Appeal from the Sheriffdom of North Strathclyde at Dumbarton before Lord Coulsfield ; Lord Milligan ; Lord Allanbridge

OPINION OF THE COURT delivered by LORD COULSFIELD

1. On 20 September 1991, the defenders entered into a written partnership agreement whereby they agreed to carry on business together under the name of Hillfoot Cars. By a supplementary minute of partnership dated 13 October 1993, the defenders and the pursuer agreed that the pursuer should be assumed as a partner in the business. However, difficulties arose and the business relationship between the pursuer and the defenders came to an end on or about 10 January 1994. In July 1995, the pursuer, who had contributed a sum of £17,500 as capital in the business, raised the present action against the defenders in the Sheriff Court at Dumbarton. The action is an action of accounting and the first crave seeks an order ordaining the defenders to produce the whole books and accounts of the firm and a full account of their intromissions with the assets of the firm so that the true balance due to the pursuer may be ascertained; and alternatively craves payment of the sum of £20,500 with interest. After sundry procedure, which it will be necessary to examine in detail, the sheriff, on 25 April 1996, granted decree against the defenders for payment to the pursuer of the sum of £15,662 together with certain sums as interest. The defenders appealed to the sheriff principal who on 5 September 1996 allowed the appeal and on 26 September 1996 made certain findings as to expenses. The pursuer now appeals against the sheriff principal's interlocutors.

2. Two provisions of the partnership agreement are of importance. Firstly, clause 5 provides: *"The parties shall keep or cause to be kept proper books of account in respect of the business of the said partnership with Profit and Loss Accounts and shall be prepared and audited by F.L. Walker & Co., Chartered Accountants, Glasgow, or such other Accountants as the partners shall from time to time agree. Copies of such audited Accounts will be exhibited by the Auditors to each partner as soon as practicable. Unless objections are made in writing to the Auditors within two months of exhibition of such copies to each partner, the Accounts will for all purposes be deemed to be accepted by each partner".*

3. Secondly, clause 17 of the partnership agreement provides *inter alia*: *"If any dispute, difference or question shall arise out of these presents or as to the meaning, intent or construction hereof (or in respect of the Accounts of the partnership, the retiral of any partner from the partnership, dissolution of the partnership, or any valuation herein provided for, or otherwise in relation to the partnership) whether arising during the existence of the partnership or after its termination, the same shall be referred to an Arbiter..."*.

4. On 7 July 1995, the Sheriff Court fixed 25 July 1995 as the last date for lodging defences; 15 September 1995 as the last date for adjustment and 29 September 1995 as the date for an options hearing. On 24 August 1995, the sheriff allowed defences to be received, although late. The interlocutor proceeds: *"Thereafter on Pursuer's Motion, and of consent, ordains the Defenders to produce the whole books and accounts of the firm of Hillfoot Cars carried on by the Parties...together with a full account of their intromissions with the assets of the firm and that within 28 days from this date"*.

5. A set of accounts for the period 1 October 1993 to 10 January 1994 were prepared by the auditors, Messrs Walkers. These accounts were lodged in process by the agents acting for the defenders and the document bears the court stamp with the date of lodging given as 28 September 1995. These accounts brought out a sum due to the pursuer of £15,662, the sum for which the sheriff later granted decree. On the following day, 29 September, the sheriff, on joint motion and on cause shown, continued the options hearing to 27 October 1995. The effect of that order, in terms of Rule 9.8(1) of the Ordinary Cause Rules was to permit adjustment of the parties' pleadings until 14 days before 27 October. A record of the pleadings was made up and lodged on 20 October 1995. The document bears the description "first amended record" but it does not appear that there had been any previous record or any amendment and the document appears to be simply the record of the pleadings as adjusted, under the Ordinary Cause Rules. The defenders' answers, as contained in that record, include reference to clause 17 of the partnership agreement and averments that there were no net proceeds of realisation of the partnership assets after settlement of all the obligations of the partnership. The defenders' first plea-in-law in the record lodged on 20 October was a plea that the action should be sisted to await the outcome of arbitration. In addition, before the continued options hearing, the

defenders lodged a note of the basis of their preliminary plea, in accordance with Rule 22.1: the note added nothing of substance in regard to the preliminary plea but did indicate that the defenders intended to insist on their plea in regard to arbitration.

