Trinity Term
[2013] UKSC 37
On appeal from: [2012] CSIH 4; [2012] CSIH 88

JUDGMENT

Apollo Engineering Limited (Appellant) *v* James Scott Limited (Respondent) (Scotland)

before

Lord Hope, Deputy President
Lord Clarke
Lord Carnwath

JUDGMENT GIVEN ON

13 June 2013

Heard on 13 May 2013

Appellant
Gabriel Politakis

Respondent
Nick Ellis QC

(Instructed by Macroberts LLP)

Advocate to the Court
Andrew Young QC

(Instructed by Faculty Solicitor)

LORD HOPE (with whom Lord Clarke and Lord Carnwath agree)

1. From time to time cases come before the courts that try the patience of even the most phlegmatic of judges. This, I fear, is one of them. On the one side there is an articulate and determined litigant who suffers from an implacable belief that his case has not been dealt with justly and, because he has run out of money, cannot afford to be represented. On the other is an opposing party for whom these proceedings have been dragging on for far too long and which has little or no prospect of recovering any of its expenses. One may regret the situation in which that party finds itself. But our basic common law rule that a party is entitled to a fair hearing applies not only to those whom the court finds it easy to deal with, but to everyone. That is the standard the judges who have dealt with this case in the Court of Session set for themselves at each stage in the proceedings, as their carefully reasoned opinions amply demonstrate. So, had it not been for an order that they made because they regarded the proceedings as incapable of achieving anything of value, the case would not have been open to consideration by the Supreme Court at all. As it is, the course they took has raised the possibility which this court cannot ignore that the interlocutor which they pronounced may, after all, be appealable.

2. Mr and Mrs Politakis are the directors and the only shareholders of Apollo Engineering Ltd ("Apollo"). They wish to appeal to this court against two interlocutors that were pronounced in a case that was stated for the opinion of the Court of Session under section 3 of the Administration of Justice (Scotland) Act 1972 ("the 1972 Act") on 28 September 2007. The case had been stated on the application of Apollo before section 3 of the 1972 Act was repealed by paragraph 1 of Schedule 2 to the Arbitration (Scotland) Act 2010. The arbitration proceedings to which the stated case related arose out of a contractual dispute between Apollo and James Scott Ltd about pipe construction work which Apollo had been carrying out for James Scott Ltd in 1990 at Coulport. James Scott Ltd are the respondents to these proceedings.

3. On 18 January 2012 an Extra Division of the Inner House (Lady Paton and Lords Reed and Bracadale) refused a motion enrolled by Mr Politakis in his own name, as Apollo had run out of funds and could no longer afford legal representation: [2012] CSIH 4. He had asked the court to make an order under article 6 of the European Convention on Human Rights which would allow him to represent the company. He was invited to make submissions on his own behalf, and he did so both orally and in writing. The court held that it was well established by the authorities that Scots law does not permit a company to be represented by a director or an employee of the company. It can be represented only by an advocate

or a solicitor with a right of audience: *Equity and Law Life Assurance Society v Tritonia Ltd* 1943 SC (HL) 88; *Secretary of State for Business, Enterprise and Regulatory Reform v UK Bankruptcy Ltd* 2011 SC 115. The Extra Division also held by a majority (Lord Reed and Lord Bracadale differing in this respect from Lady Paton) that, as the issues in the case were complex and it was unlikely that the appeal could be presented effectively by anyone without legal qualifications, article 6 did not require that Mr Politakis's motion should be granted. As he was not suitably qualified, this would not provide the company with an effective right of access to the court: *Airey v Ireland* (1979) 2 EHRR 305.

4. On 27 November 2012 the Extra Division (Lady Paton and Lords Menzies and Bracadale) pronounced a further interlocutor which dealt, among other things, with an opposed motion which had been enrolled by James Scott Ltd for the stated case to be dismissed: [2012] CSIH 88. It was in these terms:

> "The Lords, having resumed consideration of the cause, refuse Mr Politakis leave to appeal to the Supreme Court; refuse the motion enrolled by Mr Politakis in June 2011 and amended on 18 April 2012 to sist himself in room and place of Apollo Engineering Limited; refuse the alternative motion to sist himself as a party to the court and arbitration proceedings; find Apollo Engineering Limited liable to the respondents James Scott Limited in the expenses of the two day hearing held on 7 and 8 July 2011, said expenses to be paid out of the sum held as caution for Apollo Engineering Limited by the Accountant of Court; remit an account thereof, when lodged, to the Auditor of Court to tax; dismiss the Stated Case and decern; reserve meantime any question of expenses in that process insofar as not already dealt with."

