SHERIFF APPEAL COURT

[2017] SAC (Civ) 19
EDI-A53-15

Sheriff Principal M W Lewis
Sheriff Morrison QC
Sheriff Principal RA Dunlop QC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL M W LEWIS

in the appeal by

GABRIEL POLITAKIS, 28 Ottoline Drive, Troon, Ayrshire, KA10 7AW

Pursuer and Appellant

against

JOHN DESPENSER SPENCELY, 19A Carlton Terrace, Edinburgh, EH7 5DD

Defender and Respondent

and

JAMES SCOTT LIMITED, City Gate, Altens Farm Road, Nigg, Aberdeen, AB1 4LT

Party Minuter

Pursuer and Appellant: Gabriel Politakis
Defender and Respondent: Manson, advocate; BTO Solicitors LLP
Party Minuter: Ellis QC; MacRoberts LLP

8 May 2017

Background

[1] In 1990 Apollo Engineering Limited ("Apollo") entered into a sub-contract with James Scott Limited ("Scott") under which Apollo agreed to supply specialist fabrication

and instal pipework required in the construction of an explosives handling floating jetty at Coalport. The value of the work was in the order of £4,000,000. On 25 September 1991 Apollo went into liquidation. The liquidator and Scott became embroiled in a dispute which led to litigation in the Court of Session. Scott sued the liquidator for recovery of materials in the possession of Apollo. The liquidator counterclaimed for £2,000,000 in respect of unpaid work and damages for breach of contract. By the end of June 1993 the Court of Session action was sisted for arbitration. In the course of that arbitration a case was stated for the opinion of the Court of Session.

[2] Apollo had little by way of assets and carried much debt. The liquidator of Apollo was concerned to protect himself against awards in the arbitration. Accordingly, in January 2001, the liquidator made a proposal under Part 1 of the Insolvency Act 1986 that the company and its creditors enter into a Creditors Voluntary Arrangement ("CVA"). The liquidator believed that the CVA would provide a benefit to the unsecured creditors because the costs of the arbitration would be met by a third party (Adquest Holdings Limited – "Adquest") and any successful outcome would, subject to certain agreed deductions, fall to Apollo. On 31 January 2001 the CVA was approved and eventually the liquidation was sisted pending final decree in the arbitration *(McGruther v James Scott Ltd* 2004 SC 514).

[3] In July 2005 an arbiter, John Despenser Spencely, was appointed under a joint deed of appointment. On 26 September 2006 the arbiter awarded expenses of an amendment procedure in favour of Scott. He also specified that the account of expenses was to be taxed by the auditor of the Court of Session and we were told that the taxation took place on 30 May 2007. In addition, following a debate, in a "final draft opinion" in May 2007 the arbiter excluded substantial parts of Apollo's case from probation – in effect he dismissed almost the whole of Apollo's case other than declaratory craves and a claim for £30,000 or thereby.

That element of the arbitration remains extant. The many complicated issues arising from the relationship among the parties resulting in further litigation are explained in some detail in *Apollo Engineering Ltd v James Scott Ltd* 2009 SC 525.

[4] Mr Politakis was the managing director and principal shareholder of Apollo. He doggedly sought to represent Apollo as a lay representative in much of the litigation involving Apollo. He was not permitted to do so in the Court of Session (*Apollo Engineering Ltd v James Scott Ltd* [2012] CSIH 88) and took his argument ultimately to the Supreme Court, where he did not meet with success. He informed us during the appeal hearing that this matter is to be ventilated in the European Court of Justice. Mr Politakis is also the director and shareholder in Adquest. In essence the principal source of money to fund the litigation and the arbitration derives from Mr Politakis. The funds of Apollo have long been exhausted. Mr Politakis has become weary, frustrated, anxious, and upset at what he believes to be the underhanded tactics of the arbiter, Scott and those who advise them as well as what he perceives to be gross injustices in the various court processes which have consistently failed to provide him with what he seeks by way of appropriate and acceptable remedy.

[5] Being thoroughly unhappy with the actings of the arbiter and with the decision of the arbiter contained in the final draft opinion in May 2007, and facing liability for taxed expenses in the arbitration in the sum of £195,000 or thereby, both referred to in paragraph [3] above, Mr Politakis decided to bring all matters to a head by raising the current proceedings in which the arbiter is defender and Scott is the party minuter.

