SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

[2024] SC EDIN 42

EDI-CA31-23

JUDGMENT OF SHERIFF O'CARROLL

in the cause

QUTUB TRADING DMCC

Pursuer

against

DALTON GROUP LIMITED, STEPHEN GILBERT DALTON AND STEPHEN GILBERT DALTON JUNIOR

Defenders

Pursuer: Ower KC, Morton Fraser MacRoberts LLP
Defender: Lindsay KC, Ennova Law

EDINBURGH, 15 OCTOBER 2024

The Sheriff, having resumed consideration of the cause, Sustains the pursuer's first and second preliminary pleas-in-law; Refuses probation of the following defenders' averments: In Answer 4, "The condition requiring payment of a deposit operated solely in favour of the Company. The Company was, accordingly, entitled to waive compliance with it and by accepting the order, retaining the goods to fulfil it and pressing the Pursuer to pay the price and arrange uplift the Company waived compliance with said term." "Mr Noor, on behalf of the Pursuer, was aware that the Pursuers order had been accepted by the Company when sending his messages of 9th September 2019." "At that stage the earlier invoices totalling £430,000 also remained outstanding." "On receipt of the sum of £122,250 referred to in article 5 of Condescendence the Company retained said sum towards these losses as it was entitled to do." In Answer 5, "Pursuer's failure to make payment in full for the 2000 mt

of scrap purchased in August, its failure to indemnify the Company in respect of its losses resulting from the Pursuer's failure to pay for and collect the scrap". In Answer 12, "subject to the explanation that by the time of the exchange of messages and issue of an invoice on 10th and 11th September 2019 the Pursuer was liable to the Company also in respect of the August transactions and for the losses sustained by the Company". In Answer 13, "Explained and averred that so far as the Company was concerned, payment of the sums outstanding in relation to the August transaction was also required, and the Company was entitled to (and did) treat said payment of £122,250 as to account of said sums". In Answer 15, "Explained and averred that within the Scrap Yard the quantity of shredded steel scrap was considerably greater than 150 mt". In Answer 16, "The precise terms of the conversation between Mr Khan and Mr Gorniks are not known and not admitted as no contemporaneous written record of this conversation was taken". In Answer 19, "under explanation that the Company was entitled to receive these funds as a deposit for the reasons hereinbefore condescended upon." "under explanation that the Pursuer had no contractual or other legal entitlement to a refund". In Answer 21, "under explanation that these arguments were factually and legally correct"; Repels the defenders' first and second preliminary pleas-in-law; Remits the parties' remaining averments to probation on a date to be fixed hereafter; Fixes a pre-proof hearing at a date to be fixed hereafter; Reserves meantime the question of expenses occasioned by the debate.

[This interlocutor and heading incorporates the corrections made under OCR 12.2 by way of interlocutor dated 17 October 2024].

NOTE

Introduction

[1] This is a commercial action being a claim for payment of five separate sums totalling around £670,000 together with interest. The pursuer brings the action as an assignee of claims by others and in its own right. The second and third defenders have or had an interest in the first defender. The first defender entered liquidation on 29 January 2020. The parties were involved in the scrap metal business. The cause of action arises out of certain contractual arrangements made for the sale and supply of scrap metal between the parties or assignors. The precise nature of those contracts and the way in which the disputes about payments have arisen is unnecessary to record for the purpose of this Note. What is of direct relevance is some aspects of the history of litigation between the parties which is not in dispute.

[2] This action follows on proceedings raised by the pursuer against DMR Exports Limited ("DMR") in 2019 in the commercial court at Edinburgh Sheriff Court under reference EDI-CA56-19. That action sought payment of £122,250 paid by the pursuer for scrap metal from DMR which was not supplied. That sum is said to constitute a debt owed to the pursuer. That action was undefended. No defences were lodged and no notice of intention to defend was lodged. The pursuer sought and obtained decree in absence on 17 December 2019 for that sum with expenses and interest. A charge was served on 16 January 2020. DMR passed a special resolution that the company be wound up. An order placing the company in liquidation was pronounced by the sheriff at Dunfermline on 29 January 2020.

