EXTRA DIVISION, INNER HOUSE, COURT OF SESSION before Lord Reed Lord Clarke Lord Menzies on appeal from the Sheriffdom of Glasgow and Strathkelvin 8th July 2008

OPINION OF THE COURT delivered by LORD REED

Introduction

[1] This is an appeal from the decision of a sheriff principal sitting as a sheriff in a commercial action. For the reasons explained below, we have come to the conclusion that the sheriff principal has acted incompetently and that the appeal should be allowed. Put shortly, we consider that he stepped outside his proper role in adversarial procedure as an impartial arbiter between the parties to the action.

The factual background

[2] In 1995 the pursuer was divorced from her husband Peter Jackson. No order was made at that time in respect of financial provision, nor was any agreement entered into. Subsequently the terms of a minute of agreement were negotiated. The defenders, a firm of solicitors, acted on the pursuer's behalf. The terms of the agreement were eventually settled, and it was executed on 2 and 6 December 1999. Its material terms were as follows:

1. Under Clause One (a) and (b) the pursuer was to convey to Mr Jackson the matrimonial home at Hawthorn Avenue, Lenzie. The conveyance was to be completed "*not later than three months from the date of last signature of this Agreement and furthermore subject to Mr Jackson implementing all conditions contained herein*". According to the pursuer's pleadings, the value of the subjects was approximately £300,000.
2. Under Clause One (c), "*in exchange for said conveyance*" Mr Jackson was to secure the discharge of the existing standard security over the subjects at Hawthorn Avenue, and was to discharge the pursuer from all liability in respect of the loan which it secured. According to the pursuer's pleadings, the amount of the loan was approximately £145,000 plus interest. The net value of the subjects is said to have been approximately £153,000.
3. Under Clause Two, Mr Jackson was to purchase for the pursuer a house at Gadloch Avenue, Lenzie, at a price of £157,000, with settlement as at 11 June 1999. Title to those subjects was to be vested in the pursuer alone, for no consideration, and free of encumbrance. Under Clause Three, Mr Jackson was also to be responsible for certain improvements to the subjects.
4. Under Clause Four, shop premises at Cowgate, Kirkintilloch, said to be occupied by the pursuer, were to be leased by Mr Jackson to the pursuer for a period of ten years at a nominal rent, Mr Jackson being responsible for insurance and repairs. The pursuer was to have an option to renew the lease for a further five years on the same terms. A formal lease incorporating those terms was to be signed and delivered within three months from the date of Mr Jackson's signature of the minute of agreement.
5. Under Clause Five, Mr Jackson was to deliver to the pursuer the keys and documents relating to a car, which was to be retained by the pursuer as her property. Mr Jackson was to provide a replacement car of similar value four years later, and was to be responsible for all motoring costs relating to the cars.
6. Under Clause Six, Mr Jackson was to transfer the benefit of a life policy to the pursuer.
7. Under Clause Seven, Mr Jackson was to deliver a Personal Equity Plan to the pursuer.
8. Under Clause Eight, Mr Jackson was to have the pursuer named as the main beneficiary, on his death, of all his pension funds.
9. Under Clause Ten, Mr Jackson was to convey to the pursuer's mother, for no consideration, a liferent interest in a house at Easter Garngaber Road, Lenzie. The conveyance was to be completed not later than three months from the date of signature of the minute of agreement.
10. Under Clause Twelve, Mr Jackson was to have the pursuer named as beneficiary, in the event of his death, in respect of a number of insurance policies.

[3] According to the pursuer's averments, she received title to the subjects at Gadloch Avenue on 11 June 1999. On about 8 December 1999 a disposition of the subjects at Hawthorn Avenue was executed by the pursuer and delivered to Mr Jackson's solicitors. According to the pursuer's averments, that was done in reliance upon the defenders' advice. In the event, Mr Jackson failed to implement Clauses 4 and 10 of the Minute of Agreement. The pursuer subsequently began proceedings against him to enforce performance of his outstanding obligations. While those proceedings were in dependence, Mr Jackson executed a trust deed for the benefit of his creditors. Both the shop to which Clause Four related and the house to which Clause Ten related were owned not by Mr Jackson but by a company, Stonepine Ltd, with which he was associated. Since that company was not party to the minute of agreement, the pursuer was unable to enforce Clauses 4 and 10. She would not receive any distribution from Mr Jackson's trustee.

The history of the case prior to the first debate

[4] The pursuer commenced the present proceedings in 2003. In her initial writ, she sought damages from the defenders for loss and damage said to have been suffered as a result of their professional negligence. The proceedings were commenced in the form of a commercial action, in accordance with Chapter 40 of the Ordinary Cause Rules 1993. On the lodging of defences the sheriff (as he then was: we shall so refer to him throughout, for the sake of simplicity) fixed a date for a case management conference. The important nature of such a hearing is apparent from rule 40.12:

> "***40.12****(1) At the Case Management Conference in a commercial action the sheriff shall seek to secure the expeditious resolution of the action.*

(2) Parties shall be prepared to provide such information as the sheriff may require to determine -

(a) whether, and to what extent, further specification of the claim and defences is required;

(b) the orders to make to ensure the expeditious resolution of the action.

.....

(3) The orders the sheriff may make in terms of paragraph 2(b) may include but shall not be limited to -

(a) the lodging of written pleadings by any party to the action which may be restricted to particular issues;

(b) the lodging of a statement of facts by any party which may be restricted to particular issues;

(c) allowing an amendment by a party to his pleadings;

(d) disclosure of the identity of witnesses and the existence and nature of documents relating to the action or authority to recover documents either generally or specifically;

(e) the lodging of documents constituting, evidencing or relating to the subject matter of the action or any invoices, correspondence or similar documents;

(f) the exchanging of lists of witnesses;

(g) the lodging of reports of skilled persons or witness statements;

(h) the lodging of affidavits concerned with any of the issues in the action;

(I) the lodging of notes of arguments setting out the basis of any preliminary plea;

(j) fixing a debate or proof, with or without any further preliminary procedure, to determine the action or any particular aspect thereof;

(k) the lodging of joint minutes of admission or agreement;

(l) recording admissions made on the basis of information produced; or

(m) any order which the sheriff thinks will result in the speedy resolution of the action (including the use of alternative dispute resolution), or requiring the attendance of parties in person at any subsequent hearing.

.....

(5) The sheriff may continue the Case Management Conference to a specified date where he considers it necessary to do so -

(a) to allow any order made in terms of paragraph (3) to be complied with; or

(b) to advance the possibility of resolution of the action".

[5] The sheriff's interlocutor stipulated that the case management conference was to be conducted by means of a conference call. We note that most of the hearings during the course of the present proceedings, including hearings of opposed motions, were conducted by those means. Since the use of that form of procedure was not the subject of detailed discussion before us, it would not be appropriate for us to consider it in detail. In the absence of such discussion, however, we would not wish to be taken to have tacitly approved the procedure followed in the present case. It is a general principle, of constitutional importance, that the administration of justice should take place in open court. As Lord Diplock observed in ***Attorney General v Leveller Magazine Ltd*** [1979] A.C.440 at page 450:

"If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice ....requires that [proceedings in court] should be held in open court to which the press and public are admitted".

Similar observations have been made by the European Court of Human Rights in relation to Article 6 of the European Convention on Human Rights:

"The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of Article 6.....This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention" (***Diennet v France*** (1995) A 325-A, paragraph 33).

