



SHERIFF APPEAL COURT

**[2022] SAC (Civ) 33
KIL-A25-21**

Sheriff Principal C D Turnbull
Temporary Sheriff Principal S F Murphy KC
Appeal Sheriff R D M Fife

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in the appeal in the cause

HUGH BEATTIE

Pursuer and Respondent

against

GLOVERALL PUBLIC LIMITED COMPANY

Defender and Appellant

**Pursuer and Respondent: Dempsey, advocate; Thompsons
Defender and Appellant: Davies, advocate; Lindsays LLP**

29 November 2022

Introduction

[1] This appeal concerns the proper application of Ordinary Cause Rule (“OCR”) 26.1 in the context of prescription and issues of *res judicata*. The defender and appellant (“the appellant”) appeals (with permission) against the decision of the sheriff at Kilmarnock to repel two of their preliminary pleas.

[2] The background to the case, as averred by the pursuer and respondent (“the respondent”), is that the respondent was engaged, in or around June 2009, to act as the agent in Scotland for Peter Scott & Company Ltd (“Peter Scott”). Peter Scott entered

administration in or around May 2010. The appellant subsequently acquired the brand “Peter Scott”. In November 2011 the respondent and the appellant entered into an oral agreement whereby the respondent was to be engaged as the appellant’s commercial agent in Scotland. The contract was subject to the same terms as governed the respondent’s relationship with Peter Scott. By letter dated 15 October 2014, the appellant terminated their contract with the respondent with effect from 15 January 2015.

[3] It is not in dispute that the respondent was engaged by the appellant as a commercial agent; that the Commercial Agents (Council Directive) Regulations 1993 (“the 1993 Regulations”) govern relations between agents and their principals; and apply as between the respondent and the appellant. In the present action the respondent seeks compensation from the appellant under regulation 17(6) of the 1993 Regulations, that for damage said to have been suffered by him as a result of the termination of his commercial agency with the appellant. Regulation 17(6) entitles a commercial agent to compensation for the damage he suffers as a result of termination of the agency.

[4] The respondent originally raised proceedings against the appellant in Jedburgh Sheriff Court. By interlocutor dated 8 January 2020 that action was dismissed on the ground that Jedburgh Sheriff Court did not have jurisdiction in relation to the dispute. On 14 January 2020 the pursuer obtained warrant to serve an initial writ from the sheriff of North Strathclyde at Kilmarnock (“the First Kilmarnock Action”). In the First Kilmarnock Action the pursuer sought damages from the defender arising from the termination of the contract. That action was served on 15 January 2020. Following the lodging of a minute of tender and minute of acceptance thereof, decree was granted in favour of the respondent. The respondent raised the present action in Ayr Sheriff Court. It was served on 15 January 2020. Jurisdiction was founded upon the place of performance of the obligation in question

being Ayr, where the respondent held his bank account. In January 2021, the sheriff held that Ayr Sheriff Court did not have jurisdiction on that basis. The sheriff remitted the cause to Kilmarnock Sheriff Court in terms of Ordinary Cause Rule 26.1. Before the sheriff at Kilmarnock the appellant maintained pleas of prescription and *res judicata*. Having heard counsel for the parties in debate the sheriff subsequently repelled those pleas.

Submissions for the Appellant

[5] The respondent's claim was subject to the short negative prescription. Section 6 of the Prescription and Limitation (Scotland) Act 1973 ("the 1973 Act") provides that if an obligation has subsisted for a continuous period of 5 years from the date on which the obligation became enforceable without any relevant claim having been made in relation to the obligation, then the obligation shall be extinguished. Section 9 of the 1973 Act, read with section 4 thereof, defines a "relevant claim" as a claim made in any proceedings in a "court of competent jurisdiction" in Scotland or elsewhere.