[6] In the present action Mr Politakis seeks declarator that in substantially dismissing Apollo's claims the arbiter acted in bad faith and that in finding and making an award of expenses against Apollo the arbiter also acted in bad faith. As a result of those actings in

bad faith, Mr Politakis seeks (i) repayment of £40,000 representing the fees and outlays paid to the arbiter for his services, and (ii) damages in the sum of £250,000 being the legal expenses incurred by Apollo in conducting the arbitration. After a two day diet of debate the sheriff granted decree of absolvitor on 6 April 2016. She considered that Mr Politakis did not have title to sue, that the action was incompetent, that the claim by Mr Politakis had prescribed and in any event the pleadings were hopelessly irrelevant and lacking in specification. The appeal targets each and every decision made by the sheriff.

The preliminary motion

[7] At the commencement of the appeal Mr Politakis invited us to discharge the hearing and to sist the appeal. He fully recognised that the timing of his motion, on the first morning of a two day diet of appeal, was unfortunate. He had, through the efforts of his wife, obtained the prospect of securing the services of Messrs Livingstone Brown, solicitors, to represent him in relation to the appeal and to that end he had already obtained and partially completed a legal aid application form. His motion was opposed by Mr Manson and Mr Ellis as (1) coming too late in the day, (2) being based on a speculative outcome, and (3) there was no prospect of Mr Politakis securing legal aid in a representative capacity. We refused the motion essentially for those reasons. The appeal had been marked many months ago and had been through at least three procedural hearings. At none of these hearings was there a whiff of a suggestion that Mr Politakis might apply for legal aid. Mr Politakis was unable to provide any written communication from Messrs Livingstone Brown, suggesting a willingness to represent him. Completing an application form is one thing – securing the grant of legal aid is quite another.

The grounds of appeal

[8] In his Note of Appeal Mr Politakis advanced 11 separate grounds. He insisted upon all of them. Many of the grounds of appeal are overlapping and as a result some of the argument presented to us and the responses thereto were somewhat repetitious. We have distilled the grounds of appeal into the following headings:

- relevancy and specification (including immunity from suit);
- title to sue;
- competency and jurisdiction;
- prescription; and
- expenses and sanction for counsel.

Submissions

[9] Mr Politakis and counsel adopted their respective written notes of argument which they each supplemented orally during the appeal hearing. As the notes of argument form part of process, we have not set out the detail but provide a summary of the submissions at appropriate points in this opinion.

[10] Mr Politakis invited us to allow the appeal, to recall the sheriff's interlocutor of 6 April 2016 and to remit back to the sheriff to schedule a proof before answer. Mr Manson invited us to refuse the appeal and to adhere to the sheriff's interlocutor, a motion endorsed by Mr Ellis who proposed that we go a little further in correcting an error in the sheriff's interlocutor. To that end he invited us to allow the substance of the appeal subject to a minor amendment by inserting after the words "grants decree of absolvitor" the words "in respect of craves 3 and 4 and quoad ultra dismisses the action".

Decision

[11] Having regard to the terms of the pleadings, the note of appeal, notes of argument for both parties and the authorities, we do not accept that the sheriff erred in law in any respect as contended for by the appellant.

Relevancy and specification

[12] The essence of the case pled by Mr Politakis appears in articles 10-13 and 19 of condescendence. In each of these articles of condescendence Mr Politakis makes bold and serious averments of "bad faith", "malicious representation", and "false pretences". For example, in article 10 he avers that the respondent allowed a minute of amendment in the arbitration knowing that the procedure associated with that would generate extortionate expenses, that most of the expenses were falsely allocated in bad faith by the respondent and that he was denied a fair hearing by the arbiter. In article 11 he avers that in a stated case the arbiter made statements which "are made in false pretences", that "he and his clerk have brought a fundamental element of Scots law into serious disrepute" and that the arbiter was "only interested in inflicting serious, substantial and substantive injustice on Apollo in total collusion with the Minuter." Article 12 contains a similar theme with averments that "the arbiter "intentionally and irrationally misrepresented Apollo's averments…", and "The irrational, malicious and bad faith dismissals of Apollo's claims ….only confirms the deliberate and substantial injustice served by the defender." Article 13 contains repeated allegations of false pretences, irrationality and bad faith.

