Hilary Term
[2013] UKSC 12
On appeal from: [2012] CSIH 7

JUDGMENT

Davies and another t/a All Stars Nursery (Appellants) *v* The Scottish Commission for the Regulation of Care (Scotland) (Respondent)

before

Lord Hope, Deputy President
Lord Kerr
Lord Wilson
Lord Reed
Lord Carnwath

JUDGMENT GIVEN ON

27 February 2013

Heard on 30 January 2013

Appellant
W Stuart Gale QC
David J T Logan
(Instructed by Campbell Smith WS LLP)

Respondent
Jonathan Mitchell QC
Scott Blair
(Instructed by The Care Inspectorate)

Intervener
W James Wolffe QC
Alastair Duncan QC
(Instructed by Scottish Government Legal Directorate)

LORD HOPE (with whom Lord Kerr, Lord Wilson, Lord Reed and Lord Carnwath agree)

1. The appellants, Mrs Sheila Davies and Mrs Maureen Mowat, operate a children's nursery, known as All Stars Nursery, at 95 Don Street, Aberdeen. As it was a "care service" within the meaning of section 2(1)(m) of the Regulation of Care (Scotland) Act 2001 ("the 2001 Act"), it required to be registered under Part I of that Act. It was a criminal offence to provide a care service which is not registered: section 21. Section 1 of the 2001 Act established the Scottish Commission for the Regulation of Care ("the Commission") as a body corporate with the aim of creating a national body for the regulation of care services provided in Scotland. It was to the Commission that applications for registration had to be made under section 7.

2. The Commission had power under section 9 to grant an application unconditionally or subject to such conditions as it thought fit to impose. It also had a continuing duty to ensure that the national care standards and any regulatory requirements were complied with. Where a service was failing, it could give notice under section 10 that unless improvements were made within a specified period steps would be taken for its registration to be cancelled. If those steps were not taken it could propose to cancel the registration and, after having given notice of the proposal, adhere to that proposal and give notice of its decision to do so under section 17(3). There was a right of appeal to the sheriff under section 20 against a decision of which notice had been given under that subsection. The appellants' application for registration of the nursery was granted, subject to certain conditions, in 2004.

3. It was not very long before the Commission became concerned at the way the nursery was being operated. On 5 March 2008 it served an improvement notice on the appellants under section 10. As in its view significant improvements had not been made within the period which had been specified, it served a further notice under section 15(2) of the 2001 Act of a proposal that the nursery's registration should be cancelled. On 18 August 2008 it gave notice to the nursery under section 17(3) of its decision to implement that proposal. The appellants disputed the factual basis for the Commission's concerns. They appealed to the sheriff against the decision to implement the proposal under section 20 of the 2001 Act.

4. Section 20 of the 2001 Act is in these terms:

"(1) A person given notice under section 17(3) of this Act of a decision to implement a proposal may, within fourteen days after that notice is given, appeal to the sheriff against the decision.

(2) The sheriff may, on appeal under subsection (1) above, confirm the decision or direct that it shall not have effect; and where the registration is not to be cancelled may (either or both) –

(a) vary or remove any condition for the time being in force in relation to the registration;

(b) impose an additional condition in relation to the registration."

5. On 10 October 2008 the Commission gave notice under section 15(2) of a second proposal that the appellants' registration should be cancelled. This was followed on 30 March 2009 by a further notice under section 17(3) of the Commission's decision that the proposal should be implemented. The appellants appealed to the sheriff against this decision also. The two appeals then proceeded together as summary applications under rule 1.4 of the Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc Rules) 1999. The primary crave in each case was that the sheriff should direct that each of the decisions should have no effect, as they were unreasonable and disproportionate and based on findings that were inaccurate.

6. The appeals proceeded to proof before the sheriff. There appears to have been, in that court, a marked and highly regrettable lack of case management. Evidence was heard on 24 days spread over a period of about 15 months. 20 of those days were taken up by counsel for the Commission in his cross-examination of the first-named appellant. At the end of her cross-examination, when several witnesses on both sides still had to give evidence, counsel for the appellants moved the sheriff to be allowed to lead evidence in re-examination about the current circumstances of the nursery. The evidence up to that point had been directed to the manner in which the nursery was being run prior to the two notices of cancellation. Counsel for the Commission objected, on the ground that the appeals should be decided on the basis of the facts as they were at the dates of the decisions to cancel. The sheriff heard legal argument on this issue over a period of five days. On 3 February 2011 he upheld the objections and ruled that evidence as to the state of the nursery after 30 March 2009 was inadmissible. The Sheriff gave leave to appeal his decision on this point to the Sheriff Principal.