[3] The pursuer in this action alleges that gratuitous alienations (alternatively unfair preferences) of the sum sued for and other sums was made by DMR to the first defender

before liquidation. That included transfer of the £122,250 sum. Those transactions rendered DMR insolvent. That is the first sum sued for in the present action. Allegations of fraudulent trading and fraudulent representations by the present defenders are also made in this action resulting, it is averred, in additional sums due to the pursuer. Those aspects of the current action are not relevant for the purposes of this debate.

[4] The defenders deny liability for payment of any of the sums claimed by the pursuer, including the £122,250 figure. The defenders' averments include certain substantive averments relating to that sum and related issues with which the prior action was concerned. Those challenged averments are specified in the appendix to the pursuer's note of argument. They are the averments that the pursuer seeks to have excluded from probation.

[5] The matter proceeded before me as a debate on both parties' pleas-in-law. The pursuer invited the court to sustain its preliminary pleas-in-law and to find that the specified averments by the defenders were *res judicata* and ought to be excluded from probation. The pursuer further moved that the preliminary pleas for the defender be repelled and that a proof be fixed. The defenders invited the court to sustain their first plea-in-law, repel the pursuer's averments relating to *res judicata*, repel the pursuer's first and second pleas-in-law and fix a proof before answer.

[6] Counsel for the defender opened the debate and briefly developed his arguments from the pursuer's Rule 22 note. They may be summarised as follows. The pursuer's averments regarding *res judicata* are irrelevant. That is because issues of *res judicata* may only arise when a matter has been the subject of judicial determination pronounced *in foro contentioso*. The prior court action was undefended. Accordingly *res judicata* cannot apply. OCR 7.5(a) which provides that a decree in absence not challenged or reviewed "shall have

effect as a decree *in foro contentioso*" on the expiry of six months from the date of decree or charge has no application to the present circumstances.

[7] Developing the argument further, it was accepted by the defenders that there were five essential elements to a plea of *res judicata*: see the summary of the law in *Carew-Reid* v *Lloyds Banking Group* [2013] CSOH 5 per Lord Hodge. It was conceded that four of the five elements were present in this case (decree by competent court in action between same parties on same grounds on same subject matter). The fifth element that the decree be *in foro contentioso* was however not present as the decree was in absence. A plea of *res judicata* cannot rest on a decree in absence: *Fulton* v *Earl of Eglinton* (1895) 22 R 823; *Esso Petroleum Company Ltd* v *Law* 1956 SC 33; *Carew-Reid* v *Lloyds Banking Group plc (supra); Macphail Sheriff Court Practice (4th ed.)* paragraph 7.22. The parties are agreed that the prior decree was a decree in absence.

[8] OCR 7.5(a) cannot provide a relevant basis for the plea of *res judicata*. It has no application. That rule cannot convert a decree in absence into a decree pronounced *in foro contentioso* for the purposes of a plea of *res judicata*: see the decision of Inner House in *Esso Petroleum Company Ltd, supra* and the dicta of Lord Carmont at page 38. That authority has not been overturned and binds this court. It is trite law that the common law cannot be modified by secondary legislation, which is the nature of the ordinary cause rules.

[9] The defender's reply was as follows. In terms of OCR 7.5, the decree in absence became entitled to the privileges of a decree *in foro contentioso* six months from the date of service of the charge on 16 January 2020. The service of the charge was equivalent to personal service. The charge was neither suspended nor reduced. Neither was the decree. As of 17 July 2020 the decree in absence became final and had effect as a decree *in foro contentioso* under the rule: see *Macphail, supra,* paragraph 2.130. The plea of *res judicata* can

be used as a shield or a sword and is used by the pursuers in the former sense: see *RG* v *Glasgow City Council & Anr* 2020 SC 1, paragraph 27.

