow had advised that the work could be completed by 20 September.

[9] Lord Bannatyne states in his note that he found all of this to be "wholly unsatisfactory". On a number of occasions he had re-set the timetable. Mr Shanley was in material non-compliance with his orders. He had been warned that dismissal was a real likelihood. His Lordship continues at paragraph [67] as follows:

> "The position appeared to me to be this: the reclaimer simply seemed unwilling or unable to comply with the orders of the court. Repeated undertakings were given on behalf of the reclaimer which were not complied with. The reclaimer did not seem to take his obligations to the court seriously. In no case, which has ever come before me, have I had to deal with such repeated failures to obtemper the court's orders, in circumstances where no proper explanation could be put forward for the failures.
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> [68] I felt by this point that the court had bent over backwards in offering time to the reclaimer to put his case in order. The reclaimer appeared by 13 September to be just ignoring the court and appeared to believe that he could simply flout the orders of the court and the court would do nothing. It appeared to be his position that the court would simply continue to indulge him in his repeated failures.
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> [69] It appeared to me by this point that the court had no option but to dismiss the action on the basis of the reclaimer's default without proper explanation.
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> [70] I recognise that this was a highly unusual and grave step to take. However, the history of this case, which I have set out, I believed justified this action. I had no confidence that the reclaimer would ever fully comply with the orders of the court.

> [71] The respondent was being prejudiced by the conduct of the reclaimer (his lack of action). It was repeatedly having to come back to court for lengthy hearings in relation to this issue of compliance and incurring significant expense which may in the end of the day not be recoverable. It was being materially prejudiced by the state of preparation of the reclaimer's case. It was I believe, as argued before me, extremely difficult, if not impossible, for the respondent to prepare given the way in which the reclaimer's case was being presented.
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> [72] Against that whole background I dismissed the action. Compliance with the timetable set by the court in the commercial court is critical to the court's efficient operation. The court cannot operate properly where there are repeated failures without good cause, to comply with the timetable set.
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> [73] When considering the issue of dismissal there was discussion before me of whether the reclaimer would be prevented, by my dismissing the action, from raising another action against the respondent. As I understood it, the position of both sides, was that he would be able to raise another action, despite my dismissal of the present case.
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> [74] Accordingly in dismissing this action I was not preventing the reclaimer, if he so wished, from raising a further action against the respondent to recover the sums claimed in the present action."

The challenge to the dismissal of the action

[10] Mr Shanley has reclaimed (appealed) against this decision, and also against parts of the interlocutor of 7 September, and all of an interlocutor of 10 October (these will be mentioned later). There is a question as to the competency of the reclaiming motion against dismissal but meantime we shall deal with the merits of the challenge. Again Mr Shanley was representing himself. He noted that both sides' productions, expert reports, and witness statements were in the court process. The bank had handed over their documents in a shambolic state. They were then provided to his expert. The essence of his submission was that the joint bundle was a joint administrative matter between the parties. On his part he had entrusted the task to his solicitors. He understood the court's displeasure. He also felt let down by the solicitors. For example, on two occasions they lost the password. When called on to pay £2,000 for the instruction of McNeill & Cadzow he immediately obliged.

They were specialists in these procedures. He did not receive Lord Bannatyne's note until January 2018, which was well after the marking of the reclaiming motion. He then made an attempt to put together a joint bundle, but the bank's agents did not co-operate. He considered that this exercise had to be a collaborative effort. In his view he had done all that he could do, and submitted that he was "a third party" with no control over what was happening. Both sets of solicitors had a responsibility to the court to arrange the productions, etc in a manner which facilitated the efficient conduct of the proof, yet he was the one being punished, firstly in agent and client expenses awards, and now by the dismissal of the action – all for a delay in the production of the joint bundle at a time when there were still several weeks to pass before the commencement of the proof. The dismissal decision was draconian, disproportionate and unjust. So far as the joint minute was concerned, this was not just a matter for him; the bank also had a responsibility to specify matters not in dispute.