7. The appellants appealed against the sheriff's decision to the sheriff principal. The hearing of the appeal was fixed for 12 April 2011. In the meantime the Public Services Reform (Scotland) Act 2010 ("the 2010 Act") had been enacted. The overarching purpose of this statute was to simplify and improve what the policy memorandum which accompanied the Bill when it was introduced in the Scottish Parliament in May 2009 described as the landscape of public bodies in Scotland. Part 5 of the 2010 Act contained provisions for the furthering of improvement in the quality of social services, and the setting up under section 44 of a body to be known as Social Care and Social Work Improvement Scotland ("SCSWIS"). Part 6 provided for the furthering of improvement in the quality of health care and the setting up of a body to be known as Healthcare Improvement Scotland ("HIS"). The functions of the Commission were to be divided between these two bodies, and section 52 provided that the Commission was to be dissolved. Section 47 provided that "day care of children", which was the service for the provision of which the appellants had been registered under the 2001 Act, was to be one of the care services for which SCSWIS was to be responsible. Provision was made in section 102 for the transfer of staff and all property (including rights) and liabilities of the Commission existing immediately before the date when section 44 was to come into force to SCSWIS. By paragraph 37 of Schedule 14 it was provided that Part 1 of the 2001 Act was to be repealed.

8. The relevant provisions of the 2010 Act were brought into force by the Public Services Reform (Scotland) Act 2010 (Commencement No 4) Order 2011 (SSI 2011/122) ("the No 4 Commencement Order") on 1 April 2011. The effect of that Order was, among other things, to establish SCSWIS under section 44 and, by bringing sections 52 and 102 into force, to dissolve the Commission and transfer all the Commission's staff and property to SCSWIS. It also brought into force the repeal of Part 1 of the 2001 Act.

9. At the outset of the hearing on 12 April 2011 before the sheriff principal counsel for the appellants said that he wished to raise a preliminary point. This was that the Commission could no longer be a party to the appeal, 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. His submission was that each of the decisions of the Commission of which notice had been given under section 17(3) of the 2001 Act was a nullity, and that it should be so directed. Counsel on both sides were agreed that the sheriff principal's decision on this point might render the discussion of the principal issue in the appeal unnecessary. So he heard argument on the preliminary point only.

10. It was common ground that the effect of the No 4 Commencement Order was that on 1 April 2011 Part 1 of the 2001 Act was repealed, that the Commission was dissolved and that its staff, property and liabilities were transferred to

SCSWIS which came into existence on the same day. The question was whether there was anything in the Public Services Reform (Scotland) Act 2010 (Health and Social Care) Savings and Transitional Provisions Order 2011 (SSI 2011/121) and the Public Services Reform (Scotland) Act 2010 (Health and Social Care) Savings and Transitional Provisions (No 2) Order 2011 (SSI 2011/169) which showed that it was still open to counsel to appear for the Commission and that the Commission itself could continue to participate in the proceedings and oppose the appellants' appeals.

11. On 9 May 2011 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 decisions which the Commission made were to be treated as if they had been made by SCSWIS, those decisions could no longer have any meaning or effect: 2011 SLT (Sh Ct) 208, para 17. As he saw it, he had no alternative but to so hold, given that the Scottish Ministers had chosen to bring sections 52 and 102 of the 2010 Act into force. He removed a condition that had been imposed on the first-named appellant to the effect that she was not to have contact with, or access to, children enrolled or enrolling at the nursery. He also held that the effect of his order was that the nursery was to be treated for all purposes as if it had been registered under Part 5 of the 2010 Act, with the result that SCSWIS would have all the necessary powers to monitor the situation at the nursery and to take any action under that Act in the interests of the children that might be necessary.

