SHERIFF APPEAL COURT

[2020] SAC (Civ) 8
DBN-B10-19

Sheriff Principal D C W Pyle
Appeal Sheriff A G McCulloch
Appeal Sheriff N A Ross

OPINION OF THE COURT

delivered by APPEAL SHERIFF N A ROSS

in appeal by

OWEN HANNAWAY

Pursuer and Appellant

against

(FIRST) DISCOUNT TRADE WINDOWS LTD; (SECOND) BARRIE JOHN WILLIAM KNOX and (THIRD) THE NATIONAL FARMERS UNION MUTUAL INSURANCE SOCIETY LIMITED

Defenders and Respondents

Pursuer/Appellant: Macpherson, advocate; Digby Brown LLP
Defenders/Respondents: Hastings, sol adv; BTO Solicitors LLP

19 August 2020

[1] The appellant presented a summary application under section 1(1) of the Administration of Justice (Scotland) Act 1972 (the "1972 Act") for an order for recovery of an insurance policy, in order to raise an action against the third respondent. The third respondent (the "insurer") is the employers' liability insurer of the first respondent (the "company"), and opposes recovery. The second respondent is the former director of the company. The sheriff refused the order. Section 1 of the 1972 Act provides:-

> "(1) Without prejudice to the existing powers of the Court of Session and of the sheriff court, those courts shall have power, subject to the provisions of subsection (4) of this section, to order the inspection, photographing, preservation, custody ad detention of documents and other property (including, where appropriate, land) which appear to the court to be property as to which any question may relevantly arise in any existing civil proceedings before that court or in civil proceedings which are likely to be brought, and to order the productions and recovery of any such property, the taking of samples thereof and the carrying out of any experiment hereon or therewith…
> (4) Nothing in this section shall affect any rule of law or practice relating to the privilege of witnesses and havers, confidentiality of communications and withholding or non-disclosure of information on the grounds of public interest.

The proposed claim

[2] The appellant claims that he was injured in an accident at work on 3 May 2016 while in the employment of the company. He raised an action in 2017 in the Court of Session. It was not defended, because the company had ceased to trade in 2016 or 2017. Parties do not dispute that the appellant holds a Court of Session decree dated 8 December 2017 against the company in the principal sum of £750,000.

[3] The appellant served a charge for payment on the company on 25 January 2018. No payment was made. The appellant now states that he intends to raise an action against the insurer. The insurer admits it provided employer's liability insurance to the company at the relevant dates. The second respondent opposed the granting of the present application, but made no appearance at this appeal. The company has made no appearance throughout.

[4] The appellant intimated the claim on the insurer at least by early 2017, and on 10 March 2017 the insurer responded refusing to indemnify the company in respect of the appellant's claim. The refusal has been maintained since then. Although not the subject of pleadings, parties discussed in submission that the refusal was made on the claimed basis that the insurance policy did not cover the appellant's claim. The insurer's position has not

been tested in any court proceedings. There has been no application for recall of the decree against the company.

[5] The appellant served a charge for payment on the company on 25 January 2018. The second defender made an application to the Registrar of Companies on about 9 January 2018 to remove the company from the register of companies (Companies Act 2006 section 1000(3)). The appellant's agents served an objection to the removal, initially in January 2018 and again in July 2018. The Registrar suspended the striking-off as a result. Since then, unknown third parties (whose identity the Registrar treats as confidential) have also lodged objections, even though the appellant has now withdrawn his own. The effect is that the removal proceedings are unresolved, the company remains on the register, and there is no date for the removal proceedings to be resolved.

[6] The appellant has a potential claim against the insurer in terms of the Third Parties (Rights against Insurers) Act 2010 (the "2010 Act"). It has not yet raised an action. The insurer maintains there are presently two potential defences to such an action.

[7] The first potential defence is based on the terms of insurance policy between the company and the insurer. The details of the defence are not set out in the present pleadings, but reference was made in submission to the appellant not qualifying as an employee, and the premises in which any accident occurred not being included in the policy. The details of this defence remain entirely vague at present. Neither the appellant nor the insurer pleads any details of the claim or its defence. The insurer refuses, however, to provide the appellant with a copy of the policy. Their position has resulted in the appellant raising this summary application.

[8] The appellant avers that the present application is necessary because he now intends raising an action against the insurer for enforcement of the unsatisfied decree in terms of the

2010 Act. That gives rise to the second potential defence. Such proceedings are only competent if the company, as insured, is a "relevant person" under the 2010 Act. It is common ground that the company is not presently a relevant person but will gain that status if a provisional liquidator is appointed, or other insolvency procedure is underway (2010 Act section 6) or if it has been removed from the register of companies (2010 Act section 6A).