The common law principle is illustrated by such cases as ***McPherson v McPherson*** [1936] A.C.177 and ***Storer v British Gas plc*** [2000] 1 W.L.R.1237. It applies to commercial cases as much as it does to any other type of case: a sheriff dealing with a commercial case is not conducting an arbitration. Exceptions to the general principle, created by judicial practice, require to be considered with care, bearing in mind that convenience is not the only (or the most important) consideration. It is also necessary to bear in mind that the requirements of fairness apply to a hearing conducted by means of a telephone call just as they apply to any other form of judicial hearing. In the present case, for example, we note that at one of the continuations of the case management conference the sheriff was unable to make contact with the defenders' solicitor and counsel, as their telephone line was engaged, but nevertheless proceeded with the hearing and made a number of orders *"having heard the pursuer's solicitor"*. Where fairness requires that both parties be heard, that requirement cannot be dispensed with because of a difficulty in making contact with the defenders' representatives by telephone.

[6] At the case management conference, the sheriff refused a motion to remit the action to the Court of Session, allowed a period for the adjustment of the parties' pleadings, and continued the hearing under rule 40.12(5).

Several continued hearings subsequently took place, at which various orders were made of a procedural character. On 13 December 2004 the sheriff closed the record and allowed a debate under rule 40.12(3)(j) on the defenders' plea to the relevancy of the pursuer's averments.

The first debate and its aftermath

[7] The debate proceeded over four days during February, March, June and November 2005. The pursuer's pleadings, as they stood at that stage, alleged that the defenders had been negligent in advising her prior to her divorce in 1995, with the consequence that she had failed to obtain an order for financial provision. The defenders were also alleged to have been negligent in relation to the negotiation and drafting of the minute of agreement, with the consequence that the pursuer was unable to enforce Clauses Four and Ten against Stonepine Ltd. The defenders were also alleged to have been negligent in respect of the drafting of Clause Eight (concerning Mr Jackson's pension funds) and Clause Twelve (concerning the life policies). The defenders were further alleged to have been negligent in delaying to enforce the minute of agreement, in failing to advise the pursuer that the standard security over the subjects at Hawthorn Avenue was voidable, and in providing advice which induced the pursuer to deliver the disposition of the subjects at Hawthorn Avenue prior to Mr Jackson's performance of his obligations under Clauses Three, Four and Ten. Damages were quantified at £800,000, on the basis that that was the value of the financial provision which the pursuer ought to have received on divorce. Alternatively, various sums were sought in respect of the defenders' alleged negligence subsequent to the divorce.

[8] In April 2005, when the debate had been partly heard, the defenders' solicitors sent the sheriff an e-mail which narrated that a specification for the recovery of documents had been prepared on behalf of the pursuer and had been discussed with the defenders' solicitor. The sheriff was requested to hear a motion for its approval at the debate hearing in June 2005. The defenders' solicitor responded by e-mail, submitting that the sheriff should make a decision on the relevancy of the pleadings as they stood, and that any motion for the recovery of documents should not be dealt with until it was clear what averments, if any, had survived the debate. In the event, the interlocutors and e-mails contain no record that any such motion was made.

[9] The use made of e-mails in the present proceedings was the subject of some criticism during the hearing before us, but, apart from one particular instance which we consider below (the sequence of e-mails following the second debate), was not considered in detail. In the circumstances, it would be inappropriate for us to enter into a detailed discussion. Again, however, we would not wish, in the absence of such discussion, to be taken to have tacitly approved the practice which was followed in the present case. It is apparent that the discussion in the e-mails passing between the sheriff and the parties' solicitors went beyond administrative matters of the kind which might otherwise have been dealt with by a clerk of court (such as the enrolling of motions, the lodging of pleadings, and the ascertainment of dates when counsel were available). As in the example just mentioned, some of the e-mails contain legal submissions which could have been made at a judicial hearing. As we have explained, the general rule is that such hearings should take place in public, and exceptions to that rule require careful consideration and justification.

[10] Following the debate, the sheriff issued a note dated 23 January 2006 in which he discussed counsel's submissions. Most of the criticisms of the pursuer's pleadings which had been made by counsel for the defenders were accepted. The sheriff stated for example that certain averments were "*either irrelevant and/or lack the necessary specification to be admitted to probation";* that he *"would ....exclude from probation*" certain other averments; that another averment "*falls to be deleted for want of specification";* that other averments "*should not be remitted to probation*"; that the branch of the case concerned with the validity of the standard security "should not be admitted to probation"; and that, in relation to the branch of the case concerned with the enforceability of the minute of agreement against Stonepine Ltd, "*the pursuer has failed to aver enough to allow the defenders fair notice of the case against them".* In relation to other averments, although the sheriff accepted that the defenders' submissions were equally well-founded, he made clear his unwillingness to deal with the defenders' plea on the existing averments, on the basis that it would be possible for the pursuer to amend the pleadings, following the recovery of documents, so as to state a relevant case. In relation to the branch of the case concerned with the pension funds, for example, the sheriff stated:

"I accept that at the present moment the pleadings lack the requisite degree of specification to enable the defenders to have fair notice of the case which they require to meet. I am sure however that the case can be managed in such a way that before the allowance of proof the pursuer's motion for the court's approval of a specification of documents can either be agreed or argued. The pursuer's pleadings can be made sufficiently specific following the recovery of documents to enable a proof to be allowed without causing prejudice to the defenders".

That passage could be read as indicating that the sheriff had already formed a view about allowing a proof following the recovery of documents and the resultant amendment of the pursuer's pleadings. At that stage, the sheriff had not dealt with any motion for the recovery of documents; nor had he heard any motion for leave to amend in relation to the averments in question.

[11] In the interlocutor which was issued with the note, the sheriff did not sustain the defenders' preliminary plea to any extent, but instead fixed what was described as a further case management conference, but was properly a hearing for further procedure under rule 40.14. In his note, the sheriff explained that the purpose of the hearing was to discuss *"the effect of the terms of this Note in relation to which averments should be excluded from any allowance of probation*".

[12] A number of e-mails passed between the sheriff and the parties' solicitors prior to the hearing for further procedure. They illustrate how such an exchange can develop, in effect, into a form of hearing. In one e-mail, the sheriff wrote:

"There are significant sections of the pursuer's pleadings which will have probation refused and the first step will be to identify these ...For the reasons outlined [in the note of 23 January 2006] I could listen to a discussion on whether a restricted specification of documents should be approved".

Unsurprisingly, in view of the sheriff's Note and his e-mail, the pursuer's solicitor then sought (by e-mail) the approval of a specification of documents. The defenders' solicitor responded to the sheriff:

"As you are aware, from our previous emails, the Defenders' position is that there should be no further discussion of the pleadings before your Lordship issues a determination. It is also the Defenders' position that it is inappropriate that consideration should be given at this stage to granting Commission and Diligence/approving any specification".

In relation to that matter, the sheriff's attention was drawn to the Opinion of the Court delivered by Lord President Emslie in ***Stout v United Kingdom Atomic Energy Authority*** 1978 S.L.T.54. In that case the court allowed a reclaiming motion against the allowance of a proof before answer and dismissed the action. The court stated (at page 57):

"It should be mentioned that counsel for the pursuer asked us in the last resort to delay judgment until it was seen whether any documents which might be recovered under a specification granted after the Lord Ordinary's allowance of proof before answer might enable the pursuer to plead his case relevantly against one or other of the third and fourth defenders. For such a course there is no warrant in principle or practice and we have declined to give effect to the motion. The possible fruits of a further recovery of documents which could well have been sought and executed before the closing of the record cannot affect the relevancy of the pursuer's pleadings as they now are".

