Hilary Term
[2015] UKSC 1
On appeal from: [2012] CSIH 23

JUDGMENT

McGraddie (Appellant) *v* McGraddie and another (Respondents) (Scotland) (Costs)

before

Lord Neuberger, President
Lady Hale, Deputy President
Lord Reed

JUDGMENT GIVEN ON

28 January 2015

Heard on 10 July 2013

Appellant
Andrew Smith QC
Jonathan Brown

(Instructed by McClure Naismith LLP)

Respondent
The Lord Davidson of Glen Clova QC
Eric Robertson
(Instructed by Balfour & Manson)

Respondent
Richard Keen QC
Stuart Buchanan
(Instructed by HBM Sayers)

LORD NEUBERGER: (with whom Lady Hale and Lord Reed agree)

1. This judgment concerns an issue arising out of a judgment given in this Court relating to an unfortunate dispute between a father, the pursuer, and son, the first defender.

2. In their bare essentials, the facts are as follows. In February 2007, the pursuer gave the first defender a cheque for £285,000. The first defender and his partner spent about £85,000 of this sum on various items. They used the remaining £200,000 to purchase a house ("the house") in Stewarton, East Ayrshire, in their own names for £285,000, the balance of the purchase being raised by way of mortgage. The parties then fell out, and the pursuer began proceedings seeking the conveyance of the house to him, on the ground that the £285,000 had been paid to the first defender to buy a property for the pursuer.

3. The proceedings came before the Lord Ordinary, Lord Brodie, who rejected the defenders' case that the £285,000 had been a gift from the pursuer, and accepted the pursuer's case that the house had been put into the defenders' names without his knowledge or authority – [2009] CSOH 142. Accordingly, the Lord Ordinary granted the pursuer substantially the relief which he sought - [2010] CSOH 60. (The pursuer also succeeded in relation in relation to another property, a flat in Glasgow, but nothing hangs on that for present purposes.)

4. The defenders appealed, and the Extra Division allowed their appeal, essentially on the ground that they considered that the Lord Ordinary should have concluded that the £285,000 had been intended to be a gift by the pursuer to the first defender – [2012] CSIH 23. The pursuer appealed and, for reasons given by Lord Reed, this Court allowed his appeal against the decision of the Extra Division and reinstated the Lord Ordinary's decision – [2013] UKSC 58, [2013] 1 WLR 2477.

5. In the normal way, we then invited the parties to make submissions on the form of order and expenses, which in England and Wales are referred to as costs. There is no problem about the form of the order, but the submissions identified an issue arising out of the pursuer's claim for the expenses of the appeal which has caused the Court some concern.

6. The defenders were legally aided in the Inner House and in the Supreme Court, but the pursuer was not. Accordingly, the pursuer seeks an order that the Scottish Legal Aid Board ("the Board") pay his expenses pursuant to section 19(1) of the Legal Aid (Scotland) Act 1986. This enables the court to make such an award in relation to "the whole or any part of any expenses incurred by [a legally unassisted party] (so far as attributable to any part of the proceedings in connection with which another party was a legally assisted person)". By virtue of section 19(3), the court can make such an order in relation to expenses of an appeal if "an order for expenses might be made in the proceedings, apart from this Act", and "the court is satisfied that it is just and equitable in all the circumstances that the award should be paid out of public funds".

7. There is no problem about the basic issue of whether such an order should be made in this case. The Board should clearly be required to pay the pursuer's costs both in the Inner House and in this Court. With all due respect to the Inner House, for the reasons given by Lord Reed it was unfortunate that the Board decided to support the appeal against the decision of the Lord Ordinary, and it would be simply unjust if the pursuer was out of pocket as a result of that appeal. Indeed, as the pursuer's advocate points out, but for the grant of legal aid to the defenders to appeal to the Inner House there would in all probability have been no appeal against the decision of the Lord Ordinary.

8. Further, it seems plain that the defenders would be unable to meet the pursuer's costs, or any significant proportion of them. Accordingly, we have no hesitation in concluding that this is an appropriate case for the exercise of the section 19 jurisdiction. Although the Board did not formally concede this, it is only fair to record that they sensibly limited their submissions on this aspect to explaining that their funding of the defenders' appeal to the Inner House was based on advice from counsel, pointing out that one should be wary of relying on hindsight, and suggesting that there was nothing particularly exceptional about these proceedings.

9. The point which the Board does take arises from the fact that the pursuer took out so-called After the Event Insurance ("ATE insurance") against his potential liability for the defenders' expenses if he lost his appeal to this Court and was ordered to pay the defenders' expenses. The premium which the pursuer paid for the ATE insurance was £40,000, and it protected the pursuer up to a maximum liability of £100,000. The pursuer contends that the £40,000 ATE premium should be recoverable as part of his expenses, whereas the Board contends that this is impermissible as a matter of law.

10. The relevant provisions are as follows. Rule 46(1) of the Supreme Court Rules ("the SCR") permits the Court to make "such orders as it considers just in respect of the costs of any appeal", and rule 51 limits any recoverable costs to those which were "reasonably incurred and reasonable in amount". Practice Direction 13 ("PD 13"), para 1.3 provides that "the assessment of costs" is governed by the SCR, supplemented by the Rules and the Practice Directions which supplement Parts 44 to 47 of the Civil Procedure Rules ("the CPR") of England and Wales "with appropriate modifications for appeals from Scotland and Northern Ireland". The basis of assessment of costs is dealt with in para 3(1) of PD 13, which provides that, where costs are assessed on a standard basis (as in this case) the court "will not allow costs which have been unreasonably incurred or which are unreasonable in amount". To the same effect, rule 42.10 of the Rules of the Court of Session in Scotland provides that "only such expenses as are reasonable for conducting the cause in a proper manner shall be allowed".

