FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 53
XA89/19

Lord Brodie

NOTE BY LORD BRODIE

in the application for leave to appeal

under section 113 of the Courts Reform (Scotland) Act 2014

by

EXPLORE LEARNING LIMITED

Applicant

against

a decision of the Sheriff Appeal Court

Applicant: Lindsay QC; Shepherd & Wedderburn
Respondent: Logan; Harper MacLeod LLP

12 November 2019

[1] The applicant, Explore Learning Ltd, wishes to appeal a decision of the Sheriff Appeal Court (SAC) dated 31 May 2019 in a summary application to the sheriff brought under section 75 of the Public Services Reform (Scotland) Act 2010 and accordingly seeks permission to do so. The respondent, Social Care and Social Work Improvement Scotland (otherwise "the SCSWIS" or "the Care Inspectorate"), opposes the grant of permission.

[2] The respondent is a statutory body constituted by section 44 of the 2010 Act. It is the statutory successor to the Scottish Commission for the Regulation of Care. The 2010 Act

replaces and materially re-enacts the Regulation of Care (Scotland) Act 2001. The 2001 Act made and the 2010 Act makes, provision for the registration formerly by the Scottish Commission for the Regulation of Care and now by the respondent, of care services, including the day care of children.

[3] The summary application in terms of section 75 of the 2010 Act was an appeal by the applicant against the cancellation, in terms of section 64 of the 2010 Act, of the registration of certain services provided by the applicant at specified locations. The sheriff refused the applicants' appeal by interlocutor dated 9 October 2018. The SAC refused the applicant's appeal against the sheriff's decision on 31 May 2019.

[4] A number of grounds were put forward in the appeal by the applicant to the sheriff and then again in the appeal to the SAC. However, the applicant now seeks to appeal against the decision of the SAC of 31 May 2019 on one ground only which is set out in the Application for Leave to Appeal as follow:

> "a. The Sheriff Appeal Court erred in law to a material extent at paragraphs [37] to [41] of the Opinion of Court when it held that the respondent did not have a discretion to continue to register a 'non-care provider'. The Court ought to have held that the respondent erred in law to a material extent when it was considering whether or not to cancel the applicant's registration by failing to take into account that it had a discretion to continue the applicant's registration even if it considered that the applicant had never provided registered day care of children services. The respondent was not obliged to cancel the applicant's registration in such circumstances. It merely had a discretion to do so. Although a person cannot provide a registerable care service without first being registered with the respondent, the 2010 Act does not state that only persons providing a registerable care service may be registered: see section 59 of the 2010 Act. There is no prohibition on persons not providing a registerable service from being registered by the respondent. This discretion to register persons that are not providing a registerable care service is explicitly recognised by section 64(4) of the 2010 Act. Maintaining the applicant's registration in such circumstances would not have been *ultra vires*. This general discretion helps the respondent to fulfil its aims and general principles which are set out in sections 44 & 45 of the 2010 Act. The respondent's discretion requires to be exercised reasonably after all relevant and material circumstances had been taken into account: *Donaldson v*

> *Renfrewshire Council* [2011] CSIH 66 at paragraphs [17] and [18]. It also required a recognition that the decision making process in respect of a decision whether or not to grant a registration for the first time, as the relevant and material considerations would differ in each case. As the respondent had a discretion to grant or maintain a registration even where no registered care services were being provided, it was incumbent upon the respondent to consider how to exercise its discretion in the particular circumstances of this appeal. The respondent did not consider how to exercise its discretion. It was not inevitable that the respondent would have exercised its discretion against the applicant. This is a material error of law which vitiates the Decision. For this reason alone, the appeal should have been allowed by the Court"

[5] In terms of section 113(1) of the Courts Reform (Scotland) Act 2014 an appeal may be taken to the Court of Session against a decision of the SAC constituting final judgment in civil proceedings but only if (a) with the permission of the SAC, or (b) if that Court has refused permission, with the permission of the Court of Session. Where an application for permission is made to the Court of Session it falls to be considered, in terms of RCS 40.2, by a procedural judge.

[6] Section 113(2) of the 2014 Act provides:

> "(2) The Sheriff Appeal Court or the Court of Session may grant permission under subsection (1) only if the Court considers that—
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> (a) the appeal would raise an important point of principle or practice, or
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> (b) there is some other compelling reason for the Court of Session to hear the appeal."