[13] The hearing on further procedure took place on 20 February 2006, when the sheriff pronounced an interlocutor which was subsequently issued, with a note, on 2 March 2006. Although the sheriff had been referred not only to *Stout* but also to the case of ***Kennedy v Norwich Union Fire Insurance Society Ltd*** 1993 S.C.578, which we consider below, he did not make any order in respect of the defenders' preliminary plea, but allowed the pursuer to lodge a minute of amendment. He recorded in his note:

"Parties were to endeavour to adjust the terms of a specification of documents which would be required if the pursuer was to make her case more specific".

[14] In his interlocutor, the sheriff found the defenders entitled to the expenses occasioned by the debate, and also to the expenses incurred in relation to the part of the pursuer's case based on the defenders' alleged negligence prior to the date of the decree of divorce. He explained in his accompanying note that he did so because "*the defenders had been very substantially successful in the debate and were entitled to their expenses*". Although he awarded the defenders their expenses " he omitted from his interlocutor the customary provision allowing the defenders to make up an account of expenses and lodge it in process, and upon that being done remitting the account to the Auditor of Court to tax and to report. He explained in his note that that omission was deliberate, and was designed to prevent the defenders from enforcing the award of expenses:

"In the course of the discussion I voiced concern that the defenders, whose expenses are covered by the Master Policy insurers, might seek to enforce any awards I might make against the pursuer, a privately funded individual, before the conclusion of the action. This might be done in an effort to force the pursuer to abandon the action. I asked the defenders' counsel for an undertaking that any award would not be so enforced. She said that she had no authority to give such an undertaking. I could have avoided the potential issue by reserving the question of expenses but I thought it better that I deal with the issue of expenses now as I hope to pass the management of this case to one of the other commercial sheriffs as soon as possible....

Accordingly I said that I would make a finding in favour of the defenders but refrain from including in the interlocutor the usual formula allowing the defenders to make up an account, lodge it in process and upon this being done remit the account to the auditor of court to tax and to report. By so doing would achieve the same result as the undertaking which I sought. At the conclusion of the action, or at some other juncture then thought appropriate, whichever sheriff is then dealing with the case should be able to allow the defenders to lodge an account and then remit it to the auditor for taxation.

.....

In the context of a commercial action under Chapter 10 (sic) it seems to me that what I did is an entirely appropriate exercise of judicial discretion".

[15] We cannot agree. In the circumstances of the present case, it does not appear to us that the possibility that an award of expenses might affect the pursuer's ability or desire to proceed with the action was a proper reason for declining to make such an award if it was otherwise appropriate. If there was reason to be concerned about the effect of an award of expenses upon the pursuer's ability to proceed with the action, that was in any event a concern which should have been voiced by her counsel, not by the sheriff: his role was not that of an advocate for either party. If the sheriff considered that an award of expenses was appropriate, it was not then his function to seek an undertaking from the defenders that the award would not be enforced. If, in exceptional circumstances, the sheriff was persuaded that it was appropriate in the interests of justice that the enforcement of an award of expenses should be delayed, the appropriate step in procedural terms would be to supersede extract of the decree for expenses.

[16] On 9 March 2006 the sheriff certified the cause as suitable for the employment of counsel, and refused the defenders' motion for leave to appeal against the interlocutor of 2 March. An appeal to the Court of Session was marked but was refused as incompetent by a single judge acting under Rule of Court 40.12(4). No grounds of appeal had been lodged at that stage, and the judge's attention was not drawn to the fact that the appeal was on the basis of competency.

[17] On 30 March 2006 the sheriff granted the pursuer's opposed motion for the recovery of documents in terms of a specification of documents, and found the defenders liable in the expenses of the procedure relating to the specification of documents, and in the expenses of the hearing on 9 March.

[18] In the meantime, there had been a series of e-mails relating to the sheriff's refusal to allow the defenders to lodge their account of expenses for taxation. The defenders' solicitor sent an email to the sheriff and to the pursuer's solicitor in which it was contended that the sheriff's treatment of expenses had been incompetent and was liable to cause a number of procedural problems. As a pragmatic solution, the defenders' solicitor offered an undertaking along the lines which the sheriff had earlier sought, on the basis of which, it was suggested, the sheriff could then make an order for the taxation of expenses in the usual terms. The defenders' solicitor also copied to the sheriff an earlier e-mail which she had received from the pursuer's solicitor in which the defenders' proposal had been rejected and in which the pursuer's solicitor declined to "waste time" revising the proposed undertaking. The sheriff then sent an e-mail to the pursuer's solicitor, copied to the defenders' solicitor, stating:

"I have just seen your response to an earlier e-mail from [the defenders' solicitor].....

It may be the that (sic) expense can be minimised by agreeing the terms of an undertaking. If you are able to agree such I, for my part, and without in any way conceding the incompetence of what has been done, would be prepared to pronounce a further interlocutor allowing an account to be made up etc. No further hearing would be required".

The terms of an undertaking were then settled.

[19] Following a hearing (described as a case management conference) on 26 June 2006, the sheriff issued an interlocutor on 6 July 2006 in which he allowed the amendment procedure to continue and also allowed accounts of expenses to be lodged for taxation. In his note of the same date, he summarised what had happened since the debate:

"Following a debate I issued a judgment which decided that the pursuer's pleadings were inadequate for proof as they then stood. Since I formed the view that they could be made relevant, I allowed the pursuer to embark upon an amendment procedure. I also approved the terms of a specification of documents to enable the pursuer to recover documents necessary to enable her pleadings to be made relevant".

We consider that it was inappropriate for the sheriff to proceed in that way. He should not have anticipated that the pursuer's pleadings could be made relevant by means of amendment following the recovery of documents, since at the close of the debate he had not yet heard the parties in respect of any application for leave to amend or for the recovery of documents. In the light of the authorities to which he had been referred, including *Stout* and *Kennedy*, he should have dealt with the defenders' preliminary plea - which was the matter which had been remitted to debate - on the basis of the pursuer's pleadings as they stood. The sheriff also explained in his note that he had decided to allow the previous awards of expenses to be taxed, since undertakings had now been given that the awards would not be enforced until the conclusion of the action.

[20] On 9 October 2006, at a further hearing described as a case management conference, the sheriff allowed the pleadings to be amended, and appointed parties to be heard "in debate on the defenders' preliminary plea as that is more fully specified in the defenders' revised further note of basis of preliminary plea". Following further amendment by the pursuer, the second debate proceeded on 6 December 2006.