5. That interlocutor, leaving aside the orders about expenses, fell into three parts. First, Mr Politakis was refused leave to appeal to this court against the interlocutor of 18 January 2012 refusing his application to represent his company. Second, his attempts to sist himself as a party to the proceedings were rejected. That would have enabled him to represent himself, as a natural person is entitled to present his own case. But he was not a party to the arbitration or to the contract with James Scott Ltd, so there were no grounds for regarding him as entitled to be sisted in these proceedings in his own name. Mr Politakis has not sought leave from the Inner House to appeal against this part of the interlocutor. Third, the stated case was dismissed, so the proceedings in the stated case were brought to an end. The Extra Division did not give its opinion on the questions in the case, on which it had not heard any argument. It was of the opinion that, since at any future hearing Apollo would be unrepresented, it would be fruitless for it to permit the stated case proceedings to continue: [2012] SCIH 88, para 40. There has been no application for leave to appeal against that part of the interlocutor either.

6. The circumstances in which it is competent to appeal to the Supreme Court against a judgment of the Court of Session are set out in section 40 of the Court of Session Act 1988 ("the 1988 Act") which, so far as relevant to this case, provides:

> "(1) Subject to the provisions of any other Act restricting or excluding an appeal to the Supreme Court and of sections 27(5) and 32(5) of this Act, it shall be competent to appeal from the Inner House to the Supreme Court –
>
> (a) without the leave of the Inner House, against a judgment on the whole merits of the cause, or against an interlocutory judgment where there is a difference of opinion among the judges or where the interlocutory judgment is one sustaining a dilatory defence and dismissing the action;
>
> (b) with the leave of the Inner House, against any interlocutory judgment other than one falling within paragraph (a) above.
>
> …
>
> (4) On an appeal under this section all the prior interlocutors in the cause shall be submitted to the review of the Supreme Court."

7. The answer to the question whether it is competent to appeal to this court against the interlocutors of 18 January 2012 and 27 November 2012 is not as straightforward as it might have been if the Court of Session had proceeded to answer the questions in the stated case. In *John G McGregor (Contractors) Ltd v Grampian Regional Council* 1991 SC (HL) 1 it was held that an opinion of the court upon questions of law given on consideration of a case stated under provisions such as those in section 3 of the 1972 Act did not constitute a "judgment" within the meaning of section 40(1) of the 1988 Act. The House dismissed Grampian Regional Council's petition of appeal as incompetent. But the facts here are different, as the Extra Division did not give its opinion on the questions of law that were before it in the stated case.

8. In this situation two questions arise. The first is whether, having regard to the terms of section 3 of the 1972 Act, the decision in *McGregor* applies to this case at all. Apollo is not seeking to appeal against any opinion. Its appeal is directed to the fact that the stated case has been dismissed. The second is whether, if the appeal is not incompetent for the reasons given in *McGregor*, that part of the interlocutor of 27 November 2012 which dismissed the stated case was a

"judgment" against which an appeal to this court is competent under section 40(1) of the 1988 Act without the leave of the Inner House of the Court of Session. The Supreme Court directed that these two questions should be the subject of an oral hearing as to the competency of an appeal against that interlocutor. Mr Politakis was given permission, in the exceptional circumstances of this case, to represent Apollo at the hearing. The court was also assisted by submissions made by Mr Andrew Young QC, who had been appointed at the court's request as an advocate to the court by the Dean of Faculty.

9. Mr Politakis made it clear that he also wished to appeal against the interlocutor of 18 January 2012. But it is plain that this was an interlocutory judgment within the meaning of section 40(1) of the 1988 Act for which the leave of the Inner House was required to appeal against it, and the Inner House has refused his application for leave to appeal. It could be submitted to the review of this court under section 40(4) as one of the prior interlocutors in the cause. But that can only happen if an appeal is competently before this court under section 40(1) in the first place, and if it is necessary to subject the interlocutor to review as part of that appeal. Leave to appeal having been refused by the Inner House, there is no self-standing right of appeal against it.