12. The Commission appealed against the sheriff principal's decision to the Court of Session. On 24 January 2012 the First Division (Lord President Hamilton and Lord Drummond Young, Lord Marnoch dissenting) allowed the appeal and continued it to a later date to enable the parties to consider their position on the issue of whether the sheriff was in error in refusing to permit the appellants to lead evidence as to the current condition of their care service: [2012] CSIH 7, 2012 SLT 269. The majority were of the opinion 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 these proceedings and that it was the proper respondent: para 26. The relationship between it and SCSWIS, which had taken over all the Commission's staff and its financial resources and in practical terms was performing all the Commission's functions, was one of implied agency: para 31. Lord Marnoch was of the opinion that the effect of the transitional provisions was that the proceedings should be adjudicated on as if, so far as relevant, Part 1 of the 2001 Act remained in force, that SCSWIS should be held to have taken over the conduct of the proceedings as from 1 April 2011 and that, while the proceedings should be allowed to proceed, the Commission was no longer the proper contradictor: para 42. The appellants have now appealed against that decision to this court.

13. The judgment of the First Division was an interlocutory judgment within the meaning of section 40(1)(a) of the Court of Session Act 1988. It comes before us on appeal without the leave of the Inner House of the Court of Session. Section 40(1)(a) provides that it is competent to appeal from the Inner House to the Supreme Court against an interlocutory judgment without the leave of the Inner House where there is a difference of opinion among the judges. The respondents' position, as set out in paragraph 9 of the statement of facts and issues, is that they do not accept that there was any relevant difference of opinion as to the substantive issue before the court, which was the correctness or otherwise of the sheriff principal's disposal of the case. But Mr Mitchell QC did not insist on this point at the hearing of the appeal, and I think that he was right not to do so. There plainly was a difference of opinion on the question whether the Commission remained in existence for the purpose of conducting the proceedings or had been replaced for this purpose by SCSWIS. This was more than a mere technicality, as a proper understanding of the effect of the transitional provisions is needed to resolve questions as to who is in a position to serve any further notices that may be needed and to give instructions for the future conduct of any further proceedings before the sheriff. In my opinion this appeal, albeit without leave of the Inner House, is competent.

The transitional provisions

14. It is obvious that a reorganisation of existing public services such as that which the 2010 Act was designed to achieve requires transitional provisions to ensure that there is an orderly transfer of the old system to the new one. As Ian McLeod, *Principles of Legislative and Regulatory Drafting* (2009), p 98 points out, savings and transitional provisions are intended to smooth the operation of the law when an Act is repealed. He adds that it is particularly important that drafters are able to identify the gaps in their instructions which the instructing department would have plugged if it had appreciated the need to do so. Then at p 99 – headed "Matters requiring particular care and attention" – he draws attention to the fact that, where an existing statutory corporation is being replaced by a new one, transitional provisions are necessary to deal with a range of purely practical matters. These include the transfer of rights of action vested in the old corporation to the new one, and the power to take over litigation which was being carried on by or against the old one at the time of its demise.

15. By section 132 of the 2010 Act it was provided that the Scottish Ministers were to have power by order to make such consequential, supplementary, incidental, transitional or saving provision as they considered necessary or expedient for the purposes of giving full effect to any provision of the Act. Section 133(1) provided that the power was to be exercised by statutory instrument. That power was exercised by the making on 18 February 2011 of the Public Services Reform (Scotland) Act 2010 (Health and Social Care) Savings and

Transitional Provisions Order 2011 ("the No 1 Order") and by the making ten days later, presumably to fill a gap that had been perceived in the No 1 Order, of the Public Services Reform (Scotland) Act 2010 (Health and Social Care) Savings and Transitional Provisions (No 2) Order 2011 ("the No 2 Order").

16. One might have expected the solution to the issue which the sheriff principal was asked to consider to have been obvious upon an examination of these orders. Unfortunately that is not so. There is a gap which needs to be filled and, as the division of opinion in the Inner House shows, there is room for argument as to how this can be done. Careful drafting ought not to have allowed this to happen. It is a pity that Mr McLeod's advice was not followed. The result has been the compounding of the delay caused by the protracted proceedings in the sheriff court. It has taken almost two years ^ for this issue to be argued out in the appeal courts.

17. The No 1 Order was in five parts. Article 1 in Part I defined the expressions used elsewhere in the Order, including "the appointed day". It was to mean 1 April 2011. Part II set out a number of transitional provisions relating to care services, as did Part III for independent health care services. Part IV set out a number of savings provisions. Part V did the same thing in relation to the provisions of another statute with which this case is not concerned.