[6] The appellant relied upon the opinion of Lord Eassie in *Thomas Menzies (Builders) Ltd v Anderson & Menzies* 1998 SLT 794. The effectiveness of the writ lodged in court and founded upon in interrupting the prescriptive period has to be judged at the moment of its lodging. There is no dispute that the present claim became enforceable on the termination of the agency contract on 15 January 2015. No "relevant claim" was made in relation to the obligation within 5 years of that date. Although claims were made by the pursuer in proceedings raised in Jedburgh and Ayr Sheriff Courts, neither of these courts were courts of competent jurisdiction. Neither the decision from Jedburgh nor that from Ayr was appealed. Those decisions are determinative of the issue of jurisdiction.

[7] The respondent argued that the effect of sheriff's interlocutor remitting the cause to Kilmarnock Sheriff Court, the court with actual jurisdiction to hear the claim, was to retrospectively revive an obligation which had been extinguished on 16 January 2020. The sheriff erred in holding that the effect of Ordinary Cause Rule 26.1(7) was to retrospectively revive the pursuer's claim.

[8] The appellant submitted that the respondent, having obtained decree against the appellant in the First Kilmarnock Action for damages arising from the termination of the contract, is barred from raising a second claim for damages against the same defender arising from the same termination of the contract. Both actions are founded on the same single act, namely, the termination of the agency contract and in both actions the respondent seeks or sought damages arising from that termination, albeit under different heads of claim.

[9] The appellant relied upon the decision of the Inner House in *Smith v Sabre Insurance Company Ltd* 2013 SC 569 and to the elements of the plea of *res judicata* set out therein at para [20]. There is no dispute that three of the five required elements were present. There had been a prior determination by a court of competent jurisdiction; the decree in the prior action had been pronounced *in foro contentioso* without fraud or collusion; and the parties to the second action were the same as those in the first. The issue between the parties turned upon the two remaining elements - whether the subject matter of each action was the same; and whether the *medium concludendi* in each action was the same. The appellant contended that both the subject matter and the *medium concludendi* of each action were the same; and the sheriff had erred by concluding otherwise. The two claims are presented on the same factual basis and arise from the same single legal act, namely, the termination of the contract. The appellant relied also on the decision in *Stevenson v Pontifex and Wood* (1887) 15 R 125 for the one action rule.

Submissions for the Respondent

[10] In a cause transferred under OCR 26.1, the action is not dismissed and re-raised, and the initial writ is not re-served on the defender: it is the same cause. The date of the judicial interruption is the date the claim was made. The 1973 Act is silent as to whether any jurisdictional defect within the initial writ which can be cured without dismissal of the cause ought to be taken as a judicial interruption. OCR 26.1 fills this *lacuna* and provides that it can – the matter shall proceed in all respects as if it had been originally brought in the court to which it is transferred. Accordingly, the sheriff correctly held that he was bound by the terms of OCR 26.1 which provides that a transferred cause shall proceed in *all respects* (emphasis added) as if it had been originally brought in the court to which it is transferred, giving retrospective effect to the date on which the proceedings were deemed to have been raised in Kilmarnock Sheriff Court.

[11] The respondent submitted that both the subject matter and the *medium concludendi* (the point in controversy between the parties) of the two actions are different. In the First Kilmarnock Action, the subject matter was the right of the respondent to obtain damages for the appellant's breach of contract. In the present action, the subject matter is the respondent's right to payment by the appellant. Similarly, the *medium concludendi* of the First Kilmarnock Action was the appellant's breach of contract, whereas in the present case it is the appellant's failure to pay what is owed to the respondent under the 1993 Regulations.

[12] In *King v T Tunnock Ltd* 2000 SC 424 the Inner House confirmed that a claim under regulation 17 is not a damages claim. Delivering the opinion of the court, at para [38], Lord Caplan observed that:

“The word ‘damage’ is used to connote the factor that mainly introduces the eligibility for compensation. However, it is important to keep in mind that the reference is to damage or *iniuria* and not to ‘damages’”.