Section 3 of the 1972 Act

10. The report of the Appeal Committee in *McGregor* was given by Lord Jauncey. He said at p 4 that its decision to find that the petition to appeal in that case was incompetent was based on clear authority for the view that an opinion of the court upon questions of law in a case stated under section 3 of the 1972 Act did not constitute a "judgment" within the meaning of section 40(1) of the 1988 Act. He added that this view was in any event consonant with the ordinary use of language, and that it was supported by various other statutory provisions such as those now to be found in section 27 of the 1988 Act, which enables a special case to be presented to the court for its opinion by parties who are agreed on the facts and are in dispute on a question of law only, and in section 13(2) of the Tribunals and Inquiries Act 1971 which, by making express provision to the contrary, appears to recognise that in general an opinion of the court on a stated case does not constitute a judgment for the purposes of the jurisdiction of the Court of Appeal to entertain appeals. But none of the decisions in the cases to which he referred were concerned with the situation that has arisen in this case, and it is not so obvious that the decision of the Inner House to dismiss the stated case did not constitute a "judgment" within the meaning of section 40(1) of the 1988 Act.

11. The leading case on this subject, prior to that of *McGregor*, was *In re Knight and the Tabernacle Permanent Building Society* [1892] 2 QB 613. The question in that case was whether there was an appeal to the Court of Appeal from

a decision of the High Court upon a special case stated by an arbitrator under section 19 of the Arbitration Act 1889. The ratio of the decision is to be found in the judgment of Lord Esher at p 617, where he said:

> "It appears to me that what the statute in terms provides for is an 'opinion' of the court to be given to the arbitrator or umpire: and there is not to be any determination or decision that amounts to a judgment or order. Under these circumstances I think there is no appeal. I base my decision on the words of the statute: but when I consider the result of holding otherwise, I am fortified in the conclusion at which I have arrived. It seems to me that it would be most inexpedient that, where an opinion is given by the court under this statute in the course of a reference for the guidance of arbitrators, there should be an appeal which might be carried up to the House of Lords."

Bowen LJ said at p 619 that it appeared to him that the consultative jurisdiction of the court did not result in a decision which was equivalent to a judgment or order. The proposition that the giving by the court of its opinion to the arbitrator is not a determination or decision that amounts to a judgment is easy to understand, but it does not apply to this case as no such opinion was given. Lord Esher's point on expediency also assumes that the court has given its opinion on the questions of law that were before it. It is less easy to see why, if the court has declined to give its opinion, its reasons for reaching that decision should not be open to review by means of an appeal to a higher court.

12. Lord Jauncey also referred to two cases from Scotland. In *Johnston's Trustees v Glasgow Corporation* 1912 SC 300 the question was whether the sheriff could be required to state a case under the Housing, Town Planning etc Act 1909 after he had given judgment. It was held that it was incompetent for him to do so after he had disposed of the appeal. The court would not then be giving its opinion for the sheriff's guidance, as the sheriff could not recall his judgment and there was no provision in the statute that would allow it to be recalled by the court. Lord President Dunedin observed at p 303 that the issue was absolutely decided by authority both in Scotland and in England. The Scottish case was *Steele v McIntosh Brothers* (1879) 7 R 192 in which, after reviewing various examples in the statutes, Lord President Inglis said at p 195 that there were some proceedings, as in that case, where all that those stating the case were empowered to do was to obtain the opinion and guidance of the court in the administration of the jurisdiction conferred on them. The English case was *In re Knight and the Tabernacle Permanent Building Society*. Lord President Dunedin said that the decision in that case was entirely on the same lines as Steele's case. In *Mitchell-Gill v Buchan* 1921 SC 390 it was held that an arbiter who had stated a case for the opinion of the court would be guilty of misconduct if he disregarded the law as

stated in its opinion. Agreeing with the other judges that the arbiter was not entitled to disregard it, Lord Skerrington observed at p 398 that this was so even though the opinion could not be enforced or appealed against in the same way as a judgment or decree.

13. None of these cases touch on the question that has to be resolved in this case. The special nature of the proceedings is recognised, but it is assumed in all of them that the court will do what is provided for by the statute and will give its opinion for the guidance of the tribunal by which the case has been stated. Neither Mr Ellis QC for James Scott Ltd nor Mr Young were able to refer us to any authorities that offered assistance as to the situation which we have here where the court has declined to do what the statute provides for. Mr Ellis submitted that it made no sense for an interlocutory decision to be appealed where there was no appeal against a decision answering the questions of law, and Mr Young said to allow a right of appeal in such a case would run counter to the general thrust of section 40 of the 1988 Act which sought to limit appeals to the Supreme Court on procedural matters. But it seems to me that those submissions beg the question whether the part of the interlocutor of 27 November 2012 by which the stated case was dismissed was truly of a procedural or interlocutory character.