The pursuer's pleadings as at the second debate

[21] In the amended pleadings which were the subject of the second debate, the pursuer averred that, in reliance upon the defenders' advice, she had executed and delivered to Mr Jackson's solicitors a disposition of the subjects at Hawthorn Avenue at a time when Mr Jackson had not implemented his obligations under Clauses Four and Ten of the minute of agreement. In consequence of that advice, which was averred to have been negligent, she had suffered loss falling under two heads. The first head of loss comprised the net value of the subjects at Hawthorn Avenue. In that regard, the pursuer made the following averments in Article 9.1 of Condescendence:

"The pursuer's loss, injury and damage represents the net value of the property at 26 Hawthorn Avenue, Lenzie which she transferred to Mr Jackson's nominee in December 1999 on the defenders' advice. But for the defenders' negligent advice, the pursuer would have withheld, and would been entitled to withhold, delivery of the Disposition of 26 Hawthorn [Avenue], Lenzie, and thereby retained title to that property. Pending implement by Mr Jackson of his obligations in the Minute, the pursuer was not obliged to transfer to Mr Jackson or his nominee her title to the property at 26 Hawthorn Avenue, Lenzie. By prematurely transferring title to the property on the defenders' advice, prior to implement in full of Mr Jackson's obligations (which obligations were thereafter never implemented) the pursuer was thereby divested of an asset with a net estimated value of £153,000, without first receiving from Peter Jackson the full reciprocal consideration promised by him, namely implement of Clauses (Four) and (Ten) of the Minute. This forms part of the sum sued for".

One of the contentions put forward by the defenders in answer was that the pursuer had not been entitled to withhold performance of her obligation to deliver a disposition of the subjects at Hawthorn Avenue, since Mr Jackson had already performed his counterpart obligation to provide the pursuer with the purchase price of the

subjects at Gadloch Avenue. Alternatively, it was contended that, on principles of unjustified enrichment, the pursuer would not have been entitled to retain the subjects at Hawthorn Avenue as well as retaining the £157,000 which had been provided to her under the minute of agreement in order to purchase the subjects at Gadloch Avenue.

[22] The second head of loss claimed by the pursuer comprised damages for distress and inconvenience resulting from Mr Jackson's failure to implement his obligation under Clause Ten of the minute of agreement (i.e. to convey to the pursuer's mother a liferent of the subjects at Easter Garngaber Road). In that regard, the pursuer made the following averments in Article 9.2 of Condescendence:

"To the defenders' knowledge, their contract with the pursuer was intended to achieve (by means of the negotiation, drafting and implement of the Minute of Agreement) the beneficial regulation and clarification of the pursuer's personal, social and family affairs after a prolonged period of uncertainty. Specifically, the parties' contract was intended to achieve (by the foregoing means) inter alia security of tenure for the pursuer's mother in her home, after a prolonged period of uncertainty. As a result of the defenders' failures (as averred in Article 4), the pursuer lost the opportunity to achieve the intended purpose of the parties' contract. But for the defenders' failures, that intended purpose was likely to have been achieved. Specifically, a substantial chance existed that, if the defenders had acted properly by advising the pursuer to withhold delivery of the Disposition (of 26 Hawthorn Avenue), Peter Jackson would have procured that Stonepine Ltd grant to the pursuer's mother the liferent referred to in Clause (Ten) of the Minute of Agreement. Such a chance existed because, but for the premature delivery of the Disposition, the pursuer would have been able to exercise over Peter Jackson the compelling sanction and pressure of withholding delivery to Peter Jackson's nominee of a valuable asset (namely, title to 26 Hawthorn Avenue) pending implement of inter alia his obligation under Clause (Ten) of the Minute. In the event, as a result of the defenders' failures, the Disposition was delivered prematurely to Peter Jackson, the foregoing sanction and pressure on him was removed, and the prospect of obtaining the liferent in favour of the pursuer's mother was extinguished.

.....

The prospect of Peter Jackson procuring the grant of the liferent by Stonepine Ltd was substantial because of Peter Jackson's controlling influence over Stonepine Ltd. Peter Jackson regularly conducted business on behalf of Stonepine Ltd. Between 16 June 1995 and 31 May 2000, Peter Jackson was the company secretary of Stonepine Ltd. He was an authorised signatory on the two bank accounts operated by Stonepine Ltd with Clydesdale Bank plc. On or about 9 February, 4 November & 17 November 1999, he instructed Speirs & Jeffrey Ltd, Stockbrokers, Glasgow, to sell three separate listed shareholdings owned by Stonepine Ltd (in Aortech International and Rodime) and he received, at his home address, the sale proceeds, contract notes and tax invoices for those three transactions. Since 16 June 1995, Peter Jackson's brother, John Jackson, has been registered at Companies House as the sole director of Stonepine Ltd. The majority shareholding in Stonepine Ltd (comprising 51 ordinary shares) is held in the name of John Jackson. Despite the registration of this majority shareholding in the name of John Jackson, John Jackson habitually acts in accordance with the instructions of Peter Jackson in relation to the conduct of the affairs of Stonepine Ltd ....

In the letters dated 9 February and 17 March 1999, Peter Jackson's solicitors (James Carmichael & Co) represented that Stonepine Ltd was owned by Peter Jackson. In February and May 2001, Peter Jackson represented to Sun Life Financial of Canada that he 'owned' Stonepine Ltd".

Article 9.2 also contained averments concerning the harm said to have been suffered by the pursuer:

"As a result of the defenders' failures, the pursuer has suffered distress, anguish and upset due to the ongoing precarious nature of her mother's occupation of her home at 4 Easter Garngaber Road, Lenzie. The pursuer has suffered substantial distress, anxiety and upset as a result of the continuing threats by third parties to evict her mother from her home.....

Further, the pursuer has suffered substantial inconvenience in seeking to comfort her mother following receipt of, and in seeking to defend, the continuing threats by third parties to evict her mother. She has spent time liaising with her mother, her solicitors, Clydesdale Bank plc and John Jackson in efforts to forestall the threats to evict her mother.

Such distress, anxiety and upset et separatim inconvenience was, or ought to have been, in the reasonable contemplation of the defenders as a direct consequence of their breach of contract and negligence. Accordingly the pursuer is entitled to damages for such breach. Such damages are broadly estimated in the sum of £47,000 which forms part of the sum sued".

The defenders' answers contained the following averment:

"Admitted that it was likely that if delivery of the Disposition of Hawthorn Avenue had been withheld by the pursuer the intended purposes of the contract between the pursuer and Peter Jackson would have been achieved and thus that Peter Jackson would have procured that Stonepine Ltd grant to the pursuer's mother the liferent referred to in Clause (TEN) of the Minute of Agreement".

It was however contended by the defenders that the pursuer had suffered no loss in consequence of her mother's failure to obtain the liferent.

[23] The pursuer's claim for damages was quantified at £200,000, comprising £153,000 in respect of the loss of the net value of the subjects at Hawthorn Avenue and £47,000 in respect of the distress and inconvenience caused to her by the non-implementation of Clause 10 (ie the obligation to provide her mother with a liferent of the subjects at Easter Garngaber Road).

