FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 29
GP3/21

Lord President
Lord Malcolm
Lord Turnbull

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the reclaiming motion against a decision to grant permission to bring group proceedings

by

HUGH HALL CAMPBELL QC, representative party in proposed group proceedings,

Applicant and Respondent

against

JAMES FINLAY (KENYA) LIMITED

Respondents and Reclaimers

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Applicant and Respondent: Smith QC, C N Smith; Thompsons Solicitors Scotland
Respondents and Reclaimers: Shand QC, J G Thomson; BLM

27 May 2022

[1] A number of firms of solicitors have instructions from some 1500 former, or existing, employees of the respondents to raise proceedings seeking reparation for musculoskeletal injuries which they say were sustained while working for the respondents. By interlocutor dated 16 February 2022, the Lord Ordinary granted permission to bring group proceedings against the respondents (see [2022] CSOH 12). The respondents challenge that decision on the basis that the qualifying requirements of section 20(6)(a) of the Civil Litigation (Expenses

and Group Proceedings) (Scotland) Act 2018 have not been met. They contend that the claims of the employees are not "the same as, or similar or related to, each other".

[2] The application narrates that the group were required to carry out repetitive tasks of manual labour when harvesting tea on the respondents' plantations in Kenya. The workers were provided with baskets to carry picked, or clipped, tea. The tea plantations were often on undulating and hilly ground. The baskets sometimes weighed around 20kg. It was the combination of weight, terrain, and repetition which caused injury. The employees worked long hours. Payment was dependent upon completed work. Breaks were not provided. There was no training or risk assessment. The employees have all sustained musculoskeletal injuries in the area of the lumbar and cervical spine. Many had been dismissed from their employment with the respondents because of an inability to carry out the work. They required to vacate their homes on the plantations. Some had suffered psychiatric injury.

[3] The Lord Ordinary found (Opinion paras [29] and [30]) that the group's averments adequately identified issues arising from common working practices which allegedly gave rise to injury and the content of the respondents' duty of care in that context. They amounted to a *prima facie* case based upon the respondents having failed in their duty of care. They were sufficiently similar to justify the grant of permission. It would produce a more efficient administration of justice for the claims to be brought in group, rather than individual, proceedings. The respondents' pleas of *forum non conveniens* and limitation of actions were common to all of the claims. In a supplementary note the Lord Ordinary explained that the issue was sufficiently defined as

> "claims in respect of musculoskeletal injury arising from common conditions of employment of employees engaged in harvesting tea on estates owned and/or operated by the [respondents] in Kenya".

[4] The respondents submitted that, although the 2018 Act allowed groups of people, whose claims had a common underpinning, to raise a group action, it did not permit groups with disparate claims to bring a group action simply because they were employed by the same person. Whether the claims raised the same, similar or related issues was not a matter for the Lord Ordinary's discretion. It was only where the statutory condition of similarity was met that the Lord Ordinary had a discretion to grant permission. The claims were habile to include: all musculoskeletal injuries, whether traumatic or chronic, major or minor; all harvesting roles whether involving manual handling or not; and injuries over an indeterminate period. A group of employees doing the same kind of work was a description of a category of persons. That differed from identifying issues of fact or law which were the same, similar or related. The Lord Ordinary had no material with which to identify relevant similar issues.

[5] The only question in this reclaiming motion is whether the Lord Ordinary was correct in his conclusion that the group's averments identified issues of fact or law which are sufficiently similar or related to each other to justify the grant of permission for group proceedings. The court has no difficulty in finding that he was correct. The issues of fact, if they are disputed, relate to the nature of the respondents' working practices. The issue of law is whether these practices amounted to negligence; that is a breach of the respondents' duty to take reasonable care for their employees and not to expose them unnecessarily to the risk of harm. The Lord Ordinary defined the issue as being the validity of the claims that musculoskeletal injuries resulted from the common conditions of employment in harvesting tea on the respondents' estates in Kenya. If that validity is made out, the generic issues of

fact and law will have been resolved for all in the group, leaving causation in individual cases for determination.

[6] The reclaiming motion is refused.