14. Our attention was drawn by Mr Young to *Lady Cathcart v The Board of Agriculture for Scotland* 1915 SC 166, where a reclaiming motion against an opinion of the Lord Ordinary on a stated case was held to be incompetent as the Lord Ordinary's opinion was final, and to *Johnston-Ferguson v Board of Agriculture* 1921 SC 103, where it was held that it was beyond the intention of the legislature for a procedure to be introduced which would allow the opinion of the sheriff to be a matter of appeal to the court. Neither of these cases offers direct assistance on the point at issue. But Lord Skerrington's observation in *Lady Cathcart's* case at p 168 that in legal language an opinion is one thing and a judgment is another is of some interest. It suggests that an interlocutor which dismisses a case without giving an opinion could be regarded as a judgment for the purposes of section 40(1) of the 1988 Act – simply because, if it is not one thing, it must be the other.

15. Mr Ellis suggested that section 3 of the 1972 Act was a provision of a kind referred to in the preamble to section 40(1) of the 1988 Act because, as properly construed, it excluded an appeal to the Supreme Court. As he put it, nothing done within it will give rise to such an appeal. I do not think, however, that this provides an answer to the problem posed by this case. Section 3(1) provides that the arbiter may, on the application of a party to the arbitration, and shall, if the Court of Session on such an application so directs

> "at any stage in the arbitration state a case for the opinion of that Court on any question of law arising in the arbitration."

As Lord Jauncey said in *McGregor* at p 5, the ordinary use of language indicates that an appeal to this court against an opinion of the Court of Session under that section is excluded by necessary implication because it is for the opinion of that court only that the case has been stated. But there is nothing in the language of section 3(1) which addresses the situation where the Court of Session has dismissed the stated case without giving its opinion on the questions that were before it at all. Its role is, of course, simply to answer the questions. And the parties to the arbitration were entitled to make use of the procedure provided for by the statute and, a case having been competently stated under it, to obtain the court's opinion for the guidance of the arbiter. The statute makes no provision for the course of action that the Extra Division felt obliged to take in this case.

16. It seems to me in these circumstances that the question of competency depends on whether that part of the interlocutor of 27 November 2012 which dismissed the stated case was a judgment within the meaning of section 40(1)(a) of the 1988 Act against which there is a right of appeal to this court without the leave of the Inner House. If it is, there being no provision in any other statute of the kind referred to in the preamble to section 40(1), we must conclude that Apollo has a right of appeal under that subsection to which effect must be given – so long, of course, as the appeal raises a question which can responsibly be certified by counsel as reasonable.

Section 40 of the 1988 Act

17. Section 40(1)(a) of the 1998 Act provides that an appeal from the Inner House to the Supreme Court is competent without the leave of the Inner House in one or other of three kinds of case: (1) where it is an appeal against a judgment on the whole merits of the cause; (2) where it is an appeal against an interlocutory judgment where there is a difference of opinion among the judges; and (3) where the interlocutory judgment is one sustaining a dilatory defence and dismissing the action. An appeal is also competent, but only with the leave of the Inner House, under section 40(1)(b) where it is an appeal against an interlocutory judgment other than one falling within cases (2) and (3) above. The language that section 40(1) uses is not easy to translate into modern legal terminology. As the Lord Justice Clerk, Lord Carloway, explains in his chapter on Decrees and Interlocutors in Macfadyen, *Court of Session Practice*, Division K, Chapter 1, para [1], it is best to read the words in the context in which they appear and in their historical context.

18. One can take as the starting point the fact that an appeal lies to the Supreme Court from any order or judgment of the Court of Session if an appeal lay from that court to the House of Lords at or immediately before 1 October 2009: Constitutional Reform Act 2005, section 40(3), read together with the Constitutional Reform Act (Commencement No 11) Order 2009 (SI 2009/1604). Section 3(2) of the Appellate Jurisdiction Act 1876 provided that an appeal lay to the House of Lords from any order or judgment of any court in Scotland from which error or an appeal at or immediately before the commencement of that Act lay to the House of Lords by common law or statute. Lord Keith of Kinkel understood this to mean that, as a general rule, every final judgment of the Inner House was appealable to the House of Lords, but that the right might be restricted or excluded by statute: *Stair Memorial Encyclopaedia*, vol 6, *Courts and Competency*, para 829. I would take the right of appeal to the Supreme Court to be subject to the same general rule and to the same qualification.

