Hilary Term
[2012] UKSC 7
On appeal from: [2010] CSIH 15; [2007] CSOH 82

JUDGMENT

Anderson (Appellant) *v* Shetland Islands Council and another (Respondents)

before

Lord Hope, Deputy President
Lord Kerr
Lord Reed

JUDGMENT GIVEN ON

29 February 2012

LORD HOPE

1. This is an appeal from an interlocutor of an Extra Division of the Court of Session of 16 February 2010. The respondents seek an order under Rule 36 (1) of the Supreme Court Rules 2009 that the appellant should be required to give security for their costs of the appeal. The first respondents, Shetland Islands Council, suggest that security should be given for their costs in the sum of £50,000. The second respondents, Scottish Water, suggest £40,000 as the amount that should be given as security in their case. In response to these applications the appellant, Mrs Patricia Anderson, seeks an order that each of the respondents lodge security for her costs in the sum of £5,000.

2. With the agreement of the parties, we have considered these applications by way of written submissions. This was to minimise costs and because of the difficulties that would face Mrs Anderson, who is aged 93 and is a litigant in person, were she to be required to travel from Shetland to London for an oral hearing.

Background

3. The appeal is in respect of a petition which was presented to the Court of Session by Mrs Anderson in January 2007. She sought judicial review of what she claimed were omissions by the respondents in failing to implement and discharge their duties under statute in respect of drainage, sewerage and roads. Her complaint is that the stability of her house in Shetland has been undermined by an increase in surface run-off water emanating from land above her house. This is said to have been due to road improvement works carried out by the first respondents and to housing development works permitted by them for which the drainage is said to have been inadequate. Criticisms are also made of the drainage in the area for which the second respondents are said to be responsible. Among other remedies she seeks an award of damages against the respondents for losses she claims to have suffered as a result of their failure to perform their statutory duties. A more complete account of her allegations can be found in the opinion of the Extra Division which was delivered by Lord Hardie [2010] CSIH 15, paras 2-3.

4. On 30 May 2008 the Lord Ordinary, Lord Matthews, dismissed the petition: [2007] CSOH 82. He held that Mrs Anderson's averments were irrelevant. She had not relevantly averred circumstances that would give her a title to sue under the statutory provisions to which she referred. Nor did her averments show that

the respondents were in breach of their respective duties under the statutes or that they had in any way acted ultra vires. Mrs Anderson reclaimed, but the Extra Division refused her reclaiming motion and adhered to the interlocutor of the Lord Ordinary.

5. It is clear from Lord Hardie's opinion that the judges of the Extra Division had some difficulty in making sense of Mrs Anderson's averments. But they were entirely satisfied that they were irrelevant. She had alleged a failure by the first respondents as planning authority to consult the second respondents as drainage authority, but they held that even if there had been such a failure that would not entitle her to an award of damages. Her case against the first respondents as drainage authority was fundamentally flawed, and for a variety of reasons her approach to possible remedies for alleged damage caused by the water discharged from their drain was wholly misconceived. As for her case against the second respondents, their obligations under the statute ceased when the surface water was discharged into the first respondents' drain. Her allegations that they failed in their statutory duties of inspection, maintenance and repair were irrelevant. She did not aver that any of their works had been damaged or affected by soil erosion, except in one respect which was not said to be relevant to the problem affecting her property. Her case against these respondents was essentially lacking in specification and was plainly irrelevant

6. As Lord Hardie noted in para 4 of his opinion, Mrs Anderson decided while the hearing of her reclaiming motion was still pending to raise an action against the respondents in the Court of Session in which she sought an award of damages against them on the ground of nuisance. She also sought an order under section 46 of the Court of Session Act 1988 requiring them to perform such acts as might be necessary to prevent surface water run-off from the new houses being discharged into her property, and interdict against them from enabling water to be discharged onto it from a culvert attached to a roadside drain. This action mirrors her application for judicial review, in that she alleges in these proceedings too that the stability of her property has been undermined by an increase in the surface water emanating from land above it and seeks damages. Her action of damages for nuisance is still pending in the Court of Session.