The second debate and its aftermath

[24] As we have explained, parties were to be heard at the debate on the defenders' preliminary plea (which sought the dismissal of the action on the ground that the pursuer's averments were irrelevant and lacking in specification), as that was more fully specified in the defenders' note. Some of the arguments advanced in the defenders' note were addressed by the pursuer prior to the debate, by means of amendment of the pleadings. One argument which remained, and which the defenders' counsel advanced at the debate, was that the two heads of loss claimed by the pursuer could only proceed on bases which were mutually inconsistent. Her claim in respect of the value of the subjects at Hawthorn Avenue could only be established on the basis that, if the pursuer had withheld the disposition, Mr Jackson would not have performed his outstanding obligations: otherwise, the pursuer would not (on any view) have been entitled to retain the subjects. Her claim in respect of distress and inconvenience resulting from Mr Jackson's failure to fulfil his obligation under Clause Ten, on the other hand, was based on the contrary hypothesis: that, if she had continued to withhold the disposition, Mr Jackson would then have performed his outstanding obligations, in which event the pursuer would have been bound to deliver the disposition. Furthermore, the pursuer's averment that, but for the defenders' failures as averred in Article 4 (i.e. their failure, put shortly, to advise her not to execute and deliver the disposition of the subjects at Hawthorn Avenue while Mr Jackson's obligations under Clauses Four and Ten remained unperformed), the intended purpose of the contract between herself and Mr Jackson would have been achieved was admitted by the defenders. On that ground also the first branch of the pursuer's case was irrelevant, since the pursuer was not entitled to seek to prove the opposite of a fact which was not in dispute between the parties, i.e. that if the pursuer had withheld the disposition, Mr Jackson would have performed his outstanding obligations. A further difficulty with the first branch of the case was that the pursuer did not in any event aver that, if she had withheld the disposition, Mr Jackson would have failed to perform his outstanding obligations; but, unless that were proved, the first branch of the case was on any view irrelevant. Such an averment could not be regarded as implicit, standing the pursuer's averments in respect of the second branch of the case, to the effect that Mr Jackson was likely to have performed his obligations if delivery of the disposition had been withheld. The relevancy and specification of the claim for solatium in respect of distress and inconvenience suffered by the pursuer as a consequence of her mother's failure to obtain the liferent were also challenged.

[25] In response to these arguments, counsel for the pursuer made a motion to the sheriff at the debate to be allowed to amend the pursuer's pleadings by deleting the averment in Article 9.2 that:

"But for the defenders' failures, that intended purpose was likely to have been achieved"

(i.e. the averment which was met, in effect, with an admission by the defenders). It was common ground before us that the sheriff responded to the motion by indicating that he was not prepared to deal with it at that time. In the note which he subsequently issued on 17 January 2007, however, he stated:

"I am not prepared to allow the pursuer's motion to amend her pleadings by deleting the aforementioned sentence".

[26] In his note, the sheriff summarised the submission by counsel for the defenders that the two branches of the pursuer's case were mutually inconsistent, and stated:

"I agree with that submission....The pursuer cannot obtain damages in terms of paragraph 9.1 of the condescendence and also in terms of paragraph 9.2. The former is predicated upon her never being obliged to deliver the disposition of Hawthorn Avenue to Mr Jackson. The latter is predicated upon her having to deliver the disposition of Hawthorn Avenue to Mr Jackson. She can't have it both ways....Thus the case is not relevant".

The sheriff then noted that counsel for the pursuer

"made it clear in his submission that if I came to the view that both heads of loss could not live together, the pursuer wished to proceed with her primary case. That is the case in which the loss is quantified in paragraph 9.1 of the condescendence".

No motion was however made for leave to amend the pursuer's pleadings so as to restrict her case to that pleaded in Article 9.1. Notwithstanding the absence of any such motion, the sheriff's note proceeds, as we explain below, as if such a motion had been made and granted.

[27] At paragraph 12 of his note, the sheriff stated:

"The only attack made by the defenders on the relevance of the claim for £153,000 based upon the alleged premature delivery of the disposition of 26 Hawthorn Avenue, was that there was no averment that had the pursuer retained the disposition, Mr Jackson would have failed to procure the delivery of the lease and liferent in favour of the pursuer's mother. That there is no such averment is undoubtedly correct. However, it is implicit in this leg of the pursuer's case that she is saying Mr Jackson would not have procured their delivery.....Such loss could only arise if Mr Jackson failed to so procure. Thus although there is no specific averment to that effect it is clear to me, and was also clear to Ms Shand as was demonstrated in her submissions, that this leg of the pursuer's case is predicated upon a failure by Mr Jackson to procure the lease and liferent".

As we have explained, the absence of an averment that, had the pursuer withheld delivery of the disposition, Mr Jackson would have continued to fail to perform his outstanding obligations, thereby entitling the pursuer (according to her contention) to retain the subjects at Hawthorn Avenue as well as the other benefits she had received under the contract, was far from being the only basis on which the relevance of the pursuer's claim was challenged. The principal criticism, which the sheriff had accepted, was that the two branches of the case were mutually inconsistent. In the absence of amendment, it followed that the pursuer's averments were irrelevant, as

the sheriff had concluded. In addition, a central aspect of the argument that an essential averment was missing from the first branch of the case was that the missing averment could not be read in by implication, standing the pursuer's averments in Article 9.2 to the opposite effect (i.e. to the effect that, if the pursuer had withheld delivery of the disposition, Mr Jackson was likely to have performed his outstanding obligations), and the defenders' admission of one of those averments. It was that aspect of the argument which counsel for the pursuer had sought to address by his motion to amend the pleadings by deleting the averment which the defenders admitted: a motion which the sheriff eventually refused.

[28] Counsel for the pursuer also sought to amend the pursuer's pleadings by deleting the references in Article 9.2 to distress, anxiety, anguish and upset. Again, the sheriff did not deal with the motion at the time. In his note, he stated:

"*I have held that the two claims advanced by the pursuer cannot both survive. Counsel for the pursuer stated that, if forced to choose, the claim for £153,000 is what the pursuer wished the opportunity to prove. Accordingly, I do not require to deal with this motion to amend*".

The first observation we would make is that a judge requires to deal with a motion which has been made. The second observation is that the sheriff again appears to be proceeding as if a motion had been made, and granted, to amend the pursuer's case so as to restrict it to that pleaded in Article 9.1.

[29] The sheriff continued, at paragraph 17 of his note:

"That leaves one outstanding issue; where do we go from here? I have come to the view that the pursuer's pleadings are irrelevant".

Since the sheriff had "*come to the view that the pursuer's pleadings are irrelevant*", he should at that point have put down his pen. The answer to the question "*where do we go from here*?" was clear: the appropriate step, in the circumstances of the present case, was to sustain the defenders' plea to the relevancy and dismiss the action. The sheriff however went on:

"However, if I refuse probation to the pursuer's averments

(1) in paragraph 4.1 of condescendence on page 5 from line 13 commencing 'In around March 2000.....' to line 25 ending with the words '....Mr Jackson's net assets'.

(2) in paragraph 4.5 of condescendence

(3) on page 9 at paragraph 5.2 of condescendence from the beginning of that article to line 16 on page 10 ending with the words '....the shop premises were not owned by Stonepine Limited'.

(4) 'She lives in constant fear of eviction as a result of third party claims in relation to the subjects. Reference is made to Article 9.3'. where these averments appear in article 6.3 of condescendence and

(5) in 9.2 of condescendence

there is left a claim for damages arising out of the premature delivery of the disposition. The only attack on this aspect of the pursuer's claim is set out in paragraph 12 hereof. I did not sustain that attack for the reasons given. Although this case does not present a fine advertisement for the manner in which we conduct civil business, I am not minded to dismiss an action which, if the averments in condescendence are proved, would result in a decree in favour of the pursuer notwithstanding the considerable recasting which there has been of her pleadings. I would ordinarily have pronounced an interlocutor refusing probation to the foregoing passages and thereafter allowed a proof before answer. However, counsel for the defenders stated that if I was to allow the pursuer's motion to amend by deleting the sentence 'But for the defenders' failures, the intended purpose was likely to have been achieved' she would require to amend the answers to the condescendence to offer to prove that had the disposition been withheld, Mr Jackson would have procured that his obligations under the Minute of Agreement were met by Stonepine Limited. Since the sentence which was the focus of the proposed amendment will not be admitted to probation it may be that the defenders will wish the opportunity to amend their pleadings in the manner indicated....

