OUTER HOUSE, COURT OF SESSION

[2019] CSOH 16

CA3/18

NOTE OF LADY WOLFFE

In the cause

OUR GENERATION LIMITED

Pursuer

against

ABERDEEN CITY COUNCIL

Defender

Pursuer's Counsel: MacColl QC et Turner; Eversheds Sutherland (International) LLP
Defender's Counsel: Mure QC; Morton Fraser

19 February 2019

Introduction

The pursuer's action

[1] In this commercial action the pursuer sought declarator that it had validly terminated each of the Site Agreements in respect of roof-mounted photovoltaic systems ("the equipment") on properties owned and operated by the defender. After a procedure roll debate, I upheld the defender's plea to the relevancy of the pursuer's action and dismissed it. That opinion may be found at [2018] CSOH 124.

The defender's counterclaim

[2] There was no discussion at debate of the defender's counterclaim. The counterclaim proceeded on the factual hypothesis that the pursuer's termination notices had been ineffectual; that the pursuer was in material breach of contract and, further, that the defender had itself subsequently rescinded the Site Agreements by reason of the pursuer's repudiatory and material breach of contract.

The pursuer's motion for leave to reclaim

[3] The pursuer enrolled a motion for leave to reclaim the dismissal of its action, although its primary position was that leave was not required. If leave were required, the pursuer's position was that it should be granted. By contrast, the defender argued that leave to reclaim was required but that leave should be refused. The principal basis for the defender's position that leave was required was the subsistence of its counterclaim.

[4] Parties presented submissions on the question of whether or not leave of the commercial judge was required for the pursuer to reclaim to the Inner House and they referred to several authorities. By reason of what was said to be the uncertainty on this issue, I was asked to produce a short Note reflecting my decision at the hearing on the motion to refuse leave as unnecessary. This Note does not address the pursuer's other motion, for caution under section 726 of the Companies Act 2006 in respect of the defender's counterclaim.

Was leave to reclaim required?

The Rules of the Court of Session 1994

[5] In terms of rule 38.3(6) of the Rules of the Court of Session 1994 ("the Rules"), leave to reclaim is required from the commercial judge unless the interlocutor reclaimed makes a disposal as is mentioned in rule 38.2(1). Rule 38.2(1) refers to an interlocutor

> "disposing, either by itself or taken along with a previous interlocutor, of –
>
> (a) the whole subject matter of the cause; or
>
> (b) the whole merits of the cause whether or not the question of expenses is reserved or not disposed of".

Parties proceeded on the basis that subparagraph (b) was the relevant part of rule 38.2(1).

[6] Mr MacColl QC, who appeared on behalf of the pursuer, submitted that, as the pursuer's action had been dismissed in its entirety, leave was not required. Other than to deal with expenses, nothing more remained for the commercial judge to resolve in the pursuer's action. He referred to the observation of Lord Hope in *Buchanan* v *Alba Diagnostics Ltd* 2004 SC(HL) 9 at paragraph 39. He submitted that the defender's analysis that leave was required was incorrect. This was because the defender's counterclaim raised a separate question between the parties. The pursuer wished the question of leave to be ventilated before the Commercial Judge so as to preclude any suggestion that the reclaiming motion before the Inner House was incompetent.

[7] If leave were required, it was expedient to grant this. The reclaiming motion was likely to take no more than one day. On the other hand, if leave were required and refused, this would mean that the pursuer could only reclaim against the interlocutor dismissing its action after proof on the defender's counterclaim were heard, which was likely to be many months hence. If it transpired that the pursuer's challenge to the court's decision to dismiss its

action were correct, then the time and expense taken to litigate the defender's counterclaim would all have been wasted. That course would also take much longer.