18. The effect of articles 2 to 8 of Part II was that steps taken under the relevant provisions of the 2001 Act with regard to registration, the giving of improvement, cancellation and condition notices, applications for the variation or removal of conditions and the registration of authorised persons were to be treated for all purposes as if they had been made under the corresponding provisions of the 2010 Act and that national care standards published under the 2001 Act were to be treated as if they were the standards applicable to care services under the 2010 Act. Article 9 was in these terms:

> "Where immediately before the appointed day, the Commission has received a complaint relating to –
>
> (a) the Commission;
>
> (b) a care service; or
>
> (c) an independent health care service,
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> and investigation of that complaint has not concluded, the investigation of that complaint is to be carried out by SCSWIS."

19. The savings provisions in articles 15 to 18 of Part IV dealt with what was to happen in the case of applications for registration, inspections by the Commission, integrated inspections by the Commission and Her Majesty's inspectors and urgent cancellation proceedings that had been commenced before the appointed day and had not concluded or been determined. The effect of these provisions was that the provisions of the 2001 Act under which these actions or proceedings had been commenced were to continue in force until they had come to an end. Article 19 dealt with appeals taken against decisions notified 14 days before the appointed day by the Commission under section 17(3) of the 2001 Act. Article 20 dealt with offences, and article 21 listed a number of regulations that were to continue in force despite the repeal of the 2001 Act.

20. Of these various provisions, article 15 is of particular interest. It was in these terms:

> "(1) Subject to paragraphs (2) and (3), where a person who seeks to provide a care service or an independent healthcare service has made an application to the Commission in accordance with section 7 or 8 of the 2001 Act in respect of that service, and that application has not been determined by the Commission before the appointed day, that application is to continue to be dealt with under those provisions, and sections 9 and 15 of the 2001 Act remain in force for that purpose.
>
> (2) Where paragraph (1) applies—
>
> (a) if the application relates to a care service all references to the Commission are to be read as references to SCSWIS; and
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> (b) if the application relates to an independent health care service all references to the Commission are to be read as references to HIS.
>
> (3) Where SCSWIS or HIS determine that such an application should be granted, SCSWIS or HIS, as the case may be, must grant registration under section 60 of the 2010 Act or section 10Q of the NHS Act, as the case may be, subject to such conditions as they think fit."

Sections 9 and 15 of the 2001 Act set out various steps that were to be taken by the Commission following upon the applications provided for by sections 7 and 8 of that Act. The direction set out in article 15(2) that references to the Commission were to be read as references to SCSWIS or HIS, as the case might be, addressed

the problem as to which of those bodies was to exercise those functions after the appointed day. But it was not repeated in any of the following articles. They were silent on that point.

21. The No 2 Order contained only three articles. The first set out the relevant definitions, amongst other things. Article 2, which was headed "Appeal proceeds (sic) – savings provision", dealt in paragraph (1) with appeals against notices given by the Commission under section 17(3) of the 2001 Act that had been raised under section 20 of that Act and had not been finally determined before 1 April 2011. The direction that was set out in that paragraph with respect to such appeals was as follows:

> "Part I of the 2001 Act will continue to apply for the purposes of the care service or independent health care service which is the subject of those appeal proceedings until the final determination of those proceedings."

Article 2(2) provided that article 2(1) of the No 1 Order, which provided that where on the appointed day a person was providing a care service which immediately before that day was registered under the 2001 Act that service was to be treated for all purposes as if it had been registered under the 2010 Act, was not to apply to any care service to which article 2(1) of the No 2 Order applied. Article 3 provided that, where the final determination of an appeal under section 20 of the 2001 Act was that the registration of a care service was not cancelled, it was to be treated for all purposes as if it had been registered under Part 5 of the 2010 Act.

22. The explanatory note to the No 2 Order referred to the fact that the No 1 Order had already made various savings and transitional provisions in the light of the 2010 Act relating to SCSWIS and HIS. It then said that the No 2 Order made "further provisions for SCSWIS and HIS". But nowhere in any of the articles of the No 2 Order is mention made of either of these bodies. As was the case in articles 16 to 18 of the No 1 Order, the direction set out in article 15(2) that references to the Commission in the relevant provisions of the 2001 Act that were to continue in force were to be read as references to SCSWIS or HIS, as the case might be, does not appear in article 2. It too was silent on that point.

The issues

23. The question which is at the heart of the appeal is whether the Commission is to be taken to have remained in existence for the purpose of conducting these

proceedings, or whether SCSWIS must be held to have taken its place for that purpose after 1 April 2011. Its answer is to be found on a consideration of the effect of article 2 of the No 2 Order, read in the context of the whole of the statutory background including the terms of the No 1 Order.