The bottom line is that I have come to the view that the pursuer should be allowed, before answer, a proof of her case that had she withheld delivery of the disposition Mr Jackson would not have procured the counterpart delivery of the lease and liferent to the pursuer's mother and that, accordingly, the pursuer has lost the net value of 26 Hawthorn Avenue".

[30] If the pursuer's case as a whole was irrelevant (being based on mutually inconsistent averments), it was not the sheriff's function to pick out favoured parts of it and allow that re-cast case to proceed to proof. No motion had been made to him on behalf of the pursuer to delete the averments which he stated he would refuse to admit to probation. In particular, no motion had been made to delete Article 9.2, which the sheriff had accepted was contradictory of the other part of the pursuer's case. Nor had the sheriff been invited to give his views on relevancy and then provide the pursuer with an opportunity to seek leave to amend (a method of proceeding which is not normally appropriate in any event: *cf.* ***Lord Advocate v Johnston*** 1983 S.L.T.290 at page 294 per Lord Hunter; ***Gibson v Strathclyde Regional Council*** 1992 S.C.L.R.902 at page 907 per Lord Justice-Clerk Ross).

[31] In the interlocutor which accompanied his note of 17 January 2007, the sheriff did not make any order in respect of the preliminary plea which had been debated, but fixed a further hearing, described as a case management conference. The defender's solicitor responded by e-mail, requesting the sheriff to "proceed forthwith to issue an interlocutor determining the Debate, as your Lordship is, with respect, obliged by law so to do". The sheriff was reminded in that regard of the cases of ***Lord Advocate v Johnston*** and ***Kennedy v Norwich Union Fire Insurance Society Ltd.*** The sheriff then e-mailed the pursuer's solicitor:

"I assume in such circumstances that the pursuer is content that the CMS [case management conference] should be discharged. If that is so the interlocutor will exclude from probation the averments which I have identified in my note. I will then allow, before answer, a proof of the remaining averments".

The sheriff proceeded to issue an interlocutor dated 5 February 2007 in which, *ex proprio motu*, he discharged the case management conference, as it was described, refused probation to the averments which he had specified in paragraph 17 of his note of 17 January 2007, and allowed a proof before answer.

[32] The defenders' solicitor then enrolled a motion for leave to appeal to the Court of Session. The pursuer's solicitor responded by e-mailing the sheriff:

"In the comprehensive Note appended to your Lordship's interlocutor dated 17 January 2006, the conclusion is reached that 'it is implicit in [the remaining] leg of the pursuer's case that she is saying that Mr Jackson would not have procured (the delivery of the promised lease and liferent) (para.12, page 7); and accordingly the pursuer is being allowed to 'prove her case that had she withheld delivery of the Disposition Mr Jackson would not have procured the counterpart delivery of the lease and liferent ....' (para.17, page 9).

Read literally, these passages might be interpreted as meaning that the pursuer must prove what her ex-husband would or would not have done in the given hypothetical situation.

On behalf of the pursuer, we wonder whether, instead, it is implicit in these passages that the pursuer is entitled to seek to prove (in any event) that there was at least a substantial chance (ie a chance of non-negligible value) that Mr Jackson would not have delivered the promised lease and liferent (though of course the pursuer would hope ultimately to prove more than that).

In other words, are the foregoing passages merely a shorthand way of expressing the rather more complex concept of loss of a chance or opportunity which was discussed and approved after careful and anxious consideration earlier in the case [viz, in relation to the pursuer's claim that she had been deprived of the opportunity to obtain financial provision on divorce]?

(Certainly, our proposed interpretation would appear to be consistent with the earlier dicta in the Note dated 17 January 2006 in which your Lordship concludes: 'I accept that the pursuer might not be in a position to aver what Mr Jackson would or would not have probably done. Thus for the reasons given in the note to my interlocutor of 23 January 2006, it is not necessary for the pursuer to prove on the balance of probability what Mr Jackson would have done'. Hence my assumption that the 'bottom line' referred to by your Lordship is that the pursuer is being allowed to prove (in any event) that there was at least a substantial chance that Mr Jackson would not have delivered the promised lease and liferent, even if she had withheld delivery of the Hawthorn Disposition (though, of course, the pursuer would hope ultimately to prove more than that).

The issue is of importance to the pursuer, of course, not least because it would define the scope of the proof, but also because it may determine whether a cross-appeal (or clarifying amendment) is necessary.

In those circumstances, and with my sincere apologies for seeking to impose a further burden upon you in this matter. I have been asked to invite your Lordship to clarify the meaning of the foregoing passages (in para.12, page 7 and para.17, page 9 of the latest Note), perhaps by way of a very brief Supplementary Note, before matters proceed further".

[33] The sheriff responded by e-mail the same afternoon:

"Appended to the interlocutor will be a note explaining that in my opinion the pursuer has to prove that there was a substantial chance that had she withheld delivery of the disposition Mr J would not have procured the counterpart delivery of the lease and liferent all in terms of paragraph 12 of the note in Jan 2006 and para 8 of the note of 17 Jan 2007".

That e-mail appears to have been sent without seeking the views of the defenders' solicitor. The following day the sheriff issued an interlocutor dated 15 February 2007 granting leave to appeal, together with a note in the terms indicated in his e-mail. It stated, in particular:

"[I]n my opinion if the pursuer is to succeed at proof she requires to prove, as a minimum, that had she withheld delivery of the disposition there was a substantial chance that Mr Jackson would not have procured performance of the counterpart obligation to deliver the lease and liferent to the pursuer's mother. The terms of paragraphs [12] and [17] of the Note to the interlocutor of 17 January 2007 have to be read in that context. My apologies to parties for having adopted a shorthand form in these two paragraphs and any resulting confusion".

Discussion

[34] It was not in dispute before us that the sheriff's interlocutor of 5 February 2007 (refusing probation to the averments which he had specified in his note of 17 January 2007, and allowing a proof before answer) should be recalled on the basis that the sheriff had acted incompetently. We agree with that view, for the reasons explained below. There was, however, a difference between the parties as to the stage at which the sheriff had begun to act incompetently following the second debate, and in consequence a difference as to the order which this court should now pronounce in order to set matters right. On behalf of the defenders, it was submitted that the sheriff should have granted decree of dismissal following the debate, and that this court should therefore remit to the sheriff with a direction to grant such a decree. It was submitted that that course would be consistent with the decision in *Lord Advocate* v *Johnston*. On behalf of the pursuer, it was submitted that the sheriff had been entitled to put the case out for a hearing for further procedure, as he had done in his interlocutor of 17 January 2007, and that the court should therefore remit to the sheriff with a direction that such a hearing should now be held in

the light of the views which the sheriff had indicated in his note of 17 January 2007. It was submitted that that course would be consistent with the decision in *Kennedy* v *Norwich Union Fire Insurance Society Ltd*. In the circumstances, it is necessary for us to consider the two authorities on which reliance was placed.

