INNER HOUSE, COURT OF SESSION

[2019] CSIH 48
XA64/19

Lord Brodie

OPINION OF LORD BRODIE

in the note by

by

NEIL CUNNINGHAM

Noter

against

(FIRST) ANTHONY ARTER, PENSIONS OMBUDSMAN; (SECOND) KAREN JOHNSTON, DEPUTY PENSIONS OMBUDSMAN; and (THIRD) NAMULAS PENSION TRUSTEES LIMITED

Respondents

Noter: Byrne; Lindsays Solicitors
First and Second Respondents: MacGregor, sol adv; Pinsent Masons LLP
Third Respondent: P Reid; CMS Cameron McKenna Nabarro Olswang LLP

13 September 2019

Introduction

[1] The noter is Neil Cunningham. He is a solicitor by profession. He is resident in Milngavie, within the district of Dumbarton Sheriff Court. He has lodged a Note in terms of RCS 41.11 seeking an order to ordain the Deputy Pensions Ombudsman (the "DPO") to state a case for the opinion of the Court of Session on the questions of law which, having previously been set out in a minute sent to the DPO, are repeated at statement 8 of the Note.

Incidental to the prayer of the note is an application, in terms of RCS 2.1(1), to relieve the noter from the consequences of a failure to comply with a provision in the Rules of Court. That incidental application came before me, sitting as a procedural judge in terms of RCS 37A.1(2)(d)(i), as a single bill on 6 August 2019.

[2] The noter avers that by form dated 1 February 2016 he made a complaint (the "Complaint") to the Pensions Ombudsman (the "PO") further to section 146 of the Pension Schemes Act 1993 (the 1993 Act) concerning his rights as a beneficiary of a self-invested personal pension, or SIPP, of which Namulas Pension Trustees ("Namulas") is the sole trustee. The Complaint concerned what the noter saw as failures on the part of Namulas in its management and sale of heritable properties in which the SIPP had a 50% interest, in consequence of which the noter, as beneficiary of the SIPP, had suffered loss. Karen Johnston, (the "DPO"), exercising the same functions as the PO in terms of section 145A of the 1993 Act, issued a determination (the "Determination") of the Complaint dated 11 January 2019. The noter received the Determination by post on 14 January 2019. The Determination held that the noter's complaint should not be upheld. The noter avers that in terms of section 151(3) of the 1993 Act a determination by the PO of a complaint is "final and binding", subject only to the statutory right of appeal.

[3] Section 151(4) of the Pension Schemes Act 1993 provides that an appeal on a point of law may be taken to the Court of Session from a determination of the Pensions Ombudsman. It is convenient to note the full terms of the subsection, which are as follows:

> "(4) An appeal on a point of law shall lie to the High Court or, in Scotland, the Court of Session from a determination or direction of the Pensions Ombudsman at the instance of any person falling within paragraphs (a) to (c) of subsection (3)."

Provision for an appeal to the Court of Session under section 151(4) is made by the Rules of Court as follows:

In terms of RCS 41.49:

> "41.49. A reference or appeal under any of the following provisions shall be by stated case to which Part II (appeals by stated case etc.) shall apply ... (b) an appeal under section 151(4) of the Pension Schemes Act 1993;"

In terms of RCS 41.8:

> "41.8—(1) An application for a case for the opinion of the court on any question shall be made by minute setting out the question on which the case is applied for.
> (2) A minute under paragraph (1) shall be sent to the clerk of the tribunal
> ...
> (b) where the application may be made after the issue of the decision of the tribunal, within the period mentioned in paragraph (3);
> ...
> (3) The period referred to in paragraph (2)(b) and (c) is —
> (a) the period prescribed by the enactment under which the appeal is made; or
> (b) where no such period is prescribed, within 14 days after the issue of the decision or statement of reasons, as the case may be."