The sheriff's decision

[9] The sheriff refused the application on 7 August 2019. She applied the appropriate test under section 1 of the 1972 Act and considered the authorities, and concluded that the appellant had failed to establish that his proposed action under the 2010 Act was likely to be brought. While she accepted that the appellant had averred a prima facie case on the merits, the company was nonetheless not a relevant person under the 2010 Act, and there was no basis to conclude that this status would change in the near future. No proceedings to wind up the company were contemplated. Although the Registrar of Companies had initiated proceedings to remove the company from the register, the pursuer had submitted an objection and had thereby caused the Registrar to suspend the proceedings. Since then, unknown third parties had also made similar objections. It was therefore uncertain when, or even if, the company would be removed from the register. The sheriff concluded that it could not be said that an action was likely to be raised, because such an action remained incompetent, and she could make no finding in fact as to when that lack of competency was likely to be resolved.

[10] The appellant appeals that decision, and counsel for the appellant submitted that the sheriff erred in relying on the want of competency to find that the test of likelihood was not

met. He submitted that it was sufficient that the action was likely at some future time, not necessarily the near future. The sheriff failed to recognise balancing factual circumstances, including that the company was unlikely to resume trading; that removal proceedings had commenced but were suspended due to an unknown third-party objection; that the second respondent had initially said he would wind up the company (although he had not done so); that the company had failed to meet the charge for payment; that the company had failed to lodge accounts since January 2017. The sheriff should therefore have concluded that the company was likely to become a relevant person for the purposes of the 2010 Act, and that therefore an action was likely.

[11] The insurer cross-appealed, on the possibility that the appeal was successful. The solicitor-advocate for the insurer submitted that the sheriff erred in finding that there was a prima facie case. He submitted that the averments about raising an action were inconsistent and contradictory, and that there could be no relevant case while the company was not a relevant person. Further, the sheriff was in error in her view as to the scope of any likely proof, had made assumptions as to the legal relationships between the parties and erred in finding that an action was unlikely unless recovery of the policy was ordered.

[12] Both parties made submissions on the authorities, discussed below.

The law

[13] Section 1(1) of the 1972 Act gives the court a discretionary power to make certain orders in relation to property. The power is available where the property is such as to which any question which may relevantly arise in civil proceedings. The test then varies depending on whether the civil proceedings are already in existence or are not yet brought.

[14] It is not disputed in this action that the insurance policy between the insurer and the company, which relates to employers' liability insurance, is property as to which any question may relevantly arise. The insurer founds on the policy to avoid liability. The appellant founds, or may found, on the policy as triggering liability under the 2010 Act.

[15] There are no other civil proceedings in existence between the appellant and the insurer. The only basis for recovery of the policy is if there are "civil proceedings which are likely to be brought".

[16] Parties referred to the following authorities: *Dunning* v *United Liverpool Hospitals' Board of Governors* [1973] 1 WLR 586; *Baxter* v *Lothian Health Board* 1976 SLT(N) 37; *Moore* v *Greater Glasgow Health Board* 1978 SC 123; *Falkingham* v *Lothian Regional Council* 1983 SLT (Sh Ct) 2; *Colquhoun, Petitioner* 1990 SLT 43; *Friel, Petitioner* 1980 SC 1; *Dominion Technology Limited* v *Gardner Cryogenics Limited (No 1)* 1993 SLT 828; *Pearson* v *EIS* 1997 SC 245; *Harwood* v *Jackson* 203 SLT 1026; *Ted Jacob Engineering Group Inc* v *Robert Matthew, Johnson-Marshall and Partners* 2014 SC 579.

[17] We accept parties' positions that the law is largely summarised in *Ted Jacob Engineering* which approved statements from *Pearson* v *EIS, Harwood* v *Jackson*, and *Dominion Technology*. Such an order is a discretionary one. To justify granting an order it is necessary for a petitioner not only to disclose the nature of the intended claim, but also to show the intention of making it and also that there is a reasonable basis for making it. It is necessary to set out more than just the nature of the proposed proceedings. The petitioner must also satisfy the court that the proceedings are likely to be brought and that making such an order is appropriate. The latter exercise entails making adequate averments about the substance and basis for the case. The petitioner must show that in relation to the proceedings he has a prima facie intelligible and stateable case.

Whether the application met these requirements

[18] The appellant avers that he holds a judgment for £750,000 against the company in respect of an employer's liability claim. He avers that the insurer was on risk for such a liability, and the insurer admits that they were the company's employers' liability insurer at the relevant date, albeit the policy does not cover the appellant's claim. As such the appellant has disclosed the nature of the proposed claim (enforcement of decree) and that there is a reasonable basis for making it. There is, in our view, an intelligible and stateable case to be made and defended. In considering this part of the test it is not necessary or relevant to discuss the nature or merits of any defence or the appellant's likelihood of success.

[19] The appellant must, however, go further. He requires also to satisfy the court that such proceedings are likely to be brought. That test is not simply one of declared intention. The court must be satisfied as to likelihood. The 1972 Act does not restrict the factors which the court may take into account in making that assessment. One such factor might be the conduct of the petitioning party to date, supporting inferences as to subjective intention. Another might be the existence of any obstacle to raising the proposed action. Every case will turn on its own merits. Counsel accepted that none of the cited authorities discussed a factual situation similar to the present application.