7. The appeal to this court has been brought under section 40(1)(a) of the Court of Session Act 1988. As the Extra Division's interlocutor was a final interlocutor Mrs Anderson did not require to be given leave to bring her appeal before this court. But she was required by Supreme Court Practice Direction 4.2.2 to have her notice of appeal certified as reasonable by two counsel from Scotland. She was unable to obtain these certificates. She asked the Dean of the Faculty of Advocates to assist her by nominating counsel to undertake this responsibility, but he declined to do so as he was of the opinion that her appeal could not be regarded as reasonable. Mrs Anderson then obtained opinions from two members of the Bar

in England in which they said that her appeal had reasonable prospects of success. But their opinions did not satisfy the requirements of the practice direction. They were not from the relevant jurisdiction, and the grounds on which they based their opinions differed from those on which Mrs Anderson's case was argued in the Court of Session.

8. Mrs Anderson submitted her notice of appeal on 11 April 2011. It was accompanied by opinions which had been provided by two members of the Scottish Bar. One of them was Mrs Anderson's son, Mr R N M Anderson. Although the notice of appeal had not been certified by them as reasonable as the practice direction requires the court permitted it to be received so that she could apply for legal aid, which she then did. By a letter dated 30 September 2011 she informed the court that her application for legal aid had been refused and that she had been told that there was no prospect of that decision being reconsidered. In that letter she also informed the court that the respondents had obtained awards of expenses against her which they had had taxed and extracted, that the amount of the taxed expenses was more than £120,000 and that this exceeded the value of her house. These awards were made by an interlocutor of the Extra Division of 18 March 2010 and were in respect of the proceedings before the Lord Ordinary and in the Inner House. The first respondents say that the amount of their expenses as taxed is £53,465.60. The second respondents say that amount of the taxed expenses in their case is £40,359.60. The balance of the amount referred to by Mrs Anderson can be assumed to be attributable to an award of expenses that was made by that interlocutor in favour of Nicolson Brothers, who were an interested third party to her application for judicial review when it was in the Court of Session.

9. Although the petition was presented and has been proceeding in the name of Mrs Anderson, the proceedings have in fact been conducted throughout on her behalf by her son, who is in possession of a power of attorney in his favour dated 16 July 2003. The pleadings were drafted by him, and he appeared as counsel on her behalf in the Outer House and in the Extra Division. No objection was taken at that stage. But when the damages action based on nuisance came before the Lord Ordinary, Lady Smith, for a hearing on the motion roll on 30 September 2011 the respondents expressed their concern that Mr Anderson should be acting as counsel for the pursuer in circumstances where his instructions to do so emanated from himself under the power of attorney. Mr Anderson undertook to consult the Dean of Faculty as to whether it was proper for him to continue to represent the pursuer as her counsel. He was directed by the Dean to cease acting for her in that capacity. In an opinion which she delivered following the hearing Lady Smith said that she was satisfied that Mr Anderson's conduct in relation to the motions that were before her was unreasonable and obstructive. She also said that a proper critical independent appraisal of his mother's case did not appear to have taken place: [2011] CSOH 187, para 25.

Rule 36(1)

10. The rule in the House of Lords was that, unless the appellant was legally aided or the requirement was waived by the respondent, the appellant had to give security for costs in the sum fixed by the House, which latterly was £25,000: House of Lords Standing Order V (1); Practice Directions as to Civil Appeals, direction 10.1. When the appellate jurisdiction was transferred to the Supreme Court it was decided that the strict rule which applied in the House of Lords could operate as an obstacle to justice and that it should be departed from. The rule in the Supreme Court is that the making of an order for security for costs is at the discretion of the court. Rule 36(1) of the Supreme Court Rules 2009 (SI 2009/1603 (L17)) provides:

> "The Court may on the application of a respondent order an appellant to give security for the costs of the appeal and any order for security shall determine –
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> (a) the amount of that security, and
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> (b) the manner in which, and the time within which, security must be given."