[4] Thus, although the 1993 Act does not prescribe the manner in which an appeal to the Court of Session may be made or the period within which it is to be made, the applicable Rules of Court require that an appeal against the Determination must be made by way of an appeal by stated case for the opinion of the Court and that the appeal has to be initiated by an application to the relevant administrative officer of the DPO within 14 days after the issue of her decision, that is no later than 28 January 2019 (or 25 January 2019 if, as I understood to be the position of parties, "issue of the decision of the tribunal" is to be equated with posting of the Determination). As the authorised claimant in question the noter is a "person falling within paragraphs (a) to (c) of subsection (3)." The noter wishes to appeal from the Determination to the Court of Session on point of law. However, the noter only applied to the DPO to state a case by way of minute on 7 June 2019. Thus, as the noter accepts, on no view did he make an application for a stated case within 14 days after the

issue of the DPO's decision. It is from the consequences of that failure that the noter applies to be relieved.

[5] The PO and the DPO have lodged Answers to the Note in which they are designated as, respectively first and second respondents. The PO and the DPO have also lodged a note of objections to the competency of an appeal under statute in terms of RCS 41.5, as has Namulas (designating itself third respondent). Strictly speaking, the notes of objection are procedurally inept. The DPO has refused to state a case. No appeal has as yet been made and thus there is nothing to which objection may be made in terms of RCS 41.5. Nothing however arises from this. Parties were agreed that the noter cannot make an application for a stated case unless he is relieved from the consequences of his failure to do so within 14 days of issue of the Determination. The PO, the DPO and Namulas (collectively the "respondents") have made clear their wish to contend that the noter should not be relieved of his failure. That matter requires to be decided.

[6] The respondents do not suggest otherwise, but having had the benefit of citation of the relevant authorities and by way of clearing the ground, I should make clear that this is a case where it is competent to apply RCS 2.1 according to its terms and, having done so, to ordain the DPO to state a case, thus entertaining a late statutory appeal. As is explained in the opinion of the Court delivered by the Lord President in *Neilly* v *The Nursing and Midwifery Council* [2019] CSIH 32, it will not always be the case that RCS 2.1 can be used in this way in order to excuse the lateness of a statutory appeal, The issue addressed in *Neilly* does not arise in the present case. The 1993 Act does not provide any time limit within which an appeal must be made. The applicable time limit is entirely derived from the Rules of Court. The RCS 2.1 discretion is therefore available to be exercised according to its terms. The question is simply whether in all the circumstances of the case it should be.

History

Events prior to 14 January 2019

[7] The noter received the Determination on 14 January 2019. Something emphasised by Mr Byrne, who appeared on behalf of the noter, was the length of time that the DPO had taken to determine the Complaint. It had been made on 1 February 2016. The DPO had issued the Determination on 11 January 2019. The period between these dates was nearly three years. This fell to be contrasted with the 11 months within which the PO sets himself to determine complaints. It also fell to be contrasted with the 14 day period within which a party must request a stated case. When Ms MacGregor came to respond on behalf of the PO and DPO she accepted that the period over which the Complaint had been considered had been lengthy but she explained that this had been because of the very many queries and comments (she had counted 15 in all) which the noter had submitted to the DPO in the course of her investigation.

[8] The DPO issued a preliminary determination (the "Preliminary Determination") on 7 February 2018. The noter avers that thereafter he provided the DPO with extensive and detailed comments on the Preliminary Determination pointing out various factual and legal errors. It would appear that the noter became dissatisfied with the DPO's response. He avers:

> "By August 2018 the Noter concluded that the Complaint was not going to be dealt with properly and that he had no choice but to seek an alternative forum in order to obtain a fair hearing. Accordingly, he raised proceedings against Namulas in Dumbarton Sheriff Court."