The respondent accepted that the decision in *King* was doubted by the House of Lords in *Lonsdale v Howard & Hallam Ltd* [2007] 1 WLR 2055, however, it was not doubted on the question of whether a claim under the 1993 Regulations amounted to an action for damages. The present action is based upon a statutory remedy. It is not a claim for damages, nor is it a claim for payment of a debt in the usual sense. The present action is best seen as one for payment of a statutory payment.

Decision

Prescription / OCR 26.1

[13] The relevant dates applicable in relation to the issue of prescription are not in dispute. The starting point is the decision of the sheriff determining that Ayr Sheriff Court did not have jurisdiction and, as a consequence, remitting the cause to Kilmarnock Sheriff Court in terms of OCR 26.1, which, insofar as relevant to this appeal, is in the following terms:

“Transfer to another sheriff court

26.1. (1) The sheriff may, on cause shown, transfer any cause to another sheriff court.

(2) ...

(3) Subject to paragraph (4), where a plea of no jurisdiction is sustained, the sheriff may transfer the cause to the sheriff court before which it appears to him the cause ought to have been brought.

(4) The sheriff shall not transfer a cause to another sheriff court under paragraph (2) or (3) except-

(a) on the motion of a party; and

(b) where he considers it expedient to do so having regard to the convenience of the parties and their witnesses.

(5) ...

(6) The court to which a cause is transferred under paragraph (1), (2) or (3) shall accept the cause.

(7) A transferred cause shall proceed in all respects as if it had been originally brought in the court to which it is transferred."

[14] Transfer in the present case was made in terms of OCR 26.1 (3), a plea of no jurisdiction having been sustained. As noted by Lord Eassie in *Thomas Menzies (Builders) Ltd*, the effectiveness of an initial writ founded upon in interrupting the prescriptive period has to be judged at the moment of its lodging. The question which falls to be considered in the present appeal is, therefore, when was the initial writ lodged? The initial writ in this action was lodged and served within the quinquennium. The fact that it was lodged at Ayr is immaterial having regard to the clear language of OCR 26.1 (7). A transferred cause shall proceed *in all respects* as if it had been originally brought in the court to which it is transferred (emphasis added). The cause proceeds as if it had been timeously lodged in Kilmarnock Sheriff Court. The appellant's argument as to prescription is without merit.

Res judicata

[15] A determination of the issue of *res judicata* requires the court to determine whether or not the subject matter and the *medium concludendi* (the point in controversy between the parties) of the two actions are different. The opinion of the Inner House in *Smith* is of considerable assistance in determining these issues.

[16] We deal first with the issue of *medium concludendi*. In *Smith* it was the negligence of the defender; in the present case it is the appellant's termination of the parties' contract. The

respondent's argument conflates the *medium concludendi* with the subject matter of the action. The distinction the respondent seeks to advance in relation to the subject matter is also misconceived. Two separate heads of claim arose from the subject matter of the present dispute. That is the same position as in *Smith* – where the initial action was in respect of damages for personal injuries, and the subsequent action was to recover costs consequential upon the damage to the pursuer's vehicle. The position advanced by the respondent offends against the rule in *Stevenson*.

[17] Borrowing from the opinion of Lord Brodie in *Smith* at para [45], in determining whether the plea of *res judicata* should be sustained in the present action the critical questions come to be, looking to the substance of the matter, what was litigated and what was decided in the First Kilmarnock Action and what it was proposed to litigate and decide in the present action. If the answer is that they were the same then the plea has to be upheld and decree of absolvitor granted. In our view, the subject matter and the *medium concludendi* of both actions are the same. The subject matter was the right of the pursuer to obtain damages from the defender whether by way of reparation or in terms of the 1993 Regulations, and the *medium concludendi* was the appellant's termination of the parties' contract.

Disposal

[18] We shall allow the appeal; recall the interlocutor of the sheriff dated 12 April 2022; sustain the second plea in law for the appellant; and assoilzie the appellant from the craves of the initial writ. Parties should endeavour to agree the position in relation to expenses, which failing we shall assign a hearing in that regard.