[11] For the bank it was submitted that in the whole circumstances the Lord Ordinary was entitled to dismiss the action. Several indulgences had been granted. Despite clear warnings, there had been persistent failures indicative of a casual approach to the rules and to the court's orders. The ethos of commercial roll procedure is the speedy resolution of disputes. There is no proper basis for interfering with what was a discretionary decision by the Lord Ordinary. His reasons were clear and cogent. The decision to dismiss was neither unreasonable nor unjust. The reclaiming motion amounts to no more than a disagreement with the outcome. No error in law had been identified. Correctly in our view, little or no mention was made of the requirement for a joint minute. The focus was on the joint bundle and USB sticks.

Decision on the challenge to the dismissal of the action

[12] As the initial interlocutors recognised, the preparation of a joint bundle is, as indeed the name suggests, a joint responsibility. This remains the position even if one party undertakes to do the necessary work. If he experiences difficulties, one would expect the other party to assist. It is an administrative matter designed to promote the efficient conduct of a proof. A joint bundle of this kind is not essential to a fair trial of the issues in dispute. As a generality, a court should bear in mind its duty to adjudicate upon disputes properly before it which can still be resolved in accordance with justice and fairness between the parties. That said, dismissal of an action is available by way of sanction in an appropriate case where the court is satisfied that a party is in flagrant breach of its orders or procedural rules. If a difficulty is properly regarded as a failure by a solicitor to fulfil his responsibilities to the court and his client, as opposed to wilful non-compliance by the party, then sanctions can be aimed at the truly guilty party.

[13] At paragraph [38] of his note the Lord Ordinary accepts that the problems had been caused by the pursuer's agents being "overwhelmed" by the task. He notes their lack of the necessary technical knowledge. On 7 September counsel for the bank predicted that the timetable undertaken by the solicitor was not achievable, and so it proved. It was too optimistic. When asked, Mr Shanley paid £2,000 so that McNeill & Cadzow could carry out the work. Difficulties were encountered with the password, hyperlinking and indexing, and the deadline was missed. As recorded at paragraph [61], the bank's counsel stated that it was "clear that the pursuer's agents had not appreciated the scale of the task."

[14] The bank's third motion for dismissal was considered less than 48 hours after the deadline. The Lord Ordinary concluded that the pursuer was unwilling or unable to comply with court orders; was not taking his obligations seriously; and was flouting court orders

while expecting the court to indulge his repeated failures. In effect, the Lord Ordinary treated the matter as one equivalent to a contempt of court on the part of the pursuer, and punished him accordingly. Though we are understanding of the Lord Ordinary's frustrations, and while not suggesting that the pursuer is wholly blameless in the unfolding events, we have concluded that his note does not set out a sufficient basis for these highly personalised criticisms of the pursuer. Come the critical events, the failures were primarily those of his agents, who had promised to carry out a task which, for various reasons, proved to be beyond them. Mr Shanley told this court that he could understand Lord Bannatyne's annoyance since he too felt badly let down by his solicitors.

[15] As to the Lord Ordinary's comments at paragraph [71] and following, we consider that the prejudice to the bank was overstated. No real harm would have been caused by allowing McNeill & Cadzow a further short period to continue with their work which they predicted would be completed by 20 September. It can be remembered that the proof was still several weeks away. At the appeal hearing it was observed that in September/October 2017 senior counsel for the bank was heavily involved in an ongoing inquiry, and that he required all the allotted time to prepare for this proof. We do not find this to be a particularly persuasive or compelling factor.

[16] There was no appreciation on the part of the Lord Ordinary that a joint bundle along with USB sticks, etc is essentially an administrative step in respect of which both parties bear some responsibility. In addition, despite the earlier terms of his note, in the operative part of the reasoning there is little or no recognition of the fact that, come the critical period, the failings were ultimately those of the pursuer's solicitors. On the contrary the pursuer is condemned in highly personal terms, which in our view are not borne out by all that precedes this part of the narrative. We are persuaded that the Lord Ordinary's note reveals

no proper basis for the aforesaid contempt of court approach. Subject to the issue of the competency of this reclaiming motion, we are satisfied that his interlocutor in so far as it dismissed the action should be quashed.

[17] In that event counsel for the bank invited us to substitute our own decision to a similar effect. For the reasons explained above, we do not intend to do that. In our view dismissal was an unreasonable and disproportionate response to the situation as at 13 September. It is not possible now to turn the clock back and reach a different decision which preserves the original court date. Unless issues of competency prevent it, we shall remit the case to the commercial roll for further procedure.