11. If the ATE premium can properly be regarded as part of the pursuer's expenses, then it seems to me clear that it was a liability which was "reasonably incurred" (rule 51 of the SCR and para 3.1 of PD 13) and cannot be said to fall foul of rule 42.10 of the Rules of the Court of Session ("rule 42.10"). Furthermore, at least on the facts of this case, I cannot see a good policy reason for depriving the pursuer of reimbursement of the ATE premium if he would otherwise be entitled to it. He was not an especially rich person, and it was perfectly reasonable and sensible to protect himself in this way before embarking on an appeal to this Court to establish his ownership of a property and to vindicate his rights, even though it involved a substantial premium.

12. However, the problem which is said by the Board to stand in the pursuer's way is that, as a matter of principle, the ATE premium is not properly an item of expenses – or, to use the English equivalent, an item of cost – which is recoverable from the other party.

13. There is obvious force in this. So far as the SCR themselves are concerned, the expression "costs of any appeal" in rule 46(1) does not naturally extend to the cost of an ATE premium, which appears to me to be extraneous to the costs of the appeal, even though it was plainly closely linked to the appeal itself, at least from the pursuer's financial perspective. In the absence of any express provision permitting it, one would not expect an ATE premium, taken out to protect the person who turns out to be the successful party against liability for costs in case he loses, to be recoverable from the unsuccessful party. It is simply not part of the costs of the appeal, as a matter of ordinary language.

14. Further, it seems unlikely that, in the absence of an express provision so stating, the rules would have envisaged that a losing party's liability for a substantial sum should depend on the successful party's appetite for, and financial ability to take, the risk of losing and paying costs. It also seems to me that, if the successful party had taken out insurance to protect him against the costs of litigation generally (sometimes known as Before the Event, "BTE", Insurance), there would be no question of the BTE premium, or any part of it, being recoverable as part of that party's costs of proceedings. While it does not ineluctably follow that an ATE premium should not be recoverable as part of the costs, it would be somewhat surprising if wholly different considerations applied to the recoverability of ATE and BTE premiums.

15. This conclusion is confirmed when one turns to both the position as it appears to be in Scotland and in England and Wales.

16. Thus, turning to the language of the Scottish Rules of Court, it is hard to say that the ATE premium was a sum incurred "for conducting the cause" within rule 42.10. It was a sum incurred by the pursuer to enable or assist him to conduct the cause, to protect him against any potential liability for expenses as a result of conducting the cause, but it was not, as a matter of ordinary language, a sum incurred "for conducting the cause".

17. This conclusion is reinforced by a carefully reasoned decision of Lord Carloway in the Outer House in *McNair's Executrix v Wrights Insulation Co Ltd* 2003 SLT 1311, where he had to consider the very issue, and held that an ATE premium was not a recoverable expense. He made the point at the end of para 9 that "in a party and party taxation" (the equivalent of a standard assessment) "what is reasonably undertaken to conduct a cause cannot normally vary according to the economic circumstances or needs of the litigant". Lord Carloway immediately went on to say that the premium could not fall within rule 42.10, as it had been incurred as a result of "an extrajudicial step adopted, no doubt quite reasonably and legitimately …, to protect the economic interests of the client" and "as such it is not recoverable as an expense of process".

18. In the law of England and Wales, the position appears to be the same, at least in the absence of a statutory provision to the contrary. In *Callery v Gray (No 1)* [2001] EWCA Civ 1117, [2001] 1 WLR 2112, paras 45, 54 and 55, and in *Callery v Gray (No 2)* [2001] EWCA Civ 1246, [2001] 1 WLR 2142, para 6, the Court of Appeal consisting of Lord Woolf CJ (who was only in *(No 1)*), Lord Phillips MR and Brooke LJ, plainly took the view that, in the absence of a specific statutory provision expressly permitting the same (section 29 of the Access to Justice Act 1999), an ATE premium paid by the successful

party would not have been recoverable as part of his costs. When the cases went to the House of Lords, it is clear that Lord Hoffmann and Lord Hope (with whom Lord Bingham and Lord Nicholls agreed) took the same view – [2002] UKHL 28, [2002] 1 WLR 2000, paras 41 and 50. While it is only fair to say that there was no argument on the issue, the view of a number of eminent judges on the issue of the recoverability of an ATE premium as costs is clear.

19. In my view, therefore, (i) as a matter of principle, (ii) in the light of the terms of the relevant court rules, and (iii) on the basis of consistent judicial authority on both sides of the border, the law is clear. In the absence of agreement or a specific statutory sanction (either expressly or through valid delegated legislation) to the contrary, a successful party to litigation cannot recover an ATE premium, however reasonable it was to have incurred it, as part of his costs or expenses of legal proceedings.

20. Statutory law in England and Wales has been altered from the time when the 1999 Act was passed, and there would have been a time when an ATE premium would have been recoverable as part of a successful party's costs. However, that is of no assistance to the pursuer in this appeal because (i) at the time relevant to this case, the premium would have been irrecoverable in English law, and (ii) in any event, although the point has not been argued, it seems unlikely that English law would apply: it appears from para 1(3) of PD 13 that it would be Scottish law.

21. I regret the conclusion in this case, because it seems to me unjust that the pursuer should be out of pocket to the tune of the £40,000 ATE premium. He should be able to recover the £40,000 from the Board, given that he reasonably incurred that sum in connection with rightly seeking to challenge in this Court the result of an appeal to the Inner House which was a questionable appeal, which had only been brought because of the support of the Board.

22. For the reasons I have given, I would award the pursuer his expenses of the appeals to the Inner House and to this Court in these proceedings against the Board, but, with regret, I would direct that those expenses should not include the ATE premium of £40,000 paid by the pursuer.