[10] Counsel's written submissions explained in detail the history of OCR 7.5 and cognate provisions in both the Sheriff Court and Court of Session rules. It is not necessary to rehearse the whole history for current purposes. What is of interest for current purposes is that since 1876 there has been statutory provision allowing for decrees in absence to be treated as decrees *in foro contentioso* in the Sheriff Court. The same is true from 1868 so far as the rules of the Court of Session are concerned. Counsel submitted that rule means what it says. *Esso Petroleum Company Ltd* is not authority for the proposition advanced by the defenders. The then equivalent to Rule 7.5 was not in issue in that case although Lord Carmont does refer to the existence of the rule without comment, positive or negative.

Analysis and decision

[11] OCR 7.5 is in the following terms.

> **7.5 Finality of decree in absence**
>
> Subject to section 9(7) of the Land Tenure Reform (Scotland) Act 1974 (decree in action of removing for breach of condition of long lease to be final when extract recorded in Register of Sasines), a decree in absence which has not been recalled or brought under review by suspension or by reduction shall become final and shall have effect as a decree in foro contentioso –
>
> (a) on the expiry of six months from the date of the decree or from the date of a charge made under it, as the case may be, where the service of the initial writ or of the charge has been personal; and
>
> (b) in any event, on the expiry of 20 years from the date of the decree.

[12] In this case, the parties' representatives have helpfully distilled their arguments so as to isolate the essential matter for determination. Thus, the parties agree that there was a

prior decree in absence granted in the sheriff court in 2019 and no attempt was made to defend the action or challenge the result. They are agreed that crave 1 and associated averments in the current action concern the subject matter of that prior action. They agree that as a result of that earlier action all the ingredients of *res judicata*, bar one, are satisfied. They are agreed that the resolution of the parties' pleas turns on the proper interpretation and effect of OCR 7.5. They are agreed that personal service of the charge was made on the defenders and six months has since elapsed. So, they are agreed that the debate turns on the sole issue as to whether OCR 7.5 does or does not have the effect of enabling the prior decree in absence to be treated as a decree *in foro contentioso* for the purposes of a plea of *res judicata* thus supplying the final ingredient of the plea of *res judicata*.

[13] In my view, the pursuer's argument is sound. On a straightforward reading of the rule, the prior decree has become final and has effect as a decree *in foro contentioso*. In my view, that conclusion is inescapable, standing the concessions made and agreements between the parties on the fact and law, on a straightforward interpretation of the rule. The rule has been a part of the Scottish Courts' landscape for over 150 years in some form or another. It is clearly conceived for the purposes of enabling certainty and finality in litigation. The heading reflects accurately the purpose of the rule. The intention of the rule is so that if certain conditions are satisfied, the party holding decree may have certainty and finality in the litigation where the other party has not joined in the proceedings. Within those conditions are safeguards for the other party. Thus, the party seeking to rely on the rule must have served the initial writ or the subsequent charge personally. Service of the initial writ on the walls of court for example will not qualify. That is to ensure that the other party knows of the existence of the action. Furthermore, the party against whom decree in absence has been granted has at least six months from the date of decree or service of the

charge to take action to preserve its position. During that six months, the other party can seek to be reponed, can seek suspension or reduction of either the decree or charge or both. If that is done, OCR 7.5 does not bite. If the requirements of OCR 7.5(a) are not met, the decree in absence only becomes final, a decree *in foro contentioso*, after 20 years. These are adequate reasonable safeguards, balancing the practical need for finality in litigation with fairness to the parties, which have stood the test of time.