24. But the matter has been complicated by the service between July and December 2012 of further improvement notices, of further notices of proposals to cancel the appellants' registration and of further notices of decisions to implement these proposals. The appellants have challenged the validity of these various notices, on the ground that they were not served by a body which had power to do this under the relevant Act. They have also appealed against the decision notices under section 20 of the 2001 Act and section 75 of the 2010 Act. The result is that the proceedings that began in the sheriff court in 2008 and 2009 with reference to the state of affairs in the nursery in those years are now being duplicated by parallel proceedings which are directed to the state of affairs in the nursery in 2012.

25. Two further questions therefore need to be addressed. The first is as to the validity of the decisions that were the subject of the notices that were given between July and December 2012. The second is as to the future conduct of these proceedings, given the lapse of time since the section 17(3) notices were served in 2008 and 2009 and the fact that the notices served in 2012 are now also under appeal.

The effect of article 2 of the No 2 Order

26. The savings provision in this article does make one thing plain. Article 2(1) states in the clearest terms that Part 1 of the 2001 Act is to continue to apply for the purposes of the care service which is the subject of appeal proceedings until the final determination of those proceedings. It is accompanied by article 2(2) which makes it clear that, in the circumstances referred to in article 2(1), the care service is to remain registered under Part 1 of the 2001 Act. The service is not to be treated, for the time being, as if it had been registered under Part 5 of the 2010 Act. The Order might have directed that the appeal proceedings were to continue and be determined under section 75 of the 2010 Act as if the notices that were under appeal had been served under Part 5 of that Act. Had it done this, it would not have been open to doubt that SCSWIS was the body which had title and interest to oppose the appeal. As it is, the direction that Part 1 of the 2001 Act is to continue to apply until the appeals have been determined raises the question as to which body is in a position to do this. It is a question which the No 2 Order fails to answer. There is a gap here that requires to be filled.

27. Mr Gale QC for the appellants said that he favoured the solution to the problem that had been adopted by Lord Marnoch. By operation of law, reading the provisions of the No 2 Order in context, the proper body to resist the appeals was SCSWIS. The proceedings should be remitted to the sheriff, before whom the issue as to whether evidence could be led as to the current state of the nursery remained open as the sheriff principal did not deal with that question. But the sheriff would also have to regularise the position by giving permission to SCSWIS to enter the process by being sisted as a party to the appeals. He made it clear that the appellants would seek to oppose its being sisted on the ground that the proceedings had been so long delayed. If they were successful in their opposition to a motion to sist, the decisions that had been taken in 2008 and 2009 would fall to be treated as no longer having any effect.

28. Mr Mitchell's primary position, as it was put in his written case, was that the decision of the majority was correct and that the Commission remained in existence for the purpose of conducting these proceedings. At the outset of his reply to Mr Gale's submissions, however, he said that it was not a matter of concern to his clients whether the Commission or SCSWIS, on whose instructions he appeared, was to be regarded as being in a position to perform that function. The majority's view that the relationship between the Commission and SCSWIS was one of implied agency was difficult to support, and he submitted that it was not necessary for him to attempt to do so. His point was that all that needed to be done was to note, if this was to be the case, that as a matter of law SCSWIS had taken the place of the Commission. It was not his clients' intention to apply for SCSWIS to be sisted. He acknowledged that it would be simpler if SCSWIS were to be held to be the proper party. This would accord with the way things were in practice, since the Commission in reality no longer existed. But it should be understood that, whichever body it was, it was the proper body for the performance of all the functions in Part 1 of the 2001 Act so long as they continued to have effect in terms of article 2(1) of the No 2 Order, including the service of any new notices.

29. Mr Wolffe QC for the Lord Advocate, who had entered the process on behalf of the Scottish Government, said that those instructing him wanted to know what was the correct analysis. If the correct position was that, as Part 1 of the 2001 Act remained in force until the final determination of the proceedings, the dissolved Commission was the body that required to perform the functions that needed to be performed under it, the Scottish Government would have to do something to address that situation. His primary position in his written case was to adopt the reasoning of the majority in the Inner House. But he too acknowledged that the solution preferred by Lord Marnoch would provide a more satisfactory outcome, as all the Commission's staff and financial resources had been transferred to SCSWIS. There was no practical reason for wishing to argue that the Commission still remained in being for the limited purpose envisaged by article

2(1) of the No 2 Order. The intention of the Scottish Parliament was that there should be a seamless transfer.