[13] The sheriff (para [160]) regarded these averments and allegations as very serious and equiperated them to allegations of fraud as a result of which the facts and circumstances from which the bad faith actings, collusion and acting in abuse of power and so on may be

inferred must be distinctly stated (*Macphail*, Sheriff Court Practice, para 9.30). We agree with that succinct statement of the sheriff. A detailed examination of the pleadings of Mr Politakis does not reveal any such clarity or precision. His averments of purported bad faith are mere assertion without any proper foundation from which any inference can be drawn. There are no averments to support any basis for the allegation of wrongful knowledge on the part of the arbiter; there are no averments from which malice or corruption of fraud or collusion can be said to arise; there are no averments of circumstances from which one could conclude that the final draft opinion was issued in bad faith or that the arbiter had issued a false decision; indeed there are no averments from which it would be possible to infer fraud or collusion. Quite simply the test in *Jamieson v Jamieson* 1952 SC (HL) 44 has not been met and no relevant case has been pled. With making such serious allegations goes a responsibility to provide clear and concise averments of the basis on which the false pretences, bad faith or collusion was made (*Royal Bank of Scotland v Holmes* 1999 SLT 563; *McMullen Group Holdings Ltd v Harwood* [2011] CSOH 132; and *Dunn v Roxburgh* [2013] CSOH 42). The appellant has simply failed to discharge that responsibility.

[14] In addition, we agree with the submission of counsel that there are no averments disclosing any causal connection between the damages sought and the alleged wrongs. In short even if Mr Politakis were able to prove everything that he avers, he could not possibly succeed in this action because as the sheriff observes "he would not be able to prove that the sums sought as damages were caused by the wrongs alleged." We also agree with the submission of Mr Ellis that even if the decision of the arbiter were shown to be wrong (subject of course to the issue of competency) that does not of itself establish bad faith (*Apollo v Scott*, 2009 SC 525, at para [40]).

[15] That takes us to the matter of immunity from suit. An arbiter is immune from liability in damages unless it is proved that he acted from malice or bad faith (Stair Encyclopaedia (1988 Ed), Volume 2, para 498; *M'Millan v Free Church* (1862) 24D 1282). As we have already said, there are no averments from which malice or bad faith can be inferred.

[16] For all of the foregoing reasons the grounds of appeal on relevancy, specification and immunity from suit fail.

Title to sue

[17] The sheriff decided that Mr Politakis had no title to sue on two separate grounds. Firstly, she decided that the CVA did not permit the making of the assignation to Mr Politakis on which he relied and, secondly, she decided that the rights on which he relied arise from a tripartite contractual arrangement (the deed of appointment) which involved *delectus personae* and the rights under which were not assignable.

[18] Mr Politakis says that the sheriff was wrong in her approach and that quite simply he derives title to sue the respondent by virtue of an assignation granted by Apollo of its rights in his favour under a deed of appointment relative to the arbitration. The assignation (pages A218-291 of the Appeal Print) is dated 8 January 2015 and was signed by Mr and Mrs Politakis as directors of Apollo and by Mr Politakis as assignee. The deed of appointment (pages A215-217 of the Appeal Print) was executed by Apollo and Scott on 1 and 11 July 2005 under which the respondent was appointed as arbiter. During the course of his submission Mr Politakis took us through the terms of the foregoing documents as well as the terms of the CVA (pages A94–A100 of the Appeal Print).

[19] We agree with Mr Manson that, arising from the sheriff's decision, there are two issues for consideration and determination: (i) did Apollo have the power to grant the assignation; and (ii) the extent of *delectus personae*. It is important to consider these issues in context. There is no liquidator of Apollo, Mr McGruther having resigned some years ago. The liquidation was sisted to enable the arbitration to be undertaken. The sist has been recalled. There is no supervisor under the CVA, he too having resigned some time ago.