[9] In terms of Rule 4(b) of the Personal and Occupational Pension Schemes (Pensions Ombudsman) (Procedure) Rules 1995 a complainant may withdraw his complaint at any time with the leave of the PO, which leave shall not be unreasonably refused. As I

understand the noter's position it is that while he may not have submitted a formal notice of withdrawal to the PO, by reason of his raising the Sheriff Court action and the terms of his correspondence with the DPO in relation to that action, and perhaps more generally, he should be deemed to have requested to withdraw his complaint under Rule 4(b) and that either the DPO issued the Determination before she determined his deemed request or she refused his request unreasonably. That position and its relationship with the proceedings in Dumbarton Sheriff Court are set out in averment in the Note as follows:

> "By email dated 24 August 2018 the Noter wrote to the PO's office to confirm that '[The Pensions Ombudsman] will no longer be dealing with my complaint about Namulas. The matter is now the subject of formal litigation proceedings pursuant to a warrant granted by the Court earlier this week.' By letter dated 4 September 2018, the DPO responded to the Noter's email, outlining three potential courses of action, being granting [sic] leave in terms of Rule 4 of the Rules to withdraw the complaint, discontinuing the investigation in terms of Rule 16(1)(c), or continuing with the investigation and making a final determination. The DPO invited the Noter and Namulas for comments [sic] on the three options by 18 September 2018. By email dated 18 September 2018, the Noter wrote to the PO setting out in detail his concerns about the manner in which the Complaint had been handled and expressing the view that any determination would be a 'legal nullity'. He expressed the view that the office of the PO had shown itself to be unable or unwilling to fulfil its statutory responsibilities and referred once again to the fact that the issues in the Complaint would be determined by the Sheriff at Dumbarton and not by [the] PO.
>
> In the meantime, Namulas had enrolled a motion in Dumbarton Sheriff Court to sist the cause in terms of section 148 of the 1993 Act. As a result of an error on the part of the Noter's then agents, the motion to sist was not opposed by the last date for opposition, which was 18 September 2018. By letter dated 5 November 2018, a representative from the office of the PO wrote to the Noter to confirm that, in light of the fact that the motion to sist had not been opposed, the DPO would proceed to consider the parties' representations made in respect of the Preliminary Determination.
>
> On 12 November 2018, the Noter's new agents enrolled, and intimated to Namulas, a motion for the sist to be recalled. The motion for recall was opposed and called before the Sheriff in Dumbarton on 4 December 2018. At that hearing the motion was continued until 15 January 2019. By email dated 4 December 2018 the Noter wrote by email to the PO (copied to the DPO) to confirm that the motion for recall had been continued until 15 January 2019 and to reiterate his view that any determination issued by the DPO would be a nullity. It was therefore clear to the DPO as at 4 December 2018 that the fact that the sist had not been opposed should

> not be taken as an acceptance by the Noter that the DPO should proceed to issue her determination. Before the continued motion could be heard, the DPO issued her Determination without further consideration of whether or not the Noter should be allowed to withdraw his complaint. Namulas now relies on the Determination to support a plea of *res judicata* in the Sheriff Court action."

[10] Mr Byrne explained that as a result of two communications in 2018 the noter had come to understand that the means of challenging the Determination was by way of an application for judicial review. The first of these communications was in June 2018 when an officer of the PO, a Mr Thomas Coutts, advised the noter that if he "was unhappy with anything that [Mr Coutts] had done" his remedy was judicial review. The second communication was a conversation with senior counsel who had been instructed on behalf of the noter in relation to a hearing in Dumbarton Sheriff Court on 4 December 2018. I shall return to consider the relevance of this misunderstanding (of what may have been entirely correct advice) later in this opinion.

Events subsequent to 14 January 2019

[11] The Determination was sent to the noter on 11 January 2019 and received by him on 14 January. It was issued together with a "factsheet". The factsheet promises to explain about a number of matters including "Appealing the Determination". The section begins:

> "Appeals are to the Chancery Division of the High Court in England and Wales, the Court of Session in Scotland or the Court of Appeal in Northern Ireland.
>
> The Ombudsman has directed for England and Wales that the person wishing to appeal must lodge the appeal within 28 days after the date of the Ombudsman determination. Different time limits apply in Scotland and in Northern Ireland and local advice should be taken."