30. I am in no doubt that, of the two alternative approaches that are to be found in the judgment of the Inner House, that proposed by Lord Marnoch is the one which should be adopted. The reality is that the Commission no longer exists. It is nearly two years since it was dissolved and all its staff and resources were transferred to SCSWIS. But the position today must be taken to be the same as it was on the appointed day. As from that date it ceased to exist, and it was incapable in law and in fact of performing any functions. This makes it hard to support the majority's suggestion that the relationship between the Commission and SCSWIS was one of implied agency.

31. Lord Drummond Young said in para 31 that there was no difficulty in implying such a relationship, as it was in essence an extremely simple one which could readily be implied in almost any case where one person performs a task on behalf of another, either consensually or under a statutory scheme. That implication may present no difficulty in other contexts, but I do not see how that can be so in this case. The Commission, once it had been dissolved, was not in a position to enter into any consensual relationship with anybody. The proposition that it is possible to imply a relationship of agency from the statutory scheme under which the Commission is to be taken to have a continued existence begs the question as to what that scheme provides. That is the question which we are having to answer.

32. Lord Marnoch rejected the majority's approach because he was not convinced that the effect of article 2 of the No 2 Order was to resurrect the Commission. Its purpose was to ensure that only the substantive law was applied in the course of the proceedings. It was not necessary to re-establish the Commission for that purpose. The intention was that SCSWIS should replace the Commission. It was not necessary to insert or alter any words to give effect to it. One could simply read the provisions as a whole: para 42. I agree, but I think that it is possible to say a bit more to reinforce his argument.

33. The No 2 Order, looked at on its own and on its own terms, leaves this problem unsolved. There is, as I have said, a gap in its provisions that has to be filled. The explanatory note says that the Order makes further provisions for SCSWIS, but it does not explain what they are. So I do not think that it offers any assistance. The No 1 Order, on the other hand, does contain a provision which is directly in point. Article 15 deals with the question what was to happen where applications made under sections 7 or 8 of the 2001 Act had not been determined by the Commission before the appointed day: see para 20, above. It states that in that situation, if the application relates to a care service, all references to the

Commission are to read as references to SCSWIS. There is an echo here of the direction in article 9 of the No 1 Order that, where a complaint was made before the appointed day and the investigation had not been concluded, the investigation of the complaint was to be carried out by SCSWIS: para 18, above.

34. Why, one asks, was it thought appropriate to give these directions? The answer must surely be that it was appreciated that, as the Commission was to be dissolved on the appointed day and all its staff and resources transferred to SCSWIS, the logical consequence was to transfer responsibility for the performance of the relevant functions after the appointed day to SCSWIS. The method that was chosen in article 15 is particularly instructive. All references to the Commission in relation to an application under sections 7 or 8, and the functions referred to in sections 9 and 15, are to read as references to SCSWIS. No other mechanism was thought to be necessary. Can the gap that is left by article 2 of the No 2 Order be filled by reading all references to the Commission as references to SCSWIS in that context too?

35. A similar question arose in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586, where it was plain that when making a consequential amendment the draftsman had not used language apt to achieve the intention of the legislature. This had the effect of wholly excluding a right to appeal which it had not previously been suggested should be abolished or restricted. Lord Nicholls of Birkenhead said at p 592 that the wording of the provision should be read in a manner which gave effect to the Parliamentary intention. It had long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors too, and in suitable cases this would mean adding or omitting or substituting words in discharging its interpretative function.

36. Lord Nicholls went on, however, to say that the courts must exercise considerable caution before doing so:

> "Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation."

37. I do not think that any of these conditions would be breached if we were to adopt the formula that article 15 of the No 1 Order used and read it into the direction given in article 2(1) of the No 2 Order: that until the final determination of the proceedings all references to the Commission in Part 1 of the 2001 Act are to 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 and follow the solution adopted by the majority 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. That would be very untidy. I think that 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). I would so hold. 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.