[20] The current pleadings of Mr Politakis, which are voluminous, are light on the matter of title to sue such that they lack specification and are irrelevant. Leaving that aside, on the first issue it is important to note that in his oral submissions Mr Politakis accepted that his title to sue depended on the terms of the CVA. His contention was that Apollo's claim was entirely in the hands of the directors and that, having been given control of the arbitration, it was implicit that the current proceedings could be brought. The contention on behalf of the defender and Scott in response was that it was clear that the CVA created a trust for the benefit of the body of creditors as a whole and there were specific provisions as to how any proceeds from the arbitration were to be distributed. According to its terms, the effect of the assignation, which is alleged to be the foundation of the pursuer's title, was to divest Apollo of its claim in the arbitration but that was a matter beyond the power of Apollo. In our opinion these latter submissions are well founded. It is clear to us from the wording of the CVA that all of the assets of Apollo fell within the CVA. The right of Apollo to sue the defender is an asset of Apollo. No matter how one reads the terms of the CVA, it did not make provision for Apollo to assign any claim which it had against any party. It did not give the directors of Apollo power to assign any claim for damages. Any such claim is the property of Apollo. As Apollo is in liquidation and there is no liquidator, the claim is in the custody of the court (here the Court of Session – section 144(2) of the Insolvency Act 1986).

Mr Politakis has no locus in relation to Apollo. He does not control Apollo and he cannot pursue litigation on its behalf.

[21] The purpose of the CVA was to provide a limited power to the directors of Apollo to retain full control of and to conclude the arbitration for the purposes of recovering money for the benefit of the creditors (paras 2.1.3 and 2.8 of the CVA). We agree with Mr Manson that it would offend against that purpose if the directors were then authorised by the terms of the CVA to assign away a right to damages arising from a deed of appointment.

[22] On the second issue, namely the extent of *delectus personae,* the deed of appointment creates a tripartite relationship. The respondent accepted appointment under the deed of appointment between Apollo and Scott. Under that deed disputes between the parties were submitted to the respondent for his decision as arbiter. By accepting the appointment, the respondent entered into a contractual relationship with both Apollo and with Scott. We agree with Mr Ellis that it is a matter of construction of the particular contract in question whether or not parties' rights and liabilities are assignable or whether there is *delectus personae* preventing a party from assigning its rights and liabilities (*Cole* v *Handasyde & Co* 1910 SC 68; *Karl Construction Ltd* v *Palisade Properties Plc* 2002 SC 270). We also recognise that the construction of a contract must include the context in which it was made and the circumstances known to all the parties at the time (*Rainy Sky SA* v *Kookmin Bank* [2011] 1 WLR 2900). One element of the background is the initiating sub-contract between Apollo and Scott – this is the contract as a result of which the original disputes arose and this is the contract which includes a binding arbitration clause. It is also the contract which contained a prohibition against assignation (*Apollo* v *Scott* [2012] CSIH 88 at para. [29]).

[23] Quite simply Apollo and Scott chose the arbiter for his skill and experience. Apollo and Scott were linked as parties to the arbitration because they were in dispute and needed

their differences resolved. Apollo is prohibited from assigning its rights under the sub-contract. Scott could not assign its rights under the arbitration contract because to do so might deprive Apollo of Scott's covenant. From all parties' perspective, but especially that of the arbiter, it was necessary that the original parties remained in the arbitration to ensure the proper administration of justice. We agree with the sheriff's assessment, therefore, that the rights and obligations under the arbitration contract are, as a matter of construction, not assignable by any of those three parties without the consent of the others. As a result of that, the purported assignation upon which Mr Politakis relies is of no effect (*Linden Gardens Trust Ltd* v *Lenesta Sludge Disposal Ltd* [1994] 1 AC 85).

[24] We can find no error in the sheriff's approach to this matter. Accordingly this ground of appeal in relation to title to sue fails.

Competency

[25] The sheriff considered that, based on the pleadings of Mr Politakis and his subsequent submissions, she was being invited by Mr Politakis to investigate and review the arbiter's decisions (paragraphs 141-143 of her judgment). She concluded that the sheriff court did not have jurisdiction to do so because that was excluded by the agreement to arbitrate and further any review of the arbiter's decision could only be undertaken under the supervisory jurisdiction of the Court of Session.