19. The common law right of appeal which had existed since the Treaty of Union of 1707 was not at first under any restriction, and it was too easily open to abuse: see Lord Brodie's chapter in *The Judicial House of Lords 1876-2009* (2009), Part D, Regional Perspectives, *From Scotland and Ireland*, pp 282-283. So it was restated and modified by section 15 of the Court of Session Act 1808, which provided that thereafter no appeal to the House of Lords was to be allowed from interlocutory judgments but that such appeals were to be allowed only from judgments or decrees on the whole merits of the cause, except with the leave of the Division of the Judges pronouncing such interlocutory judgments or except in cases where there was a difference of opinion among the Judges of that Division. In *Beattie v Glasgow Corporation* 1917 SC (HL) 22 the House of Lords held that an interlocutor allowing an issue so that an action of damages could proceed to trial before a jury was an interlocutory judgment which was not appealable without leave. Lord Loreburn observed at p 24 that interlocutory judgments meant judgments which are in substance interlocutory, not those which although in form interlocutory are final in substance. Then, by section 5 of the Court of Session Act 1825, which dealt with the disposal of dilatory defences by the Court of Session, it was provided that it was not to be competent to appeal to the House of Lords against an interlocutory judgment which sustained a dilatory defence where the action was not dismissed, unless express leave be given by the Court.

20. In *Ross v Ross* 1927 SC (HL) 4, at p 6, Lord Dunedin said that the disability imposed on the House which forbade the hearing of appeals against interlocutory judgments where there had been no difference of opinion in the court below and no leave to appeal had been granted was statutory and could not be got over. But the generality of the right of appeal in cases where it was not restricted or excluded by statute has never been called in question. Interlocutors which are final in substance are, as a general rule, appealable. The wording of section 40(1) of the 1988 Act must be understood against that background.

21. Mr Ellis submitted that the interlocutor of 27 November 2012 was not a judgment on the whole merits of the cause for three reasons. The first was that it was not proper to regard the stated case as "the cause". The cause from which the stated case arose was the arbitration. All the Court of Session was asked to do was to offer advice to the arbiter. The second was that the interlocutor was not a "judgment" of the Inner House because it was an interlocutory decision in a process from which there was no appeal to the Supreme Court. The third was that it was a procedural decision taken in unusual circumstances of the stated case process which did not address the substance of the questions in the stated case at all.

22. I do not think that there is any substance in the second and third of these propositions. The decision to dismiss the stated case cannot be regarded as an interlocutory judgment of the kind referred to in section 40(1)(b) which is appealable only with leave: see *Buchanan v Alba Diagnostics* 2004 SC (HL) 9, 17. All the issues that were in controversy before the Court of Session were disposed of when the stated case was dismissed. The interlocutor was in substance a final interlocutor because the proceedings were brought to an end by it. They could not continue and the Court of Session was not in a position to retrieve them. For the same reason the decision which the Extra Division took cannot be treated as a procedural decision only. There were, no doubt, procedural reasons for it, as Mr Politakis had been refused permission to represent Apollo and the company was unable to pay for counsel to represent it. One can understand why, in these circumstances, the Extra Division was of the opinion that it would be fruitless for the proceedings to continue. But the effect of the interlocutor was not merely to resolve that issue of procedure. It was to end the proceedings completely as, having dismissed the stated case, the court had exhausted its functions under the statute, save as to resolving any outstanding issues about expenses.

23. As for the first point, the word "cause" is a word of wide ambit. It is defined in rule 1(3) of the Rules of the Court of Session 1994 as meaning "any proceedings". And it does not make sense of section 40(1) of the 1998 Act to regard the cause in question as the arbitration proceedings out of which the application for the stated case arose. The cause in question must be taken to be the cause or matter that was before the Inner House. Section 40 is concerned only with the proceedings in the Inner House in which the interlocutor was pronounced. There is no indication anywhere in the section that it is concerned in any way with proceedings in any lower court or tribunal. The proceedings in the Inner House must be regarded for this purpose, both in form and in substance, as a separate process from the proceedings before the arbiter. The dismissal of the stated case was final, in just the same way as if the interlocutor had encompassed the court's opinion on the questions that were before it: see *Davidson v Scottish Ministers (No 3)* 2005 SC (HL) 1, paras 12-14. In either case the court had, or would have had,

no further functions to perform under the procedure that brought the matter before it.

24. The question then is, which of the three kinds of interlocutor referred to in section 40(1)(a) are we dealing with in this case? For the reasons already given, the interlocutor of 27 November 2012 was not an interlocutory judgment of the second kind. It did not answer the questions in the stated case. But it was final in substance, in the words of Lord Loreburn in *Beattie*, as it brought the stated case proceedings to an end. This suggests that it was an interlocutor which did actually dispose of the whole merits of the cause.