The validity of the 2012 notices

38. On 23 July 2012 two notices were served on the appellants to inform them that it had been concluded that the nursery was not operating in accordance with the statutory requirements or conditions and that unless there was a significant improvement in the provision of the service the intention was to make a proposal to cancel its registration. One of these notices was given by SCSWIS in the name of the Commission under section 10 of the 2001 Act. The other was given by SCSWIS in its own name under section 62 of the 2010 Act. In a covering letter of the same date, which was written by a solicitor employed by SCSWIS, it was stated that nothing in these two notices should be taken to prejudice the position of SCSWIS, whether on its own account or as acting for the Commission, as to the true statutory position. Those notices were followed by an improvement notice given by SCSWIS in the name of the Commission under section 10 of the 2001 Act and an improvement notice given by SCSWIS in its own name under section 62 of the 2010 Act. Both of these notices extended the timescale for making the improvements. On 9 November 2012 two further notices were issued. The first was a notice given by SCSWIS in the name of the Commission under sections 12 and 15 of the 2001 Act of a proposal to cancel the nursery's registration. The second was a notice to the same effect given by SCSWIS in its own name under sections 64 and 71 of the 2010 Act.

39. The appellants' solicitors responded to the notice that had been given under the 2001 Act by letter dated 23 November 2012, saying that the notice issued in the name of the Commission was a nullity as the Commission had ceased to exist. In a letter of the same date in response to the notice given under the 2010 Act they said that it was not accepted that SCSWIS was capable of or competent at law to regulate the nursery, as in terms of article 2 of the No 2 Order the registration of the nursery had not been transferred to it pending determination of the appeal. So this notice too was a nullity. SCSWIS did not agree, and on 4 December 2012 two further notices were issued. The first was given by SCSWIS as agents for the Commission under section 17 of the 2001 Act giving notice of its decision to cancel the nursery's registration. The other was a notice to the same effect given by SCSWIS in its own name under section 73 of the 2010 Act. The appellants have appealed to the sheriff against the decisions that were the subject of those notices.

40. Those appeals are not before us. But I think that it would be wrong of us not to address the question whether, as the appellants have asserted, the notices that were given are to be regarded as nullities. This is so for two reasons. First, it is appropriate that we should explain how they are to be regarded in the light of our decision as to the effect of the No 2 Order. The question is whether either, and if so which, of them can be given effect. A view expressed by us on that issue now will save the cost and delay of arguing that point in the sheriff court. Second, the fact that SCSWIS have taken these further steps to achieve cancellation of the nursery's registration has the result that appeals are now being taken against them while the other appeals have not been finally determined. This raises a very real problem of case management. It needs to be addressed before a decision is taken as to how we should dispose of the appeal to this court.

41. The notice of the decision that was given under the 2010 Act must be regarded as ineffective. Article 2(1) of the No 2 Order provides in the clearest terms that Part 1 of the 2001 Act is to continue to apply for the purposes of the care service until the final determination of the appeals that were taken against the decisions of which notice was given in 2008 and 2009. Article 2(2) disapplies article 2(1) of the No 1 Order, with the result that the nursery is still registered under the 2001 Act. So it is with reference to the provisions of the 2001 Act, not those of the 2010 Act, that any steps with a view to the cancellation of the nursery's registration would have had to have been taken until the final determination of these appeals.

42. The notice of the decision that was given under the 2001 Act was said to have been given in terms of article 2 of the No 2 Order by SCSWIS as agents for the Commission. SCSWIS were, of course, proceeding on the basis that Lord Drummond Young's analysis of the effect of article 2 of that Order, with which the Lord President agreed, was correct. For the reasons given above, I am of the opinion that his was not the right analysis. The effect of the article is that

references to the Commission are to be read as references to SCSWIS. SCSWIS has, as a matter of law, taken the place of the Commission for these purposes. So it was unnecessary for SCSWIS to adopt the formula that it did when taking the various steps that it was open to it to take with regard to the nursery's registration under Part 1 of the 2001 Act. The fact that it did so cannot be regarded, however, as incompatible with the true position that it was SCSWIS and not the dissolved Commission which was taking these steps. The notice was given by an employee of SCSWIS from its address in Aberdeen under SCSWIS's letter heading. The true position was obvious for all to see, and it cannot be said that the appellants have been in the least prejudiced by the fact that the formula that was chosen was inaccurate. As this notice was given under the right statute by the body that was empowered to take the decision referred to in it, I would hold that it was a valid notice for the purposes of Part 1 of the 2001 Act.

The future conduct of these proceedings

43. The situation in which this case now finds itself is highly unsatisfactory. The appeal process which was provided by section 20 of the 2001 Act was designed to provide a person who had been given notice of a decision to implement a proposal with a remedy that was to be sought under the summary procedure. It was not intended to be an obstacle to giving prompt effect to the proposal, which is what has been happening in this case. The registration system is intended to ensure that care services are provided which satisfy the published national care standards: see section 5 of the 2001 Act. It is in the public interest, and especially in the interests of those who wish to make use of those services, that those standards are adhered to and that prompt steps are taken to address a failure to do so and, if necessary, remove the service from the register.