6. The options hearing took place on 27 October 1995. The interlocutor was in the following terms: *"The Sheriff, on Defenders' Motion, there being no objection, allows Defenders' Note of Preliminary Pleas to be received though late and form number 13 of Process; thereafter, having heard parties' procurators, refuses Defenders' Motion to sist the cause and on Pursuers' Motion, Orders that the cause shall proceed in accordance with the procedure laid down under the additional procedure contained in Chapter 10 of the Act of Sederunt Sheriff Court Ordinary Cause Rules 1993 and Fixes 22 December 1995 as a last date for adjustment".*

7. On 7 December 1995, the pursuer made a motion for summary decree which was refused by the sheriff. On 22 December 1995 the record was closed. A procedural hearing was thereafter fixed and took place on 19 January 1996. At that hearing a diet of debate was assigned for 8 March 1996. On that date, the sheriff allowed a minute of amendment for the defenders to be received and thereafter made avizandum: he did not allow the pleadings to be amended. On 25 April 1996, the sheriff granted decree for the previously mentioned sum of £15,662.

8. In brief, the pursuer's argument, which the sheriff accepted, was that the pursuer was entitled to accept the sum which was brought out as due to him in the accounts lodged on behalf of the defenders and that the defenders were not entitled to challenge the sum brought out in these accounts: and, in particular, that the defenders had not timeously stated a plea that any issue should be referred to arbitration. The sheriff accepted that, as a general rule, where parties have agreed that their disputes should be settled by arbitration, a court has no discretion to refuse to allow arbitration, if the plea is stated *in limine*. The sheriff narrates that the defenders accepted at an early stage that they were under an obligation to provide an accounting to the pursuer and that an accounting had been carried out which brought out a sum due to the pursuer. The solicitor acting for the defenders acknowledged, before the sheriff, that the defenders had not expected that that would be the outcome of the accounting. The sheriff says that the defenders now seek to refer matters raised by them on record to arbitration and describes that as a belated effort to establish that actings on the part of the pursuer have caused loss. He continues: *"To describe the arbitration plea which is now being insisted upon by the defenders as being taken in limine is to stretch the natural meaning of the term. It seems to me that the plea is now being taken very far from the outset of this litigation. The defenders seek to establish, by means of an arbitration process, that if certain matters are established then it will be shown that the pursuer is due nothing. In effect the defenders will be seeking to adjust the accounting which has already taken place. The defenders do not, of course, aver that there is anything wrong with their own accounting process. They were simply surprised by the figure brought out. In my view the defenders, in their conduct in this action, have gone a long way past the point at which they could have insisted upon their plea to arbitration. Had there been matters which were capable of affecting the outcome of an accounting process these matters should have been resolved long before the accounting process itself took place. It seems to me that the appropriate course for the defenders to have taken would have been to identify these issues at an early stage and have these matters arbitrated upon before any accounting process was consented to. Instead the defenders allowed the accounting to take place and then sought to raise matters which should have been identified and dealt with at a much earlier stage. In my view it is not open to them to do that at this stage".*

9. The sheriff goes on to note that he has been unable to find any authority that any procedure can take place after an account has been produced, other than that either the pursuer accepts the accounting, in which case he is entitled to payment, or he rejects it, in which case he lodges a note of objections.

10. The argument before the sheriff took place before the decision in ***Presslie* v. *Cochrane McGregor Group Limited and David Morran (Buildings) Limited*** (1996) S.C. 289 was available. Detailed reference was, however, made to that and other authorities in the argument before the sheriff principal and in his note to the interlocutor of 5 September 1996 the sheriff principal examines the authorities in some detail himself. The essence of the sheriff principal's decision is, however, briefly expressed in the following paragraph: *"In my view, the opinion in **Presslie** supra which was not cited to the Sheriff is very much in point. That opinion was delivered in an action for damages, whereas the instant action is*

one of count reckoning and payment. In my view, however, the principle expressed in Presslie is that a plea that an action should be sisted to await the result of arbitration may appropriately be introduced at any time before the closing of the record, and no inference that the right has been abandoned can be drawn merely from the fact that parties have engaged themselves in and incurred expense in the ordinary procedure of litigation before the plea was taken. I see no reason to distinguish the application of that principle in the instant action for count reckoning and payment, notwithstanding the procedure which has already taken place. It is surprising that the defenders did not state their first plea-in-law when they lodged their defences, or at least at an earlier stage than they did. Whatever the reason for this delay may have been, however, the plea was stated before the record was closed. Applying the principle expressed in Presslie, I am of the view that the defenders have not been shown to have waived their right to invoke the arbitration clause in the partnership contract in relation to the various matters in dispute and that the motion to sist the cause to await the result of arbitration falls to be granted. On that basis I have come to the view that the learned Sheriff's interlocutors should be recalled and the appeal allowed".