[8] Mr Mure QC, who appeared on behalf of the defender, submitted that the issues in the defender's counterclaim were intimately bound up with the pursuer's principal action. He referred to the case of *Martin and Co (UK) Ltd, Petitioners* 2014 SLT 71, in which the Inner House refused a reclaiming motion as incompetent in the absence of leave (which had not been obtained). He founded, in particular, on the observation of Lord Hope in *Apollo Engineering Ltd* v *James Scott Ltd* [2013] UKSC 37 and quoted by Lady Smith in *Martin and Co (UK) Ltd* (at paragraph 24), that the word "cause" was a word of "wide ambit".

[9] Mr Mure QC ultimately accepted, correctly in my view, that the pursuer's action and the defender's counterclaim raised separate questions and that the validity of the termination notices (which was the subject matter of the debate) did not depend on the issues in the counterclaim. He also accepted that the court was not *functus*, as it had preserved the question of expenses.

Discussion

Absence of express stipulation in the Rules

[10] As noted above, doubt about the necessity of leave only arises because of the subsistence of the defender's counterclaim. But for that factor, the pursuer would be entitled to reclaim against dismissal of its action without leave. There was no express provision in the Rules dealing with leave from a commercial action in which there was also a subsisting counterclaim. All of this was common ground between the parties.

The cases cited

[11] Turning to the cases cited to me, in *Martin and Co (UK) Ltd* the petitioner company had secured an order for recovery of documents under section 1 of the Administration of Justice (Scotland) Act 1972. When the commissioner attended to execute the order, however, two individuals obstructed the commissioner's efforts. Those circumstances led the petitioners to ask the court to find one of those individuals to be in contempt of court. Before that question was determined, the respondent reclaimed to the Inner House against an adverse finding on expenses, notwithstanding that the Lord Ordinary had refused leave. The petitioners successfully challenged the competency of the respondent's reclaiming motion.

[12] In holding that the respondent's reclaiming motion was incompetent, Lady Smith noted Lord Hope's observation (in *Apollo Engineering Ltd* at para 23) that "cause" was a word "of wide ambit". She found the reclaiming motion to be incompetent on two bases: first, because the question of the respondent's contempt of court had not been resolved and, secondly, because of the "interdependency" between the contempt issue and the original subject matter of the petition. She expressly rejected the argument that one determined whether or not an interlocutor disposed of the whole subject matter of the cause by asking whether any further order was "necessary", as the respondent had contended (see para 13 in *Martin and Co (UK) Ltd*).

[13] It should be noted that in *Apollo Engineering Ltd* Lord Hope in fact preferred the narrower reading (that "cause" encompassed the Inner House proceeding, but not the ongoing arbitration process from which the action had originated). He regarded the proceedings before the Inner House as separate from those before the arbiter. He also approached the question of finality in a practical, not formal, sense. He considered whether an interlocutor "was final in substance" and found, in that case, that it was because "[a]ll of 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": at paragraph 22.

[14] In *Buchanan*, the inventor of the patent sued the defender for alleged infringement. The defender denied this and lodged a counterclaim seeking revocation of the pursuer's patent. The Lord Ordinary heard a proof restricted to the issue of ownership of the patent and infringement. The Lord Ordinary found in favour of the defender. The Inner House refused the pursuer's reclaiming motion. The pursuer appealed, without leave, to the House of Lords. Toward the end of his speech, Lord Hope addressed the question of whether or not the pursuer required leave to appeal to the House of Lords. This question involved a consideration of section 40(1) of the Court of Session Act 1988, which made it competent to appeal from the Inner House to the House of Lords without leave against a judgement *inter alia* "on the whole merits of the cause". Lord Hope concluded that the Lord Ordinary's decision could not be described as an "interlocutory" judgement, as all the issues which were the subject of the pursuer's action against the defender had been disposed of. As he put it (at paragraph [39]), "[o]n those issues the interlocutor which he pronounced was a final interlocutor". He went on to observe:

> "it is possible to imagine cases where the disposal of all the conclusions in a counterclaim is necessary in order to determine the question which was in controversy between the parties. If that is so, and they had not been disposed of by the judgment which is to be appealed, it may be possible to say that the whole merits of the cause have not been disposed of. But in this case the questions which were in controversy [the pursuer's] right to pursue [the defender] for infringement of [the patent] and, if he was, whether the manufacture and sale of [the defender's] implement was an infringement of it. The question of whether [the pursuer] is liable in damages to [the defender] is a separate question. It did not have to be answered in order to dispose of the whole merits of [the pursuer's] action against [the defender]. In these circumstances the leave of the Inner House was not required."