44. 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 problem is one of SCSWIS's own making. It has chosen, no doubt for good reasons, not to rely on the Commission's 2008 and 2009 decision notices but to rely instead on a decision that was taken with reference to the situation that is now current in the nursery. The obvious consequence would seem to be for the 2008 and 2009 decisions to be withdrawn so that the sheriff can concentrate on the issues raised by the decision that was taken in 2012. Mr Mitchell made it clear, however, that he was not prepared to do this, in case this would lead to another challenge to the validity of the notices that were given on 4 December 2012. Mr Gale, when asked to clarify his position, said that he accepted that at least one of the appeals would have to proceed. He gave an express undertaking at the bar to the effect that his ground of challenge to the various notices issued by SCSWIS as agents for the Commission under the 2001 Act would not be insisted on. For the

reasons already given (see para 39, above) they must fall in any event to be regarded as valid notices.

45. Mr Mitchell accepted that, if the appeal against the 2012 decision were to be successful, SCSWIS could not continue to seek cancellation of the appellants' registration based on shortcomings in the running of the nursery at least four years earlier. The question whether the 2008 and 2009 decisions should have effect is no longer of any practical importance. In my opinion, were SCSWIS to insist that this question be left to the sheriff, that would, in the events that have happened and in the light of this court's ruling as to the validity of the 2012 decision notice, be an abuse of process. It is well established in Scots law that the court can exercise its inherent jurisdiction in the case of an abuse of process by way of a procedural sanction such as dismissal without express parliamentary authority: *Tonner v Reiach and Hall* [2007] CSIH 48, 2008 SC 1, para 62, per Lord Abernethy; *Moore v The Scottish Daily Record and Sunday Mail Ltd* [2008] SCIH 66, 2009 SC 178, para 14, per Lord Justice Clerk Gill.

46. Mr Mitchell, for understandable reasons, declined to commit his clients to a final decision as to whether or not they should insist on the decisions that the Commission took in 2008 and 2009. The time has come, however, for this 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 those decisions, that would be, in the light of the undertaking given to the court by Mr Gale, an abuse of process and, in the interests of appropriate case management, to take steps now to prevent such an abuse. The sheriff has power on an appeal under section 20(2) of the 2001 Act to confirm the decision that has been appealed against or direct that it shall not have effect. Those powers are available to this court on the disposal of this appeal: rule 29(1) of the Supreme Court Rules 2009 (SI 2009/1603). It would normally only be open to us to exercise those powers 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. I would therefore direct that the decisions that were the subject of the Commission's notices of 18 August 2008 and 30 March 2009 shall not have effect. That would leave unaffected the appellants appeal, also taken in 2008, against the condition imposed in 2007, which was the subject of their third crave. That should also be dismissed.

47. I would also direct, for the avoidance of doubt, that the effect of the order making that direction is that the appeal proceedings against those decisions have been finally determined. The decision that was the subject of the notice that was given on 4 December 2012 under section 17(3) of the 2001 Act was taken by SCSWIS, not by the Commission. It follows that article 2(1) of the No 2 Order, which refers to decisions by the Commission, will no longer apply. So I would also direct, again for the avoidance of doubt, that the nursery must now be treated for

all purposes in terms of article 2(1) of the No 1 Order as if it had been registered under Part 5 of the 2010 Act: see article 3 of the No 2 Order. This means that the decision under section 17(3) of the 2001 Act of which notice was given by SCSWIS on 4 December 2012, which Mr Gale accepted was validly given, must be treated as if it had been given under section 73 of the 2010 Act, and that the appeal against that decision must now proceed under section 75 of that Act. There is no material difference between the relevant provisions of the 2001 Act and those of the 2010 Act. The appeal to the sheriff should proceed on this basis from now on.

Conclusion

48. I would affirm that part of the interlocutors of 24 January 2012 by which the Inner House allowed the appeals against the Sheriff Principal's interlocutors. Quoad ultra I would recall the Inner House's interlocutors of 24 January 2012 and remit the case to the Inner House for any further orders that may be required. The aim should be to bring the appeal against the decision of which notice was given on 4 December 2012 to a conclusion as expeditiously as the administration of justice will allow (see MacPhail, *Sheriff Court Practice* (3rd edition, 2006), para 26.01).