[7] What, in relation to appeals from the SAC, is set out in section 113(2) of the 2014 Act is usually referred to as "the second appeals test". Discussion of and guidance in relation to the application of the second appeals test is to be found in the opinion in *Politakis* v *Spencely* 2018 SC 184, under reference to *Eba* v *Advocate General for Scotland* 2012 SC (UKSC) 1, at paragraph 48 and *Uphill* v *BRB (Residuary)* [2005] 1 WLR 2070, at paragraph 20 (and see also *Bridging Loans Ltd* v *Hutton* [2018] CSIH 63, 2018 Hous LR 83 at paragraph 1; *Khaliq* v

Gutowski 2019 SC 136 at paragraph 43; and *Aldabe* v *the Advocate General for Scotland* [2019] CSIH 35 (referred to in the respondent's answers to the application in support of the proposition that whether a proposed appeal was arguable was a relevant consideration)). For present purposes it is sufficient to note that permission can only be granted if either the section 113(2)(a) or the section 113(2)(b) criterion is satisfied; satisfaction of one or the other is a necessary condition for a grant of permission. However, satisfaction of one or the other criterion is not necessarily a sufficient condition for a grant of permission. Satisfaction of either criterion only means that the relevant court (the SAC or the Court of Session) *may* grant permission. In considering the exercise of its power in that situation it accordingly appears to me that the court must have regard to the prospects of success in the proposed appeal and the suitability of the particular case as a vehicle with which to advance such point as it is intended to make (in so far as such a requirement is not already implicit within the statutory criteria). I would see that as illustrated in the court's approach in *Politakis* and *Aldabe*. It is consistent with the submissions I heard both from Mr Lindsay QC, on behalf of the applicant, and from Mr Logan, on behalf of the respondent.

[8] Here the SAC has refused permission by interlocutor dated 23 July 2019. The applicant has therefore renewed its application before this court. As far as the statutory criteria are concerned the applicant relies on the section 113(2)(a) criterion: that the appeal would raise an important point of principle or practice. In the Application this contention is developed as follows:

> "a. The appeal raises an important point of principle or practice because it is concerned with the existence of a general statutory discretion that the respondent has to register, and to continue register, persons who are not providing registerable care services; and the circumstances in which this discretion falls to be exercised. This is an important point of principle which is of general application. It is not limited to the particular facts and circumstances of this appeal. It is important that the existence and extent of

> this statutory discretion, if any, is clarified by the Court of Session as it will have a considerable impact on the manner in which the current system of registration is operated by the respondent. The respondent contends that it has no such discretion whereas the applicant submits that it does have. This issue of statutory interpretation has not been authoritatively determined by the courts. The applicant is not merely contending that an established principle or practice has not been correctly applied."

[9] Mr Lindsay QC advanced his submission that I should grant permission by reference to four propositions: (1) the SAC had erred in law; (2) the section 113(2)(a) criterion was met; (3) it was for the procedural judge to consider the matter *de novo*; and (4) should the court be against him it should not pronounce an interlocutor to that effect before allowing the applicant four weeks' grace in order to allow the applicant and its clients to disengage from current arrangements and to give notice to the relevant authorities, including HMRC.

[10] As to Mr Lindsay's proposition (1), it was his submission that, having decided that it had power in terms of section 64(4) to cancel the applicant's registration and having decided that the applicant was not providing a registrable care service in the form of the day care of children, the respondent had erred in proceeding on the basis that it was accordingly obliged to cancel the applicant's registration. The power conferred by section 64(4) was discretionary: "the SCSWIS may cancel the registration of the service"; and not mandatory. The respondent should therefore have given consideration to whether, in all the circumstances of the case, the power should be exercised or not. The process should have been carried out in two stages: (1) determining whether the power was available and (2) determining whether it should be exercised; and not one stage, which had been the approach of the SAC. A two-stage approach was consistent with the general scheme of registration. The background was that the applicant had been providing a high quality and well-regarded service for a long period of years which had proved popular with parents.

[11] Turning to his proposition (2), Mr Lindsay reiterated what appeared in the Application: the proposed appeal raised an important point of principle or practice in that it related to the correct interpretation and application of a statutory provision which had not been the subject of consideration by the Inner House. If the applicant was correct this would have a significant impact on the respondent's practice not only in relation to its regulation of day care for children but also the other care services listed in section 47 of the 2010 Act.