11. The sheriff principal also referred to the amendment which had been lodged but said that in his view, and subject to any further observation by the parties, the appropriate course was to sist the cause for arbitration without incurring further expense in litigation. That part of the sheriff principal's note was not objected to at the hearing on 26 September 1996 nor in the course of the appeal.

12. In the argument before us, both parties accepted that the fundamental rule is that if parties have agreed that disputes should be resolved by arbitration, that agreement must receive effect unless the right to insist on arbitration had been abandoned or waived. Both parties accepted what was said in *Presslie supra* as authoritative. Reference was made in particular, to the opinion of the court delivered by Lord Morison at page 292 where it is stated: *"The Lord Ordinary held that the question had to be determined by an objective assessment of the first defender's conduct, and that such an assessment was not affected by their motive in failing to take the plea until they did. Although we agree with that view, the explanation tendered by the first defenders does provide an illustration of a situation in which failure to take the plea during a period in which the record is subject to adjustment might be objectively held as not inconsistent with an intention to reserve, rather than to abandon, the right to go to arbitration".*

13. Reference was also made to a passage at page 293 where it is stated: *"If the plea may be appropriately introduced at any time before the closing of the record, no inference that the right has been abandoned can be derived merely from the fact that parties have engaged themselves in and incurred expense in the ordinary procedures of litigation before the plea was taken".*

14. These passages make it plain that the question whether the right to insist on arbitration has been abandoned or waived is one which depends on the whole circumstances of the case, and that there is no absolute rule that the right is lost even by a failure to state the plea before the record is closed.

15. It was, however, submitted on behalf of the pursuer that, in an action of count reckoning and payment, the rule that the plea must be stated *in limine* must mean that it must be stated before the accounts were lodged. ***Presslie*** was an action of reparation in which issues of liability and quantum arose, neither of which could be decided before the record was closed. In the present case, the question whether there was a liability to account had been decided in August and the quantum due was settled when the accounts were lodged. The situation could be compared with the lodging of a tender in a reparation action. Once the defenders had lodged their accounts, they could not dispute them. There was nothing in any authority to suggest that once a party had lodged accounts he was entitled to challenge what was brought out in those accounts, in the absence of some new factor such as a challenge by the other party to their accuracy or the discovery of some previously unknown factor. Reference was made to ***Hobday* v. *Kirkpatrick's Trustees*** 1985 S.L.T. 197 and it was submitted that nothing in that case gave support to the view that the party who had lodged accounts could challenge them. In ***Polland* v. *Sturrock*** 1952 S.C. 545 it had been indicated that the procedure after accounts were lodged allowed the pursuer to attack and the defender to defend those accounts. If the defenders wished to raise any issue, whether or not by arbitration, they should have done so before the accounts were lodged. The sheriff principal had substantially reached his conclusion on the ground that arbitration could be insisted in because the record had not been closed before the

arbitration plea was stated. He had failed to take into account the significance of the stage of lodging accounts under this procedure. Once the accounts had been lodged and the pursuer accepted them, there was nothing left to dispute and nothing to go to arbitration.