Did the subsistence of the counterclaim preclude disposal of the whole merits of the principal action?

[15] The critical word used in subparagraphs (a) and (b) of rule 38.2(1) is "cause", which is defined in rule 1.3 of the Rules as "any proceedings" and clearly encompasses both ordinary actions (ie initiated by a summons) and petitions. (Parenthetically I note that Lord Hope's approach in *Apollo Engineering Ltd* to the meaning of "cause", as confined to the proceedings in the Court of Session, and separate from the arbitration, accords with the definition in the Rules.) For present purposes, the distinction made in subparagraphs (a) and (b) of rule 38.2(1) – and which concerns whether expenses have also been dealt with - is of no relevance. (Neither party suggested that the fact that the question of expenses was as yet unresolved affected the argument.)

[16] As is clear from the observations of Lord Hope and Lady Smith, the question of whether the "whole subject matter of the cause" has been disposed of is approached in a practical, not technical, way. I propose to follow that approach for the purposes of rule 38.2(1)(b), in respect of "the whole merits of the cause".

[17] In this case, I dismissed the pursuer's action after debate. The subsequent interlocutor pronounced dealt with the whole merits of the pursuer's action, save expenses. (Had the interlocutor dealt also with expenses, it would have disposed of the "whole merits of the cause".) The issue which divided the parties was whether the subsistence of the counterclaim altered the position. It may be helpful to recall that the rationale for permitting a defender to lodge a counterclaim was one of expediency, not least to avoid separate cross actions. When first permitted, in the 1930s, the procedure then was to allow the defender to state its claim as

part of the defences to the pursuer's action: see the discussion in Thomson and Middleton's *Manual of Court of Session Procedure* (1937) at page 78. The current practice of prescribing that a counterclaim be made by a separate writ and lodged as a step of process dates from the 1965 rules. This is suggestive that, strictly, there are two actions or separate causes but which, for expediency, are dealt with together (and which, prior to the allowance of counterclaims, might have been achieved by conjoining the actions). The modern procedure treats a counterclaim as free-standing in the sense that disposal of the principal actin is not necessarily determinative of the counterclaim. So, for example, if the pursuer abandoned the principal action, the defender's counterclaim would nonetheless proceed. Accordingly, the disposal of the principal action does not *per se* affect any counterclaim.

[18] What next falls to be considered is whether there is, as Lady Smith put it, such "interdependency" between the defender's counterclaim and the subject matter of the principal action that it cannot be said that the whole merits have not been disposed of. As noted above, both parties accepted that the counterclaim and the principal action raised separate questions. Indeed, the two actions proceed on mutually exclusive hypotheses (the principal action asserts that the termination notices were effective, whereas the counterclaim is predicated on their inefficacy). While there may be cases where the disposal of the counterclaim is necessary in order to determine the question in controversy, as figured by Lord Hope in *Apollo Engineering Ltd*, the instant case is not such a case.

Decision

[19] For these reasons I prefer the submissions of the pursuer and, accordingly, refuse its motion for leave as unnecessary. For completeness, I should record that were leave necessary, in light of the factors recorded in paragraph [7] above, I would have readily granted leave. As

for parties' desire for more general clarification, I respectfully suggest that it is not possible to articulate a test with any greater degree of precision than that of "interdependency" articulated by Lady Smith in *Martin and Co (UK) Ltd*. In cases of doubt, therefore, it remains prudent for a pursuer wishing to reclaim a commercial action in which there is a counterclaim first to seek leave from the commercial judge, as the pursuer has done here, so as to avoid any issue of incompetency being first raised or determined against it in the Inner House.