[12] As for proposition (3) the SAC had been in error in refusing permission on the view that a question of statutory interpretation "is not something which can be considered to be novel". The observation that:

> "this is a fairly particular and quite rare case (it has been described as an oddity) and that is because we do not know, nor has it been established, the basis on which registration was originally achieved"

was irrelevant.

[13] I did not require Mr Lindsay to elaborate on his proposition (4). I was prepared to accept, subject to anything said by Mr Logan, that cancellation of registration (the result of refusing permission) would cause difficulty and inconvenience and that if that could be avoided by granting a short period of grace it should be. As it turned out Mr Logan presented no objection to what Mr Lindsay proposed.

[14] In making his submissions, Mr Logan adopted what was set out in the Answers to the Application. The statutory test was a high one but his primary objection to Mr Lindsay's submission was that the proposed ground of appeal had no prospect of success. The idea that registration, with its associated costs, should be maintained in respect of services which were not registrable simply because it was "a good idea" to do so, was a startling one. The applicant's operations were attracting substantial amounts of public money on the basis of their registration.

[15] Agreeing with Mr Lindsay, I accept that the jurisdiction of the Court of Session to grant permission or not arises *de novo*; it is not a question of reviewing the refusal by the SAC on 23 July 2019. However, in exercise of that jurisdiction I shall refuse permission to appeal the SAC's decision of 31 May 2019 to the Court of Session. My reasons are as follows.

[16] I consider that Mr Logan was entitled to regard the proposition that the services provided by the applicant should remain registered under chapter 3 of part 5 of the 2010 Act even although they were not services that chapter 3 contemplated as being registrable was a startling one. It may be that the applicant's services are of a high standard and much valued by those who receive them. It also may be that registration affords benefits, reputational and otherwise, for the applicant. I do not see that as being relevant. The proposed ground of appeal, that the respondent made a material error in law in not recognising that it had a discretion not to cancel the registration of what are now accepted not to be care services and therefore not exercising that discretion in a rational way has, in my opinion, no prospect of success. I accept that section 64(4) of the 2010 Act is permissive in its terms rather than mandatory; "may" means may. In that sense it can be said to confer a discretion but that is rather different from saying, as I understood Mr Lindsay to say, that section 64(4) opens up a "general discretion" requiring the respondent to consider all the circumstances which might bear on a decision immediately to cancel or not to cancel the registration of a service which has been found not to be a care service. Although it originally argued to the contrary, the applicant now accepts that the respondent was entitled to conclude that the services provided by the applicant did not constitute the "day care of children" as that expression fell to be construed in terms of section 47(1)(l) of and schedule 12 to the 2010 Act, as modified by the Scottish Ministers in terms of the Social Care and Social Work Improvement Scotland (Excepted Services) Regulations 2012. The applicant further now accepts that the

respondent accordingly had power to cancel the applicant's registration by virtue of section 64(4). The applicant does not now contend that the service it is providing is the "day care of children", or is otherwise such that it requires to or in terms of section 61 may be registered. Rather, as appears from its proposed ground of appeal, it accepts that the service it is providing is not "registrable". Given these circumstances, while the power conferred by section 64(4) is permissive or enabling in its nature, once it found that that the applicant was not providing "day care of children" it became the respondent's duty to exercise the section 64(4) discretion by cancelling the applicant's registration: cf *Sheffield Corporation* v *Luxford* [1929] 2 KB 180 at 183. I agree with the opinion of the SAC at paragraph [39], taking it to mean that section 64(4) does not create a discretion not to cancel a registration which is found to be in respect of services which do not require to be registered and to which section 61 does not apply. I see there to be no prospect of successfully arguing to the contrary. For that reason I will refuse permission to appeal. Additionally, I would not consider this appeal to "raise" an important point of principle or practice. What is in issue is the interpretation and application of a statutory provision. The SAC has determined the correct interpretation. As far as application is concerned, the existence and effect of a discretion not to cancel a non-registrable service, was not a point raised in any of the exchanges between parties prior to the respondent making its decision. It was not a point put before the sheriff. It is therefore difficult to see that the supposed error in law was material to the decision-making under review.

[17] As I have already indicated, Mr Logan had no objection to the applicant's being given a period of grace as asked for by Mr Lindsay. I accordingly agreed not to sign an interlocutor refusing permission until four weeks had passed from the date of the hearing on 10 October 2019. The respondent is entitled to an award of its expenses from the applicant.