16. For the defenders it was submitted that the sheriff principal's conclusion was correct. There was nothing to suggest that a plea of arbitration was too late, in an action of this character, if it was taken at the adjustment stage. It had been clear all along that the defenders were not conceding that anything was due to the pursuer. The arbitration point was raised in the proceedings before the continued options hearing and in proper time. There was no authority to suggest that the production of accounts on 28 September had closed the matter. The defenders had lodged accounts but the accounts lodged had no special status: they had not been approved by the court and there had been no proof. The purpose of the proceedings was to ascertain the true balance due to the pursuer; reference was made to ***Cunningham Jardine* v. *Cunningham Jardine's Trustees*** 1979 S.L.T. 298. There was no authority that the defenders must be treated as bound by accounts lodged on behalf of the partnership in circumstances such as these. There were unresolved matters in the pleadings and while it might be rare for defenders to seek to object to accounts which they had lodged this was an illustration of a case in which they must be entitled to do so. The accounts had been prepared by the auditors in accordance with the partnership agreement and the defenders had not had an opportunity to dispute them and must be entitled to such an opportunity. The procedure followed by the defenders had not been inconsistent with the preservation of their right to go to arbitration. Reference was also made to ***D. & J. McDougall Limited* v. *Argyle & Bute District Council*** 1987 S.L.T. 7 and ***Inverclyde (Mearns) Housing Society Limited* v. *Lawrence Construction Company Limited*** 1989 .S.L.T. 815.

17. As Lord Maxwell observed in ***Cunningham Jardine's Trustees*** *supra*, the procedure in an action of count reckoning and payment is in some respects cumbersome. This case illustrates the procedural difficulties which may arise. However, as Lord Maxwell also observed in the same case, the purpose of the procedure is to get an account before the court and focus, by that means, the issues in dispute between the parties, so that the true balance can be ascertained. In the present case, the defenders properly conceded at a very early stage that they were under an obligation to account. In the ordinary course, as is explained, for example, in ***Macphail: Sheriff Court Practice*** 21-09 and following, once such an order has been made, the accounts are lodged, objections, if any, are also lodged in due course and a record is then made up on the accounts and note of objection and answers, if any. It is assumed, in the ordinary case, that there will not be any further adjustment of the initial record, the summons and defences, and that further procedure will be initiated by the pursuer stating objections to the accounts. In this case, however, parties went on adjusting the record notwithstanding the order for accounts and the lodging of accounts. It is also assumed, in the ordinary case, that the accounts lodged will represent the defenders' own position in relation to any issues which may arise. However, the key to the present situation is, in our view, found in the provisions of the partnership agreement. In accordance with that agreement accounts were to be made up by the parties' auditors and these accounts were to be binding on the parties in the absence of objection. What the defenders apparently did was to obtain accounts made up by the parties' auditors and these were the accounts which they lodged. We do not see how it could be said that the defenders acted wrongly or incorrectly in following that course. However, it had the consequence that the accounts which were lodged were not accounts which had been prepared by the defenders themselves or which the defenders need be taken to have accepted and agreed. Given that the accounts lodged were prepared by the auditors, under the partnership agreement, it seems to us to be elementary that some means must be available, within the procedure, for the defenders object to those accounts, as they are entitled to do under the partnership agreement. In any event, we do not think it can be the case that the mere lodging of accounts of the character of the accounts lodged in this case must be taken to be a step which prevents the defenders from raising any dispute about them. The position might have been clearer if the defenders had gone back to court to explain the nature of the accounts which they were lodging before they did lodge them. If they had done so, provision might have been made for the defenders, as well as the pursuer, to object to those accounts. There is no authority in which it has been held that it is competent for a defender to act in this way but, on the other hand, there is no authority to the

contrary, nor any authority dealing with accounts prepared by an independent person such as the auditors in the present case. Since the underlying object of the procedure is to focus the dispute between the parties and ascertain the true balance, it seems to us, as we have indicated, that there must be some means by which both parties can challenge accounts prepared by a third party if the process is to achieve its object. We therefore see no reason why in an appropriate case, such as this, provision should not be made for objections by the party who lodges the accounts as much as by any other party.

18. In this case, what happened was that both parties continued to adjust their pleadings, and the question of a reference to arbitration was raised in the course of adjustment. The essential question, therefore, is whether in these circumstances the lodging of the accounts should be taken to have the extreme effect which the pursuer's argument sought to give it, namely that it amounted to an abandonment of the right to refer disputed matters to arbitration. In our view, it would be going much too far to hold that in the circumstances of this case there had been any such abandonment.

19. In our view, therefore, the sheriff principal reached the correct conclusion and the present appeal must be refused.

Act McLean : Brodies, W.S. (Pursuer and Appellant)
Alt Party : (1st Defender and Respondent) MacSporran
Skene Edwards : (2nd Defender and Respondent)