Orders for security under this rule will be made sparingly: Supreme Court Practice Direction 4.7.1.

11. As this is an appeal from the Court of Session for which leave is not required, some assistance as to the circumstances in which it would be appropriate to order the giving of security under Rule 36(1) in such cases may be found in decisions of the Scottish courts about the finding of caution – the Scots word for security, derived from the expression "cautio" in Roman law. Maclaren on *Expenses* (1912), p 11 states that the whole matter of caution is pre-eminently one of discretion. But, as the case law has developed, some principles as to how that discretion is to be exercised have come to be recognised. In *Ritchie v M'Intosh* (1881) 8 R 747, 748 Lord Young said that absolute impecuniosity is never the sole reason for making such an order:

> "The conduct of the cause may be such, or other matters may transpire, which may make such an order necessary, but absolute impecuniosity will never be taken as the sole ground for making a party find caution for expenses."

In *Will v Sneddon Campbell & Munro* 1931 SC 164, 171 Lord Hunter said:

> "It is well settled, no doubt, that, if a man is bankrupt and if he is divested of his estate, he is not entitled to sue an action unless he finds caution. But that is only a general rule; there are exceptions even to that. On the other hand, there is no general rule to the effect that, unless a man has been rendered bankrupt and his estates have been sequestrated, he cannot be ordained by the court to find caution. Even short of bankruptcy, I think there may be circumstances in which a pursuer might be ordained to find caution."

In the same case at p 169 Lord Justice Clerk Alness said that the history of the litigation was an element which could be taken into consideration and that, while none of the considerations in that case might of itself have been sufficient, their cumulative effect seemed to him to justify the order.

12. In *Stevenson v Midlothian District Council* 1983 SC (HL) 50 the pursuer was an undischarged bankrupt. The Lord Ordinary ordered him to find caution, although he was in receipt of legal aid. He said that he had had regard to the nature of the action and the pleadings, as well as to the fact that he was an undischarged bankrupt and had failed to pay the expenses awarded against him in a previous action. His decision was reclaimed to the Inner House where, as Lord Fraser of Tullybelton was later to observe at p 58 when the case reached the House of Lords, Lord President Emslie's comment at p 52 that by any standards it was an extraordinary action in which it was not immediately apparent that it had any merit erred only in being too restrained. The order for caution was affirmed in the Inner House, and the appeal to the House of Lords was dismissed. Lord Fraser endorsed all the factors that the Lord Ordinary had taken into account. Evidence of impecuniosity was relevant, as was unreasonable behaviour and the fact that the pleadings did not disclose any arguable case. In *Rush v Fife Regional Council* 1985 SLT 451 the sheriff's decision to order caution was upheld, having regard to the pursuer's conduct, the nature of his pleadings which were said to be hopelessly irrelevant and his failure to pay the expenses awarded against him in another action. Lord Justice Clerk Wheatley said at 453:

> "Ordering caution on a man who is manifestly not in a financial position to provide any sum of substance may appear to be a draconian order, but justice has to be even handed, and on the other side of the coin it would be grossly unfair to oblige the defenders to carry on defending an obviously irrelevant action without any hope of recovering any expenses if successful, particularly against an adversary who has shown that he is prone to table all kinds of procedural motions which have no merit and no justification."

Mrs Anderson's application

13. Mrs Anderson's application that each of the respondents should be ordered to lodge security for her costs in the sum of £5,000 is entirely without merit. Rule 36 makes no provision for an application by an appellant that a respondent be ordered to give security for the costs of the appeal. Nor did the Standing Order in the House of Lords. This should come as no surprise. To require an impecunious respondent to find caution would be, in effect, to force him to acquiesce in the appeal against the judgment which was in his favour in the court below. As a general rule, not even a bankrupt defender is required to find caution for expenses: MacLaren on *Expenses*, p 16. Nor is a bankrupt defender who is unsuccessful in his defence and reclaims, or a defender who has become bankrupt pending his appeal: *Johnstone v Henderson* (1906) 8 F 689; *Ferguson v Leslie* (1873) 11 SLR 16. As Lord Kinnear said in *Johnstone* at p 690, a respondent who is in that situation is still entitled to say that the case should not be decided against him until he has been heard.