In what follows the only further reference to Scottish procedure is the information in a somewhat cryptic footnote to the sentence "If you appeal the Ombudsman should not be

listed as a respondent in the Notice of Appeal". The footnote reads: "Unless appeal lodged in Scotland or Northern Ireland and by way of case stated."

[12] The noter explains that on receipt of the Determination on 14 January 2019 he spent considerable time in trying to understand the extent to which the DPO had had regard to his comments on the Preliminary Determination and the extent to which her reasoning had changed in response to these comments. Consistent with the noter's understanding that his remedy was by way of judicial review the noter prepared a 79 page "Judicial Review Document" containing what Mr Byrne described as a forensic analysis of the Determination for the use of counsel.

[13] On 28 January 2019 the noter contacted junior counsel with a view to appealing the Determination. The junior counsel first contacted was unable to deal with the matter and the noter contacted another junior on 29 January 2019. On 30 January he contacted, and on 31 January 2019 he instructed, agents who, in turn, instructed counsel. On 31 January junior counsel advised that he thought that appeal of the Determination might be subject to the 14 day time limit. On 15 February 2019 junior counsel provided a note advising on the merits of the appeal and confirming that the time limit had elapsed. He advised that senior counsel be instructed. Senior counsel was instructed on 18 February 2019 and on the same day he advised that, as was provided by RCS 41.8, the applicable time limit was 14 days and that the noter would accordingly need to apply to the Court to exercise its discretion in terms of RCS 2.1. A draft application for a stated case had been prepared by 25 February 2019.

[14] By email of 19 February 2019 the noter's agents wrote to the DPO to ask whether, given the expiry of the time limit, the DPO would refuse to state a case. The DPO, through her in-house legal manager, responded on 20 February 2019 to advise that the PO's office

was unable to agree to state a case and that it awaited further "correspondence" from the noter's agents and/or the Court. On advice, the noter's agents applied to the DPO by minute to state a case but not until 7 June 2019. The DPO has not corresponded further with the noter or his agents. She has not issued a certificate specifying the date of her decision and the reason for failing to state a case pursuant to RCS 41.10(4)(a) and RCS 41.11.

[15] Between 19 February and 7 June it would appear that the noter's attention was given to the action in Dumbarton Sheriff Court. A very substantial and elaborate (and as Mr Byrne acknowledged, entirely misconceived) Minute of Amendment was prepared, as I understood it largely, if not exclusively, by the noter himself. The Minute of Amendment reflected the view that the Court of Session could only properly consider his appeal once the Sheriff Court had granted certain declarators as to matters of fact. When he came to make his submissions, counsel for Namulas, Mr Reid, provided a timeline in relation to the Sheriff Court action in relation to the period subsequent to 14 January. The final day for adjustment was 12 March 2019. It passed without adjustments being intimated by the noter. There was an options hearing in the Sheriff Court on 26 March. Limited and late adjustments (to alter the pleas-in-law) were proposed on 12 April. A debate was ordered on 23 April. The Minute of Amendment was intimated on 3 June and on 10 June it was moved that it be received, it being explained that its objective was to make better progress with the appeal to the Court of Session.

Submissions

[16] On behalf of the noter, Mr Byrne accepted that the noter had made mistakes. He had been responsible for oversights. The noter was a solicitor, which might give rise to certain expectations but in this case there was an element of "a little bit of knowledge is a dangerous