[26] Mr Politakis fundamentally disagreed with the sheriff's assessment and criticised her repeatedly for classifying his action as seeking a review based on alleged wrongs by the defender. Mr Politakis argued that he is seeking damages because of the defender's alleged bad faith, malice and false pretences predicated on "conscious wrongs" and "conscious

representation". During this segment of his submission, it became clear to us that Mr Politakis' patience with the judicial system had almost been exhausted. He considered that through misguided rules in relation to lay representation and the unavailability of appropriate mechanisms or remedies combined with delaying tactics on the part of the defender and Scott all contributed to his sense of frustration. That is understandable. However, the simple question which the sheriff required to answer and which she did answer was whether the nature of the action as presently pled meant that it was competent to proceed in the sheriff court.

[27] The damages sought by Mr Politakis are for "conscious wrongs" or "conscious misrepresentations" by the arbiter. On the face of it, these claims appear to form the foundation of an action for damages in respect of which the sheriff court does have jurisdiction. However, we agree with Mr Ellis that allegations of bad faith, such as have been made in this action, would involve a review of the defender's decisions. The essential proposition for the pursuer is that, in making the decisions which he did, the defender was acting in bad faith. That proposition depends fundamentally on it being shown in the first place that the defender's decisions were wrong and that question cannot be answered without entering fully into the merits of the competing claims. Such a review is incompetent in the sheriff court (*MacPhail,* para. 2.48; *Brown* v *Hamilton District Council* 1983 SC (HL) 1 and *Forbes* v *Underwood* (1886) 13 R 465). Unless and until reduced, the decision of an arbiter is a binding statement of the legal relationship between the parties and equivalent to a court decree which determines the respective rights and obligations of the parties (*Brown (supra)* and *Farrans* v *Roxburgh County Council (No.1)* 1969 SLT 35). Mr Politakis has not sought reduction of the decision of the arbiter and accordingly it must stand.

[28] Furthermore, in respect of the arbitration conducted by the defender, Apollo (in whose shoes Mr Politakis says he stands as assignee) has already tried to reduce the arbiter's decisions on expenses and relevancy. The Inner House, in considering a challenge which included allegations of bias on the part of the defender, confirmed that judicial review could not deal with the merits of Apollo's claims (*Apollo* v *Scott* 2009 SC 525). Under the law applicable to this arbitration, the only way to review the merits of the arbiter's decision is stated case procedure under section 3 of the Administration of Justice (Scotland) Act 1973 (*Apollo* v *Scott* [2012] CSIH 88). The Inner House dismissed such a stated case at the instance of Apollo.

[29] For the foregoing reasons, we are of the opinion that the ground of appeal in relation to competency and jurisdiction is without merit.

Prescription

[30] We are satisfied that the claims have prescribed. This action was raised on 6 February 2015. The damages claimed by Mr Politakis comprise (i) £40,000 paid to the arbiter on account of his fees and expenses and (ii) £250,000 paid for legal expenses incurred by Apollo in conducting the arbitration. The arbiter's fees were paid during the period 2006 to 2012. Mr Politakis accepted that his claim for damages is subject to the five- year prescriptive period under section 6 of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act"). He also conceded during the hearing before us that his share of the arbiter's fees and expenses had "probably prescribed", although he subsequently departed from that position, and then somewhat vacillated over the point. In our view, he was correct to make the concession.

[31] Section 6(3) of the 1973 Act provides that prescription starts running when the claims become "enforceable". The commencement of the five-year period for claims for reparation for damages is set out in section 11. Such an obligation becomes enforceable when "the loss, injury or damage occurred". As the sheriff correctly identified (para [150]) the "obligation to make reparation is a single and indivisible obligation and the right to bring an action in respect of such an obligation, and the prescriptive period within which to do so, starts to run when there is concurrence between *injuria* and *damnum* (*Dunlop* v *McGowans* 1980 SC (HL) 73)".

[32] The sheriff decided that the loss and damage had occurred more than five years prior to the raising of the present action; that the loss claimed by the pursuer did not flow from the arbiter's part award; that there is no causal link averred between, on the one hand the arbiter's part award as comprising the alleged wrong and, on the other hand, the occurrence of any of the losses claimed in the action. She was also not satisfied that there were any averments to illustrate the commencement of prescription at a later date.