[20] In that respect, we note the following features of this action. First, there appears to be an effective obstacle to raising the action against the insurer, namely that liability is founded on the 2010 Act, and no duty arises until the company qualifies as a relevant person. The appellant is not in a position to satisfy a court that that position will change in any predictable timescale. It is simply unknown, and outwith the appellant's control.

Second, the want of status as relevant person not only hampers proceedings, but was brought about by the appellant's own actings. The Registrar suspended removal proceedings because of the appellant's objection. Had the appellant not intervened, the company would have become a relevant person after removal from the register and dissolution, in terms of section 6A of the 2010 Act. As matters developed, other unidentified objectors joined in, and have taken this out of the appellant's hands, so his subsequent withdrawal of his objection is ineffectual. Third, the appellant is a creditor of the company in the sum of £750,000 but has chosen not to pursue the remedy of winding up the company, or to explain that choice. That course would bring the company within the definition of relevant person, under section 6 of the 2010 Act. The appellant avers that he served a charge for payment on the company but took no further action. The absence of any explanation for that course of decision making is capable of being instructive, if not eloquent, of the appellant's intention, or absence thereof, to raise further proceedings. Fourth, counsel for the appellant accepted that the existence of a defence under the insurance contract would make raising the action less likely. The purpose of these proceedings is to establish whether there is any defence to the proposed action. It is not the purpose of an application under the 1972 Act to facilitate tactical decisions. If the likelihood of an action is materially affected by the nature of any recoveries, there is no basis to find that the action is more likely than not to be raised.

Whether the sheriff erred

[21] The sheriff noted that she could not conclude when the company would or might be removed from the register of companies. Further, the appellant did not address what other steps might be taken to remove the company, or when that might happen. There was no

factual basis for concluding that the company would qualify under the 2010 Act as a relevant person at all, or in a given period, and accordingly an action remained incompetent. There was no basis to say when or if the company would be removed from the register. We note that the possibility of winding up the company, and thereby satisfying section 6 of the Act, was not canvassed in front of the sheriff at all.

[22] We see no error in the sheriff's reasoning or conclusions. They were supported and justified by the facts. There is no error or want of logic in the sheriff's conclusion that, where an action is incompetent, and when no change to that status is underway, and none is predictable, the action is unlikely to be raised. Likelihood is assessed at the date of presentation of the petition.

[23] In any event, the decision is a discretionary one, and we would require to be satisfied that no sheriff acting reasonably could have made such a decision. That test was given little recognition in the appeal and, on the facts, is not met.

[24] For these reasons, we refuse the appeal. Even if we had accepted that the sheriff had erred, and the matter was at large for decision, we would have refused the appeal for the reasons stated. In the circumstances, it is unnecessary to deal with the cross-appeal.

The insurer's position

[25] This application arose as a result of the insurer relying on the terms of an insurance policy which it refuses to release. Although the appellant has been unsuccessful, these proceedings would not have been necessary if the insurer had released the policy.

[26] In refusing to disclose the insurance policy, the insurer cites the requirement for confidentiality, that it anticipates a flood of applications were this insurance policy to be released, and that this was in any event a fishing diligence. Their position does not appear

logical. In respect of confidentiality it is difficult to see what is confidential about a contract with a non-trading company. If the policy contains commercially-sensitive material, the insurer's commercial interests are protected by the common law remedies, such as redaction or lodging in a confidential envelope. Section 1(4) of the 1972 Act, set out above, expressly reserves such protection. The claim that confidentiality is a bar to recovery is further weakened when it is appreciated that, once an action is raised, there is a statutory right to recover such documentation (2010 Act schedule 1). In respect of a flood of applications, this application sets no precedent, because each case depends on its own facts. In relation to fishing diligence, the appellant seeks to investigate not the basis of his own action but the nature of the insurer's defence, and recovery does not affect his claim. There is nothing in the policy to fish for, as raising an action does not require recovery of the policy. Sight of the policy might, however, affect his assessment of his prospects of success and, if the insurer's position is correct, may lead to the appellant deciding not to pursue a claim. In that respect, the refusal of the insurer to reveal the policy, or even to cite the policy provisions relied upon, seems inexplicable. Separately, the insurer's position of referring to a contractual provision while refusing to reveal it, is a difficult position to reconcile. To the extent that such a position has created apparently unnecessary litigation, it is an apt subject of comment by a court. If such a position is routinely taken, it might justifiably be reconsidered.

Disposal

[27] We will refuse the appeal. Parties agreed that expenses should follow success and sanction be granted for junior counsel for the whole cause. We will follow the parties' joint position, and find the appellant liable to the respondents in the expenses of this appeal, and sanction the cause as suitable for the employment of junior counsel.