thing". After 14 January the noter had engaged in furious but misconceived activity in order to put counsel in a position to understand the case. Until he received the advice of junior counsel the noter had not been aware of the 14 day time limit. Had the factsheet crisply stated that he had 14 days to appeal it is entirely possible that the noter would have been disabused of his belief that the remedy was judicial review and been directed to the need to appeal within what was a very tight deadline. The dispensing power conferred by RCS 2.1 was available to relieve the consequences of a failure to meet a time-limit imposed by the Rules of Court where it had arisen from mistake or oversight. It was not necessary to show exceptional circumstances: *Lilburn* v *The Pensions Ombudsman and Others* [2018] CSIH 2. There was no prejudice to the respondents other than Namulas losing a windfall benefit. Here the time-limit in question had been very short. The delay of some four months was not over-long. It could be contrasted with the period of nearly three years which the DPO had taken in her consideration of the Complaint; what was "sauce for the goose was sauce for the gander". The case was of great significance to the noter. He considered that his pension fund had suffered a loss in the order of £300,000 to £400,000 as a result of mismanagement by Namulas. Without conceding the point, the Determination would appear to give rise to a plea of *res judicata* as against any damages claim by the noter against Namulas. There was no remedy available against the PO. The noter would concede the respondents' expenses.

[17] On behalf of the PO and DPO, Ms MacGregor submitted that the noter should not be relieved of his failure to bring an appeal in time. He was a solicitor. There was a need to proceed with a degree of expedition. Ms MacGregor took me through the terms of the Note. His failure to request the DPO to state a case until 7 June 2019 was a decision made by the noter contrary to advice he had received from senior counsel. It was not the result of a mistake and it was not excusable. Ms MacGregor accepted that she could not point to

prejudice to the PO or DPO in the event of the noter being granted relief but the PO was part of a statutory system the efficiency of which required adherence to time limits. As far as the terms of the factsheet were concerned, the PO was considering amending it.

[18] On behalf of Namulas, Mr Reid moved me to refuse the noter's application. The position might have been different had this application been being considered in the Spring, shortly after the noter's legal advisers had prepared a draft application for a stated case, but the noter had let time go by and was seeking recourse to RCS 2.1 in August. The provision conferred a wide equitable power but Namulas wished finality. Mr Reid pointed to the history of the matter, including events in Dumbarton Sheriff Court; until 3 June Namulas was not aware that the noter intended to pursue an appeal from the Determination. The noter had opted for the complaint procedure; he had not been compelled to do so. The price for the benefits of making a statutory complaint was the finality associated with section 151 of the 1993 Act. It was now some three and a half years since the Complaint had been made. To allow relief in terms of RCS 2.1 where the delay had been caused by a misconceived decision by the noter would be to undermine the legislature's desire for the finality which Namulas was entitled to expect no later than 12 April when there had been no pleading from the noter to meet the section 151 point.

[19] In a brief second speech, Mr Byrne expressed the wish to make clear that the present instructing solicitors had only been instructed in March 2019. No weight should be placed on the failure to adjust in the Sheriff Court action. RCS 2.1 allowed relief to be granted where the failure in question was due to any excusable cause. The court had a wide discretion. Here there had been mistakes which had caused non-compliance. This was not a case where there had been a deliberate decision not to appeal to this court. The respondents' submissions to that effect should be rejected. In the mind of the noter his steps to obtain

declarators from the Sheriff Court were steps in advancing the appeal. The first and second respondents had candidly admitted that they would not suffer prejudice in the event of the RCS 2.1 discretion being exercised in favour of the noter. Moreover they had recognised that the factsheet was sufficiently deficient to require amendment. Mr Byrne renewed his motion.

Decision

[20] RCS 2.1 provides:

> "2.1 - (1) The court may relieve a party from the consequences of a failure to comply with a provision in these Rules shown to be due to mistake, oversight or other excusable cause on such conditions, if any, as the court thinks fit.
>
> (2) Where the court relieves a party from the consequences of a failure to comply with a provision in these Rules under paragraph (1), the court may pronounce such interlocutor as it thinks fit to enable the cause to proceed as if the failure to comply with the provision had not occurred."

