27 February 2013

PRESS SUMMARY

Davies and another t/a All Stars Nursery (Appellants) v The Scottish Commission for the Regulation of Care (Scotland) (Respondent) [2013] UKSC 12
On appeal from [2012] CSIH 7

JUSTICES: Lord Hope (Deputy President), Lord Kerr, Lord Wilson, Lord Reed, and Lord Carnwath

BACKGROUND TO THE APPEAL

Mrs Sheila Davies and Mrs Maureen Mowat operate a children's nursery known as All Stars Nursery in Aberdeen which was registered in 2004 by the Scottish Commission for the Regulation of Care (the "Commission") under the Regulation of Care (Scotland) Act 2001 (the "2001 Act"). The Commission became concerned at the way the nursery was being operated and in 2008 and again in 2009 it gave notice to the nursery under the 2001 Act of its decisions to implement its proposals to cancel the nursery's registration. The nursery disputed the factual basis for the Commission's concerns and appealed to the sheriff against the decisions. The appeals proceeded together before the sheriff, who, at a particular point in the proceedings, made a decision against the nursery on an evidential issue. The nursery appealed that decision to the Sheriff Principal **[1 – 3, 5 – 7]**.

In the meantime, provisions of the Public Services Reform (Scotland) Act 2010 (the "2010 Act") had been enacted. The 2010 Act provided, among other things, that a new body, Social Care and Social Work Improvement Scotland ("SCSWIS"), would take over from the Commission the responsibility for the regulation of the day care of children. By virtue of a commencement order, as from 1 April 2011, SCSWIS was established, the Commission was dissolved, all the Commission's staff and property were transferred to SCSWIS, and Part 1 of the 2001 Act (which dealt with the regulation by the Commission of care services such as the nursery) was repealed. Two transitional orders (the "No 1 Order" and the "No 2 Order") dealt with what was to happen to various outstanding actions and proceedings as a result of the handover. Article 2(1) of the No 2 Order dealt with appeals (such as the present) outstanding at 1 April 2011 and directed that Part 1 of the 2001 Act continued to apply for the purposes of the care services involved until the appeals had been finally determined **[7, 8, 14 – 22]**.

At the appeal hearing on 12 April 2011 the nursery argued that the Commission could no longer be a party to the appeals, as it had been dissolved and replaced by SCSWIS. But SCSWIS had no title or interest to enter the proceedings, as the proceedings were concerned only with things that had been done under the 2001 Act before it came into existence. Therefore each of the Commission's decisions notified under the 2001 Act was a nullity. The Sheriff Principal held that, as the Commission had ceased to exist and there was no provision in either of the transitional orders that the Commission's decisions were to be treated as if they had been made by SCSWIS, those decisions could no longer have any meaning or effect **[9, 11]**.

The Commission appealed to the Inner House of the Court of Session. In January 2012, by a majority, the First Division allowed the appeals on the basis that the effect of the transitional provisions was that the proceedings were still governed by the 2001 Act, that the Commission continued in existence for the purposes of the proceedings and that it was the proper respondent. Lord Marnoch, dissenting, thought that SCSWIS should be held to have taken over the conduct of the proceedings and be considered as the respondent as from 1 April 2011. Further notices were served on the nursery in 2012, culminating in parallel notices under the 2001 Act and the 2010 Act issued in December 2012 of decisions to implement proposals to cancel the nursery's registration. The nursery have challenged the validity of the notices and appealed against the decisions **[12, 24]**.

The issues in the appeal are as follows. (1) Whether the Commission remains in existence for the purpose of conducting these proceedings, or whether SCSWIS took its place for that purpose after 1 April 2011. (2) The

validity of the 2012 notices. (3) The future conduct of these proceedings, given the lapse of time since the 2008 and 2009 decisions and the fact that the 2012 decisions are now also under appeal **[23, 25]**.

JUDGMENT

The Supreme Court unanimously affirms the orders of the Inner House to the extent that they allowed the appeals against the Sheriff Principal's orders and remits the case to the Inner House for any further orders that may be required **[48]**.

REASONS FOR THE JUDGMENT

The No 2 Order on its own leaves issue (1) unsolved. However, article 15 of the No 1 Order directs that, where an application for registration of a care service under the 2001 Act had not been determined by the Commission before 1 April 2011, the application is to be decided under the 2001 Act and that all references to the Commission are to be read as references to SCSWIS. This is echoed by the direction in article 9 of the No 1 Order that, where there is an outstanding complaint against the Commission or a care service as at 1 April 2011, the investigation of the complaint is to be carried out by SCSWIS. The reason for these directions must be that it was appreciated that, as the Commission was to be dissolved and all its staff and resources transferred to SCSWIS on 1 April 2011, the logical consequence was to transfer responsibility for the performance of the relevant functions after 1 April 2011 to SCSWIS **[18, 20, 33, 34]**.

The gap in the No 2 Order can be filled by adopting the formula that article 15 of the No 1 Order uses and by then reading it into the direction given in the No 2 Order, so that it says that until the final determination of the appeal proceedings all references to the Commission in Part 1 of the 2001 Act are to be read as references to SCSWIS. There is here clearly a case of inadvertence. The No 2 Order needed to say how the provisions of Part 1 of the 2001 Act were to be put into effect after the Commission was dissolved. The intended solution, and the substance of the provision that would have been written in if the draftsman had spotted the point, is to be found in article 15(2) of the No 1 Order. There is a template there that is apt for use in this context too. To do otherwise would leave the dissolved Commission in existence for some of the purposes of Part 1 of the 2001 Act and require a reference to the Commission to be read as a reference to SCSWIS for others, which would be very untidy. It can safely be assumed that, if the draftsman had considered the point, he would have written the words he used in article 15(2) into article 2(1). This solution is also supported by article 19 of the No 1 Order, because its effect is that an appeal taken prior to 1 April 2011 against a decision notified by the Commission within 14 days prior to that date is thereafter to be treated as taken under the 2010 Act. It follows that the respondent in the appeal should be SCSWIS **[36, 37]**.

On issue (2), in light of the decision on issue (1) and on a correct construction of the relevant provisions, the December 2012 notice that was issued by SCSWIS (albeit unnecessarily in the name of the Commission) under the 2001 Act is valid. The notice issued under the 2010 Act is invalid **[41, 42]**.

On issue (3), there was considerable delay in the sheriff court and it has taken almost two years for issue (1) to be argued out in the appeal courts. The fact that the question whether decisions to cancel the registration of the nursery are the subject of two parallel appeal proceedings directed to the state of affairs in the nursery on significantly different dates is a cause for real concern. The time has come for the Supreme Court to intervene in order to minimise further delay and expense. In the very unusual circumstances of this case it is open to it to proceed on the basis that, if SCSWIS were to adhere to its 2008 and 2009 decisions, that would be an abuse of process and, in the interests of appropriate case management, to take steps now to prevent such an abuse. It would normally only be open to the Supreme Court to direct that a decision by the Commission shall not have effect after considering the merits of the appeal. But where a procedural sanction is being imposed for an abuse of process a consideration of the merits is unnecessary. The Supreme Court therefore directs that the 2008 and 2009 decisions shall not have effect. This means that the appeal proceedings against those decisions have been finally determined, and that the nursery must now be treated for all purposes as if it had been registered under the 2010 Act. The December 2012 decision notified under the 2001 Act must therefore be treated as if it had been notified under the 2010 Act. The appeal against the decision must now proceed under the 2010 Act and the aim should be to bring it to a conclusion as expeditiously as the administration of justice will allow **[16, 43, 44, 46 – 48]**.

References in square brackets are to paragraphs in the judgment