[14] It is notable that the defenders are unable to point to any clear authority in point supporting their position. The *Fulton* case is not concerned at all with the effect of rules of court on the law of *res judicata*. Neither does the *Carew-Reid* case support the defenders' position, accurate though the useful summary of the law concerning *res judicata* may be. The defenders' reliance on paragraph 7.22 of Macphail omits reference to paragraph 2.130 where Rule 7.5 where the terms of the rule are rehearsed without comment. That work does not assist the defenders. The high point, indeed the crux, of the defenders' case is the *Esso Petroleum Company Ltd* decision and the dicta of Lord Carmont. Senior counsel for the defenders particularly emphasises the following passage in his opinion at page 38:

> "I do not see how the defender in the present case can introduce the principles of *res judicata* by invoking the mere language of the Sheriff Court code and extracting therefrom that the decision was *in foro* although it was plain that the antecedent cause had never been met by the putting forward of defences. If the decree, notwithstanding the language used in the Sheriff Court code, did not satisfy the requirements of our law, *res judicata* would not be applied … Unless it is made out that the antecedent decree is one that satisfies the requirement of having been pronounced in an action in which there had been at all events the minimum requirement of some tabled defence, the plea cannot be sustained."

[15] The difficulty with the defender's reliance on this passage is that the court in that case was not dealing with the then equivalent of OCR 7.5 at all. The equivalent then to OCR 7.5 was Rule 25 which was in similar terms. That had no application in *Esso Petroleum Company Ltd*, because the defenders had lodged a notice of appearance but failed to lodge

defences. Decree was sought and granted on the basis that no defences were lodged. It was what would be termed today a decree by default, not a decree in absence. In short, Rule 25 was not in play. Decree was granted under Rule 23. The dicta of Lord Carmont were directed at a different argument, based on inferences that should be made taken from the structure and arrangement of the rules in which decree passing under Rule 23 was under the general heading of "defended causes". That was the argument that was decided and it was that argument that failed. That was why only passing reference was made by Lord Carmont, without comment, to Rule 25. It follows that this authority is not in my view authority for the proposition advanced by counsel for the defenders and is not binding on me in the circumstances of this case.

[16] It was further argued on behalf of the defenders that the Sheriff Court rules were incapable of amending the common law. No authority or further argument was advanced by senior counsel for the defenders to support that proposition, which was described by counsel as trite law. Neither was there any argument made by senior counsel for the pursuer concerning that proposition, one way or the other.

[17] I am far from convinced that the defenders' proposition is sound. It seems to me that the ordinary cause rules are part of the primary legislation: see section 39 of the Sheriff Courts Act 1907, albeit they have been amended by numerous Acts of Sederunt over the years. A cursory examination of the authorities in this area, such as chapter 14 of *Craies on Legislation* (12th ed.) might suggest that the law on this subject is far from trite and the proposition asserted is unsound. But unassisted as I am by submissions from either party, I do not rule on the proposition that the common law relating to *res judicata* is not capable of being amended by legislation such as the Ordinary Cause Rules and OCR 7.5 in particular.

[18] Rather, I find that on a plain reading of OCR 7.5, applied to the agreed circumstances of this case, the prior decree in absence in favour of the pursuer took effect as a decree *in foro contentioso* as of 17 July 2020, that therefore the subject matter of that litigation is now *res judicata* between the parties, that the *Esso Petroleum Company Ltd* case, not being in point, does not compel me to a different conclusion, the defenders' averments relating to the subject matter of the earlier action are irrelevant, shall not be remitted to probation and fall to be deleted. I therefore sustain the pursuer's preliminary pleas and repel those of the defenders. I will allow the parties a proof of their remaining averments at a date to be fixed hereinafter. I will also fix a case management conference. My clerk will contact the parties to discuss suitable dates.

Expenses

[19] I was not addressed by the pursuer on the question of expenses. I expect that the parties will be able to agree on the question of expenses in the light of this judgment and if so, a note to my clerk within 14 days of publication of this decision expressing an agreed position will suffice for me to deal with that question without the necessity for a hearing. Otherwise, that question can be considered at the forthcoming CMC. Meantime, I will reserve all questions of expenses occasioned by the debate.