[21] Relying on the provisions of RCS 2.1, the noter invites the court to exercise its discretion to relieve him of the consequences of his failure to send a minute to the DPO within the period prescribed by RCS 41.8. In addition to their respective oral submissions which I have recorded above, parties lodged notes of argument. The PO, DPO and Namulas (collectively "the respondents") there contend that there is no proper basis upon which the discretion conferred by RCS 2.1 can be exercised in favour of the noter. The PO and the DPO further contend that, in any event, the questions in the Note on which the DPO is required to state a case do not disclose any points of law which ought to be determined.

[22] Parties were agreed that an authoritative source of guidance as to the exercise of the discretion conferred by RCS 2.1, in circumstances such as the present, is found in the opinion

of the Court delivered by the Lord President (Carloway) in *Lilburn* v *The Pensions Ombudsman and Others*. At paragraphs 18 and 19 the Lord President said this:

> "[18] RCS 2.1 allows the court to relieve a party from the consequence of any failure to comply with the rules where the failure has been caused by a "mistake, oversight or other excusable cause". The purpose of the power is to achieve justice between the parties, where such justice would not be achieved otherwise because of a procedural failure. …
>
> [19] RCS 2.1 does not require any exceptional or extraordinary circumstances (*Semple Cochrane v Hughes* 2001 SLT 1121), Lord Carloway at para [10] citing the correct version [of RCS 2.1], but it does require there to be a 'failure' to comply with the rules. It is not normally open to the court to use the power to reverse an action which has been deliberately taken (*Anderson v British Coal Corporation* 1992 SLT 398, LJC (Ross), delivering the Opinion of the Court, at 401)."

[23] The discretion therefore is a wide one. There are, however, certain parameters. A failure, the consequences of which may be relieved, will often, although not necessarily, have been caused by mistake or oversight, but whatever the cause, that cause will require to be identified in order to determine whether it is "excusable". Where the cause is a deliberate decision to do or to refrain from doing something that will not normally be a case for the exercise of the discretion.

[24] An application for exercise of the dispensing power almost always arises in circumstances where, in the words of Lord President Normand in *Dalgety's Trs* v *Drummond* 1938 SC 709 at 715, a member of the legal profession has acted in ignorance of the Rules of Court and of the provisions which they contain. That is not the case here. The relevant decision-maker was the noter, albeit, as Mr Byrne put it, the noter had been "advised at every turn" (I would observe that during the hearing the noter was present in court and Mr Byrne was able to, and did, take instructions directly from him on matters of detail). With that and the considerations pointed to in *Lilburn* in view, I have thought it important to try to understand why the noter acted as he did. Despite having had the assistance of

Mr Byrne I have not found that very easy to do; Mr Byrne's observation that "a little knowledge is a dangerous thing" may be as apposite as any.

[25] I have already mentioned that Mr Byrne explained that, notwithstanding what appeared in the factsheet, the noter had understood that the means of challenging the Determination was by way of an application for judicial review. I understood from what Mr Byrne told me that the noter had thought that, whatever might be the case in England and Wales, there was no statutory appeal available in Scotland. From that I supposed that the noter understood, at least in general terms, the difference between judicial review and a statutory appeal. I wondered however how what I had been told about the noter's belief squared with what appeared in the factsheet. I raised the point with Mr Byrne. Having taken instructions, Mr Byrne explained that my supposition that the noter understood the differences between judicial review and a statutory appeal and might have therefore been misled into thinking that the time limit for a statutory appeal did not apply, was incorrect; the noter had not understood that judicial review and statutory appeal were distinct processes (as I noted Mr Byrne, he said that: "the noter, as a non-litigation lawyer, does not understand the distinction between a judicial review and an appeal"). If that is so, the noter thinking that his remedy was something called "judicial review" would appear to be of no particular significance. It occurred to me that the noter may have confused perfectly sound advice he had received in 2018 as to the means of challenging the procedures adopted by the DPO with the means available to challenge her Determination once it was made, but, contrary to what appeared to be being suggested by Mr Byrne at one stage, any error in this respect does not seem to have had any impact on the noter's decision-making subsequent to 14 January 2019. I therefore leave it aside.