25. Mr Young suggested that, if we were to conclude that it was not a judgment of that kind, it could be considered to be an interlocutory judgment of the third kind because it sustained a dilatory defence by dismissing the stated case. Mention of this kind of interlocutor made its first appearance in section 5 of the Court of Session Act 1825. It provided that it was not to be competent to appeal to the House of Lords against such a judgment where the action was not dismissed unless express leave was given by the court. But that qualification did not apply where the action was dismissed.

26. The use of the adjective "dilatory" appears still to have been in common use in 1893: see Mackay's *Manual of Practice in the Court of Session* (1893), where at p 221 the author said:

> "Defences are dilatory or preliminary, and peremptory or on the merits. A dilatory or preliminary defence is one which, if sustained, puts an end to the particular suit, or at least suspends it till some other action is brought and terminated, or some proceeding taken which is necessary before the suit can proceed."

Twenty three years later it seems that the use of the adjective "preliminary" was beginning to predominate: see Maclaren, *Court of Session Practice* (1916), p 379 where the following description is given:

> "A preliminary or dilatory defence is a defence which does not touch the merits of the case, but is based upon the failure of the pursuer to observe the rules of practice or procedure of the Court before which the cause is brought."

The word "dilatory" does not appear again in the following discussion, and it is not mentioned in the index. It has long since dropped out of the vocabulary of the

Court of Session practitioner. It was preserved in section 40(1) as part of the process of consolidation of the previous Court of Session Acts. But it now looks rather odd, and thought might perhaps be given to rewording this part of the subsection at the next opportunity.

27. It is not easy to fit the interlocutor dismissing the stated case into this description. It did not touch the merits of the issues on which its opinion was being sought. The respondents' motion for its dismissal, to which the Extra Division gave effect, was based on Apollo's inability to fulfil the courts' rules of practice about representation. But it would be stretching the language of the statute to say that this objection was a defence, especially as the procedure under section 3 was not one that could, in the ordinary sense of the word, be defended. It may not matter much whether the interlocutor is to be regarded as a judgment on the whole merits of the cause or as one sustaining a dilatory defence, as both are appealable without the leave of the Inner House. On balance, however, I think that would be more correct to regard it as a judgment "on the whole merits of the cause" within the meaning of section 40(1)(a) of the 1988 Act, even though the Inner House did not address itself to the issues raised in the stated case.

Conclusion

28. For these reasons I would hold that Apollo can competently appeal to this court against that part of the interlocutor of 27 November 2012 which dismissed the stated case without the leave of the Inner House.

29. As is the case with all other interlocutors that are appealable without leave however, its petition of appeal must be certified by two counsel as reasonable – the test for which is whether the appeal raises arguable points of law which are of general public importance: *Uprichard v Scottish Ministers* [2013] UKSC 21, per Lord Reed at paras 58-63. It must be emphasised that the question for counsel is not whether the arguments which Apollo would have wished to advance in the stated case were reasonable. That is not an issue which is open for consideration by this court. It was for the Court of Session to give its opinion on the questions that were before it, not this court. The only question which this court can consider is whether the Extra Division's decision to dismiss the stated case was one which was open to it to take under the jurisdiction given to it by the statute. Unless something has gone seriously wrong, however, this was an exercise of judgment on a matter of procedure with which this court would not normally wish to interfere: *McIntosh v British Railways Board (No 2)* 1990 SC 339; *Girvan v Inverness Farmers Dairy* 1998 SC (HL) 1, at 21C-G.

30. The question whether there was any way in which Apollo's interests could have been represented so as to avoid the situation that the Extra Division described as fruitless is not before us. But it is a troublesome aspect of this case, and there may be grounds for thinking that the rule which disables a company from being represented other than by counsel or a solicitor with a right of audience needs to be re-examined. The rule about representation does not apply to proceedings before an arbiter, as has now been made clear by rule 33 in Schedule 1 to the Arbitration (Scotland) Act 2010 which provides that a party may be represented by a lawyer or any other person: see also rule 41 which enables a party to apply for issues of Scots law arising in an arbitration to be determined in the Outer House. Rules 33 and 41 are, it must be emphasised, default rules. They apply only in so far as the parties have not agreed to modify or disapply them: see section 9 of the 2010 Act. But the fact that they are there suggests that the rule about representation ought not to be applied in cases where they do apply in a way that disables a company which is unable to pay for a lawyer from obtaining the view of the court on such issues.