14. But even if it were open to this court to make such an order, there are no grounds whatever for ordering the respondents to find security in this case. They are both public authorities. There is no question as to their ability to meet any order for costs that might be made against them. Nor has there been anything in their conduct of the case that suggests that they have been in any way obstructive or unreasonable. No responsible lawyer would have put his name to such an application. Recalling Lord Justice Clerk Wheatley's words in *Rush v Fife Regional Council* at p 453, it has no merit and no justification.

The respondents' applications

15. The case for an order that Mrs Anderson should be ordered to give security for the respondents' costs of the appeal is, on the other hand, compelling. The considerations that support their application are these:

> (a) First, Mr Anderson has informed the court that the awards of expenses that have been made in the respondents' favour against his mother already exceed, after taxation, the value of her house which appears to be her principal asset. The respondents have not yet sought to enforce these awards. But there must be some doubt about her ability to satisfy them out of such means as may be at her disposal.
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> (b) Second, this is an appeal that appears to be wholly without merit. Mrs Anderson has been unable to find two counsel in Scotland who are able and

willing to say that it is reasonable, and she has been refused legal aid. Her son, by whom the proceedings are being conducted on Mrs Anderson's behalf, is incapable of providing her with independent legal advice. The notice of appeal that has been lodged on her behalf identifies the various statutory provisions on which she founds. But no attempt is made to answer the criticisms of her pleadings which formed the basis of the finding by the Extra Division that they were irrelevant.

(c) Third, the decision of the Lord Ordinary that her averments are irrelevant has already been the subject of an appeal to the Inner House. Had leave been required for her appeal to this court, it would almost certainly have been refused on the ground that no reasonable grounds have been shown for her to be allowed a second appeal in a case which has failed below because of fundamental defects in the way it has been pleaded and raises no issue of general public importance.

(d) Fourth, these proceedings can arguably be said to be an abuse of process. Mrs Anderson is at the same time pursuing an action on the grounds of nuisance in the same court which, if soundly based, will give her a remedy in damages which is the same as that which she is seeking in these proceedings. The respondents ought not to be burdened with having to respond to two sets of proceedings at her instance in which she is seeking the same remedy.

Any one of these factors, on its own, might not have been enough. But the cumulative effect of these considerations more than justifies the order which the respondents seek, subject only to the amount of the security that should be ordered.

16. The respondents say that, in addition to the taxed awards of expenses in their favour in the Court of Session, they have each incurred further expense in connection with the appeal to this court which amounts to approximately £13,000. They seek orders for the giving of security in the sums of £50,000 and £40,000 respectively. Their exposure to further expense in resisting this appeal will, of course, depend on the procedure that the court will need to adopt to deal with it. As Mrs Anderson lacks the assistance of counsel, she would have to appear personally to argue her own appeal. This would create serious problems for her in view of her age and the distance she would have to travel. It would be more satisfactory, and fairer to all concerned, if the court were to dispense with an oral hearing and deal with the appeal on paper. That would also have the advantage of keeping costs down to the minimum. It should be assumed for present purposes that this is the procedure that will be adopted.

17. In all the circumstances we consider that a reasonable estimate the amount of the security for their costs that is required in the case of each respondent is £20,000.

Conclusion

18. Mrs Anderson's request that the respondents be ordered to give security for her costs is refused. The respondents' request that Mrs Anderson be ordered to give security for their costs is granted. The court orders her to give security in the amount of £20,000 for each respondent. This must be done by delivering a cheque to the Registrar within 28 days made payable to the UK Supreme Court Security Fund for the total sum of £40,000.