[33] Mr Politakis argued that there was no loss and damage up to the point the defender issued his part award on 11 December 2014 (pages A171-212 of the Appeal Print). That part award had been issued in bad faith and with malice. That, in his submission, is the date upon which prescription begins to run. Mr Politakis seemed to accept before us that the purported wrongs in the part award all flow from an initial finding of liability and expenses subject to taxation made in 2006; the taxed report of the Auditor of the Court of Session issued in May 2007; and the defender's decerniture of 30 June 2009 (pages A133-134 of the Appeal Print).

[34] We agree with the sheriff's assessment (para [154] that the losses did not flow from the arbiter's award and that "there is simply no causal link averred between, on the one hand, the arbiter's part award as comprising the alleged wrong or default and, on the other hand, the occurrence of any of the losses claimed in this action" (*John G Sibbald & Son Ltd* v *Johnston* [2014] CSOH 94).

[35] As an alternative, Mr Politakis endeavoured to persuade us that the prescriptive period relates to acts, neglect or default which are, or were, continuing and that we should at least consider that prescription ought to run from 2012, that being the date on which he made his last payment to the arbiter. We do not accept that proposition. We agree with Mr Ellis that the only acts of negligence founded on by the pursuer which could have caused the damage which Mr Politakis seeks to recover are the arbiter's award of expenses in September 2006 and the final draft opinion in May 2007.

[36] Finally, we agree with Mr Ellis that a case for extension of time under section 11(3) must be averred and proved by a pursuer (*Pelagic Freezing Ltd* v *Lovie Construction Ltd* [2010] CSOH 145 and *David T Morrison & Co Ltd (t/a Gael Home Interiors)* v *ICL Plastics Ltd* 2014 SC (UKSC) 222) and that Mr Politakis has not done so.

Expenses and sanction

[37] Making an award of expenses is a matter which lies entirely within the discretion of the sheriff and in straightforward uncomplicated cases, the successful party is usually entitled to his expenses in full, as taxed (*MacPhail,* para. 19.07). The sheriff found the defender and Scott entitled to their expenses as they had been wholly successful in their defence to the action. There are, of course, exceptions to that general rule, but Mr Politakis

said little to persuade us that either the sheriff was wrong in her approach to the making of an order for expenses or that any exception arises.

[38] The sheriff records that the pursuer did not oppose the motion by the defender to sanction the employment of counsel and the motion by the party minuter to sanction the employment of senior counsel. Somewhat unusually Mr Politakis now seeks to argue that the sheriff erred in law in granting these motions. In our view there is no basis whatsoever to interfere with the sheriff's decision on this matter. In the sheriff court it is not necessary for a party who desires legal representation to be represented by counsel. That is a matter of choice. Whether to sanction the employment of counsel is a matter which again lies entirely within the discretion of the sheriff. The test, as set out in *MacPhail (*paragraph 12.25) *is* "whether the employment of counsel is appropriate by reason of circumstances of difficulty or complexity, or the importance or value of the claim…". The sheriff had regard to that test. She concluded that the complexity of the legal issues arising and the application of the law to the particular circumstances of the action were such that the employment of counsel and senior counsel was entirely appropriate and merited. We can detect no error in the approach of the sheriff. Accordingly, the ground of appeal about expenses and sanction of for counsel fails.

Conclusion

[39] For all of the foregoing reasons we reject the arguments of Mr Politakis. We refuse the appeal and adhere to the sheriff's interlocutor save for one minor alteration thereto. We agree with Mr Ellis that the sheriff's interlocutor requires minor correction by inserting after the words "grants decree of absolvitor" the words "in respect of Craves 3 and 4 and *quoad ultra* dismisses the action".

[40] Counsel were agreed that expenses should follow success. Mr Politakis seemed to agree with that proposal in relation to the defender but not in relation to the third party. He steadfastly maintained that the third party ought not to have entered process and indeed throughout the protracted series of litigation had caused or materially contributed to procedural delays and difficulties. As Mr Ellis submitted, however, Scott's had an interest because Mr Politakis was claiming bad faith on the part of the defender and that would affect the decision in favour of Scott in the arbitration. The appeal having failed, we are of the opinion that the defender and the third party are entitled to the expenses occasioned by it. We have also certified the appeal as suitable for the employment of junior counsel for the defender and senior counsel for the third party. We do so because we are satisfied that the complexity of the legal issues is such that sanction for the employment of counsel is appropriate.