[35] In ***Lord Advocate* v *Johnston*** the sheriff, having heard a debate, issued an interlocutor allowing the pursuer a period of time within which to lodge a minute of amendment, no motion to that effect having been made on behalf of the pursuer. Lord Justice-Clerk Wheatley stated (at page 292):

"As the pursuer had not asked for leave to amend, the course taken by the sheriff in the context of this adversarial procedure was, to say the least of it, extraordinary and to be deplored and discouraged .....

As the pursuer had not asked for leave to amend, the sheriff's duty was to decide the question of relevancy on the averments as they stood, and not to shed his responsibility by giving the pursuer time to consider amendments in the light of his expressed critical views. Judges sometimes give clear indications during a debate that pleadings are inadequate, and that situation usually results in the offending party asking for leave to amend. But if the offending party does not seek that indulgence he has to bear the consequences of his inadequacy. The fact that he may be able to cure the deficiency at a later stage does not affect the course which the judge should properly take in the situation which presents itself to him. In the instant case the proper course for the sheriff to take was, as previously noted, to decide the question of relevancy on the averments as they stood. Since he did not do so, I consider that the issue before this court should proceed not on the basis of what the sheriff has not in terms said but on the basis of what he should have said in terms having regard to what he has said in his note and his duty as the independent arbiter in the dispute. That, in my view, simply means that he should have sustained the first plea of law for the first named defender and dismissed the action against him. On that basis the sheriff's action in continuing the cause to enable the pursuer to amend if so advised, although no motion to that effect was made by the pursuer, was not just wrong but was incompetent, since he was doing something which the proper discharge of his duty precluded him from doing.

[36] Lord Hunter stated (at pages 293-294):

"There are a number of reasons why such procedure is incompetent. First, it is for the party concerned and not for the court to decide whether, and if so at what stage, leave should be sought to lodge a proposed minute of amendment. This is perfectly clear in both the Court of Session and the sheriff court, just as at the later stage of allowing a record to be amended the motion must be made by a party: see the Sheriff Courts (Scotland) Act 1907, First Sched., r.79. Second, our procedure requires that, when a party to a contested litigation seeks leave by motion made at the Bar or otherwise to lodge a proposed minute of amendment, the opposite party should have an opportunity to oppose the motion.....In the present case the appellant had no opportunity to adopt any of the courses which are open to the opposite party in adversarial procedure when his opponent seeks leave to lodge a proposed minute of amendment. Third, when the court has made avizandum after hearing argument on preliminary pleas, as the learned sheriff did in the present case, each party is, in my opinion, entitled to expect that, unless a motion is subsequently made by a party or the case is put out for any purpose, for example, to require further explanation or argument or to draw the attention of the parties to an authority which has been overlooked, a decision will be pronounced on the pleadings as they stand. If the learned sheriff had in the present case followed what, in my opinion, is the correct and proper procedure, I am satisfied from reading his note, including the passages to which your Lordship has made reference, that he would, or in any event should, have followed up the views there expressed by sustaining the first plea-in-law for the first-named defender and dismissing the action so far as directed against him. The appellant has thus been deprived of the advantages which a decision in his favour by the sheriff, whether in the end right or wrong, would have conferred. Whether or not the pursuer could have restored or could still restore the position by an appeal, and possibly by subsequent amendment of his written pleadings, must be a matter of speculation. The position is that the procedure has got off the rails to the potential disadvantage of the appellant who in my opinion was and is entitled to expect and to achieve the result which competent procedure would and should have produced".

[37] In the later case of ***Kennedy* v *Norwich Union Fire Insurance Society Ltd*** the Lord Ordinary, after a procedure roll discussion of the pursuer's averments, put the case out by order so as to provide an occasion on which the pursuer might seek an opportunity to lodge a minute of amendment with a view to clarifying certain averments which were lacking in specification. To that extent, the circumstances resembled those of *Lord Advocate* v *Johnston*. There was however one significant difference. According to information placed before the Inner House, the Lord Ordinary had been invited at the procedure roll hearing to reach a decision on the main issue of principle and then to allow the pursuer an opportunity to seek leave to amend if he was against the pursuer only on the subsidiary question of specification. Accordingly the Lord Ordinary had not acted on his own initiative, and had not acted in a manner which was incompatible with his role as an impartial arbiter in adversarial proceedings. Neither party had been deprived of a fair hearing in respect of any aspect of the procedure; nor had the Lord Ordinary tied his own hands, or those of the parties, in relation to any aspect of the possible amendment.

[38] In those circumstances, the argument which was presented in *Kennedy* on behalf of the defenders, and the issue which was decided by the court, focused on a relatively narrow question of procedure. The issue was defined by the court (at page 583):

"It is necessary for us to decide whether or not Lord Advocate v Johnston establishes that it is incompetent for a Lord Ordinary to continue a case by putting it out on the by order roll without having finally determined questions of relevancy which one party or the other has invited him to decide".

Unsurprisingly, the court decided that so absolute a proposition was not established by *Lord Advocate* v *Johnston*: as the court noted, Lord Hunter had mentioned in his Opinion a number of circumstances in which such a course of action would be appropriate. The court continued (at page 583):

"The question then is whether Lord Advocate v Johnston renders it incompetent for a Lord Ordinary who has taken a case to avizandum, following a procedure roll debate, to put that case out by order in any circumstances other than well recognised ones such as we have just referred to".

The court concluded that the *ratio decidendi* of the earlier case was narrower in scope, and did not establish such an unqualified proposition: the fundamental problem with the sheriff's conduct in *Lord Advocate* v *Johnston* was not that he had taken a procedural step without adequate reasons, but that he had acted in a manner which was unfair and incompatible with his judicial function. As the court observed (at page 584):

"It is no doubt incompetent to pronounce an interlocutor which has an effect tantamount to the granting of a motion, which, had it been made by a party, could have been opposed by any other party, when in fact no such motion has been made by any party and no party has had any opportunity to state his opposition to it. Such a course of action is fatally flawed".

After citing the dicta from the Opinions of Lord Wheatley and Lord Hunter which we also have cited, the court stated (at page 585):

"In our opinion, these passages recognise that, at least in normal circumstances, the function of the judge who hears a procedure roll debate on pleas to the relevancy or competency is to deal with all the submissions made in support of those pleas and to give effect to, or repel, or expressly to reserve each plea which has been debated".

The court did not however consider that putting a case out by order following a debate, even in the absence of satisfactory reasons, was necessarily and in itself an incompetent act. The court stated (at pages 586-587):

"In our opinion, there may, from time to time, be circumstances in which the Lord Ordinary, after due consideration, can properly conclude that the interests of justice would best be served by giving a party a chance to remedy something of the nature of a formal pleading defect, of the kind referred to by Lord Keith of Kinkel in ***G.U.S. v Littlewoods. [G.U.S. Property Management Ltd v Littlewoods Mail Order Stores Ltd*** *1982 S.C.(H.L.) 157 at* ***page 178]. Another example of the same flexibility in approach is that in Armia*** *Ltd v Daejan Developments Ltd 1979 S.C.(H.L.) 56, 1978 S.C.152 where the Lord President, with whom Lord Cameron agreed, was prepared to deal with the matter upon the basis that the plea of waiver would be amended.....We should also note that in a number of cases, including* ***Maclennan v Maclennan*** *1958 S.C.105, the court has felt able to determine an important question of legal principle albeit it has been recognised that the pleadings upon which the principal argument rested were inadequate. In that case both parties had accepted that that course should be followed; but from such cases it appears to us that the court can properly decide matters at a procedure roll and then with the consent of parties or on the express motion of one of the parties continue the case for further procedure including possible amendment".*

[39] In the present case, the purpose of the second debate was not to determine a question of legal principle (as is sometimes the practice in commercial cases), but to consider the defenders' plea to the relevancy and specification of the pursuer's averments. There is no indication that any circumstances existed, such as were discussed by Lord Hunter in *Lord Advocate* v *Johnston* or by the court in ***Kennedy v Norwich Union Fire Insurance Society Ltd,*** which warranted a departure from what the court described in the latter case (at page 585) as being *"in normal circumstances, the function of the judge*" who has heard such a debate: namely, "*to deal with all the submissions made in support of [the] pleas and to give effect to, or repel, or expressly to reserve each plea which has been debated*".