Objections to the competency of the interlocutor of 13 September 2017

[18] In maintaining an objection to the competency of the reclaiming motion against the interlocutor of 13 September, reference was made to Rule of Court 38.9 which provides:

> "Where decree by default has been granted against a party in respect of his failure to lodge a step of process or other document, a motion for review by that party of the interlocutor granting such decree shall be refused unless the document is lodged on or before the date on which the motion is enrolled."

It was not in dispute that a properly formatted joint bundle etc had not been lodged by the date of the enrolment of the reclaiming motion. Furthermore, this remained the position as at the date of the appeal hearing. The submission for the bank was that in these circumstances, whatever its merits, the reclaiming motion required to be refused.

[19] Counsel for the bank conceded that the terms of this rule do not preclude the allowance of further time to the pursuer, but he submitted that no indulgence in terms of Rule of Court 2.1 or otherwise should be allowed given that the position was not remedied in advance of the court adjudicating upon the reclaiming motion. We are not so persuaded. If the terms of Rule of Court 38.9 are not mandatory, and we doubt that any procedural rule

of this nature can ever be absolutely binding upon a court of justice, what is so sacrosanct about the date of the hearing of the reclaiming motion? There is the particular feature of this case that the relevant documents have been produced – it is simply a matter of the organisation and formatting of material which is already in process. This is markedly different from a failure to lodge a document or a step of process which is fundamental to a party's case. As already mentioned, the default is of an administrative nature in which both parties had some responsibility. We also note that a joint bundle was lodged; there were simply difficulties as to its form – see paragraph [36] of the Lord Ordinary's note. Similarly USBs were lodged twice, but again there were difficulties as to their formatting. No doubt a court solicitor would have appreciated that the pursuer's position would be improved if all issues were remedied in advance of the appeal hearing, but this may not be so obvious to a litigant representing himself. In the whole circumstances, whether under Rule of Court 2.1(1) or otherwise, we are not persuaded that we should treat the reclaiming motion as incompetent on the basis of Rule of Court 38.9.

[20] Separately it was argued that the reclaiming motion was incompetent because it was marked out of time. The interlocutor dismissing the cause was pronounced on 13 September. In terms of Rule of Court 38.2 the pursuer had 21 days in which to mark the reclaiming motion. It was enrolled on 25 October 2017. The case was not fully resolved by Lord Bannatyne until his interlocutor of 10 October when various orders were made, including finding the pursuer liable in the expenses of the cause and allowing the bank an additional fee. The reclaiming motion challenged the three interlocutors dated 7 and 13 September and 10 October. We were informed that the pursuer thought that it was necessary to wait for the completion of the process before the earlier interlocutors could be challenged. Reliance was placed upon the terms of Rule of Court 2.1(1), and the court was

asked to exercise its dispensing power. In the whole circumstances we are prepared to do that. It follows that the challenge to the competency of the reclaiming motion in respect of the interlocutor of 13 September is rejected.

The challenge to the other interlocutors

[21] There was no challenge to the competency of the reclaiming motion in respect of the other two interlocutors. It was conceded by counsel for the bank that if the dismissal of the action was quashed then the interlocutor of 10 October could no longer stand. This leaves only the challenge to the interlocutor of 7 September in so far as it dealt with expenses. The submissions on this matter bore some relation to the submissions recorded earlier. For the pursuer it was contended that the Lord Ordinary had unfairly punished the reclaimer for the faults of his solicitors. If an award of expenses was to be made, it should have been against the pursuer's agents. We are satisfied that similar flawed thinking to that discussed earlier in relation to the subsequent dismissal of the action influenced the expenses awards in the 7 September order. We shall therefore quash paragraphs 3 and 4 of that interlocutor. Along with that we shall quash the first paragraph of the interlocutor of 13 September and all of the interlocutor of 10 October. Although the pursuer has enjoyed considerable success in this reclaiming motion, in the unusual circumstances of this case we shall make no award of expenses due to or by either party in respect of the expenses incurred in the Inner House. We shall remit the case to the commercial roll for further procedure. We urge both parties to co-operate in the meantime so that the necessary steps are taken to fulfil Lord Doherty's original order of 3 May 2017.