[26] I accept, however, as the noter avers, that he was ignorant of the 14 day time limit until junior counsel advised him of it on a preliminary basis on 31 January 2019. I also accept that the time allowed by the Rules of Court within which to make an appeal against a determination by the PO (by requesting him to state a case) is very short. In some cases it may be impracticably short. The recipient of a determination will of course only know what he is faced with if he is aware of what the time limit is. As a means of drawing attention to what that is in Scotland, I consider that the terms of the factsheet attached to the Determination merited Mr Byrne's strictures (the PO's history in relation to this matter has not been a very happy one: see *City of Edinburgh Council* v *Rapley* 2000 SC 78 at 79 and 80; and *Lilburn* v *Pensions Ombudsman* at para [9]). That said, exiguous as the information provided by the factsheet may have been, it did at least mention the availability of an appeal and the fact that an appeal was subject to an (undisclosed) time-limit. A prudent recipient of the Determination, particularly one who was a solicitor, might have been expected to take immediate competent advice as to when and how he should go about appealing, if that is what he wished to do. Nevertheless, as Mr Reid acknowledged, if relief in terms of RCS 2.1 had been applied for shortly after 31 January or even shortly after 25 February 2019, by which time the noter had been advised by senior counsel and a draft application for a stated case had been prepared, the noter would have been able to advance quite a persuasive argument. The noter might have said (as Mr Byrne argued could still be said) that he had taken active steps to instruct litigation solicitors and counsel; that he had done this as speedily as possible; that had the ordinary allowance of 42 days under chapter 41 of RCS applied he would have had until 25 February to lodge an appeal; and that 14 day time limit of RCS 41.8 is anomalously short which does not give, in cases of complexity such as this, sufficient time for the preparation and composition of an application.

[27] I agree with Mr Reid that the noter's application has a rather different appearance when looked at from the perspective of August (or perhaps, more properly, early June) than when looked at from the perspective of late February. Mr Byrne explained the delay after 25 February as referable to the noter's belief (unsupported, as I would understand it, by the senior counsel whom he had instructed) that to enable the Court of Session to make an informed decision as to whether the Determination contained errors of law it would first be necessary to seek declarator in the Dumbarton Sheriff Court action as to material facts which the DPO had, according to the noter, in bad faith omitted from the Determination, a belief of which the noter was not disabused until 6 to 7 June, following which he acted quickly. Thus, despite having received correct advice and being in a position to apply to this court no later than 25 February 2019, the noter did not do so but embarked upon what Mr Byrne described as a misconceived procedure in Dumbarton Sheriff Court. It was only on 7 June 2019 that the noter applied to the DPO to state a case and lodged his note with the court.

[28] Here the noter's failure to comply with the Rules of Court had occurred by the dates in February that the noter had received the advice of junior and then senior counsel. Accordingly, his frankly incomprehensible decision not to follow that advice did not cause his non-compliance. I therefore consider that decision does not prevent an exercise of the RCS 2.1 discretion in his favour. However, the noter's subsequent delay in acting on counsel's advice is a factor which weighs against an exercise of that discretion. The PO and the DPO contend that the questions in the note do not disclose any points of law. While I see some force in that contention, given the potentially wide scope of appeal on point of law as identified for example in *R (Iran)* v *Secretary of State for the Home Department* ([2005] EWCA 892), I consider it inappropriate to attach weight to this. The respondents have not pointed to prejudice consequential on allowing the noter relief, beyond loss to Namulas of the

finality which it might reasonably have considered had been attained. The noter, on the other hand, may, if deprived of the opportunity to appeal the Determination, lose any chance of recovering what he considers to be substantial losses incurred by his SIPP. Balancing these various factors as best I can, I will, albeit with some hesitation relieve the noter of the consequences of his failure to comply with requirements of the Rules of Court, on the condition that he be found liable to the first, second and third respondents in the judicial expenses consequent on the presentation of the Note and all procedure following thereon.