[40] The objection to the sheriff's conduct in the present case, as in *Lord Advocate* v *Johnston,* is not however merely that he put the case out for a hearing for further procedure without having dealt with the defenders' preliminary plea. The objection is more fundamental: that the way in which the sheriff dealt with the case following the debate was fatally flawed, since he followed a course of action on which the parties were entitled to be heard without affording them that opportunity, and thereby acted incompetently.

[41] The sheriff decided that various averments should be deleted from the pursuer's pleadings, so as to restrict her case to the first head of loss, and that a proof before answer should then be allowed on the remaining averments. The pursuer had not however sought leave to amend her pleadings so as to restrict her case to the first head of loss. The defenders had not had an opportunity to be heard on the question whether leave to lodge a minute of amendment should be allowed; nor had they been given an opportunity to answer any minute of amendment; nor had they been heard on the question whether any proposed amendment should be allowed. If such an amendment had been sought, the terms of the proposed amendment would have been a matter to be decided by those acting on behalf of the pursuer: in particular, it would have been for them to decide whether they should aver that, if the pursuer had withheld the disposition, Mr Jackson would thereafter have continued to fail to perform his outstanding obligations, or whether they should formulate the pursuer's case in terms of the loss of a chance. If an amendment had been allowed, the question would then have arisen whether the pursuer's case, as amended, should proceed to proof, or whether a further debate was appropriate. In particular, as we have explained, counsel for the defenders had concentrated her fire, at the second debate, on the inconsistency between the pursuer's two heads of loss. Her related criticism of the absence from the first branch of the case of an averment that, if the pursuer had withheld the disposition, Mr Jackson would have continued to fail to perform his obligations, was rejected by the sheriff on the basis set out in paragraph 12 of his note of 17 January 2007, which we have already quoted:

"That there is no such averment is undoubtedly correct. However, it is implicit in this leg of the pursuer's case....this leg of the pursuer's case is predicated upon a failure by Mr Jackson to procure the lease and liferent".

The sheriff's discussion of this branch of the case does not suggest that all that the pursuer required to prove - or was offering to prove - in relation to her first head of loss was that there was "a substantial chance" that Mr Jackson would not have performed his obligations. If any amendment by the pursuer had gone only that far, as the e-mail from the pursuer's solicitor requesting "clarification" of the note would suggest, then there would have been an issue for debate on which the defenders had not been heard. By effectively amending the pursuer's pleadings at his own hand, allowing a proof before answer and then explaining in his supplementary note that the pursuer merely required to prove the loss of a chance, the sheriff deprived the defenders of the opportunity to seek a debate on that issue.

[42] Nor was it only the defenders who were prejudiced: as counsel for the pursuer submitted during the appeal, the result of the sheriff's conduct was that both parties found themselves in a position which neither party would have wished for, and which neither party had moved the sheriff to adopt. The difficulty in which the pursuer found herself was that she appeared at first sight, on the basis of the pleadings which the sheriff had decided to admit to probation, and in the light of the sheriff's note of 17 January 2007, to be required to prove on a balance of probabilities what Mr Jackson would have done if delivery of the disposition had been withheld. That difficulty resulted in the e-mail from the pursuer's solicitor to the sheriff, which in turn led to the sheriff's note of 15 February 2007. It was in our opinion inappropriate for the sheriff to issue that note, not only because it fell outwith the scope of his power to correct any clerical or incidental error in his earlier note (under rule 12.2(2)), but also because it appears to have been issued, in anticipation of an appeal, without having first sought the views of one of the parties affected.

[43] Although we have been critical of the procedure followed in the present case, we wish to emphasise that there is no suggestion that the sheriff acted other than in complete good faith and with the best of intentions. It may be that the sheriff considered that, whatever the position might be under ordinary procedure, he was entitled in a commercial case to act as he did. If so, we are unable to agree with that view. The role of the judge in commercial actions differs from his role in most other actions in one important respect, which is encapsulated in paragraph 5 of Court of Session Practice Note No. 6 of 2004:

"The procedure in, and progress of, a commercial action is under the direct control of the commercial judge. He will take a proactive approach".

That appears to be an equally apt description of the sheriff's role in commercial actions in the Sheriff Court. As that description makes clear, judicial responsibility for case management relates to the procedure in the action and its progress. That responsibility is reflected, in the Sheriff Court, in the terms of the relevant rules, including rule 40.3(1):

"In a commercial action the sheriff may make such order as he thinks fit for the progress of the case in so far as not inconsistent with the provisions in this Chapter".

In order to manage the procedure in an action so as to receive its expeditious resolution, the sheriff requires to take steps which concern the substance of the dispute between the parties. It is necessary, for example, to ensure that the matters in dispute are clearly focused, and that the issues which require to be resolved by judicial decision, rather than other means, are identified. The sheriff will often require to decide the order in which issues should be determined, and whether they should be determined at debate or after proof. These are only examples: there are many other ways in which the sheriff exercises control over procedure in a commercial action and which involve a departure from the more passive role which he would adopt in most other types of proceeding. The fact that the sheriff is actively involved in case management does not however detract from the adversarial nature of the proceedings. Nor does it warrant any departure from the judicial role as an impartial arbiter between the parties. Judicial case management must not stray to any extent into the making by a judge of a party's case for him, or involve in any respect the confusion of the role of a judge with that of an advocate.

Conclusion

[44] In the circumstances, we shall recall the sheriff's interlocutor of 5 February 2007 and remit to the sheriff with a direction to sustain the defenders' preliminary plea and to grant decree of dismissal, as he should have done following the debate. We shall also direct the sheriff to find the pursuer liable to the defenders in the expenses of the action, so far as not already dealt with. For the avoidance of doubt, the parties are released from their undertakings in relation to expenses. We were invited by counsel for the pursuer to leave it to the sheriff to deal with expenses, and we would ordinarily have done so; but in view of the length of these proceedings already, and in the absence of any suggestion that the pursuer has grounds for opposing an award of expenses, we shall make such a direction in the interests of finality, with an order in the usual terms for the lodging of accounts and taxation. We were also invited by counsel for the defenders to direct the sheriff to certify the cause as suitable for the employment of counsel, but it appears that the sheriff has already done so, by his interlocutor of 9 March 2006. In case any further orders are required, we shall in addition direct the sheriff to proceed as accords.

Pursuer and respondent: Sandison; Maclay Murray & Spens
Defender and appellant: Shand, Q.C.; Biggart Baillie