SHERIFF APPEAL COURT

[2021] SAC (Civ) 18
PIC-PN676-19, PIC-PN677-19, PIC-PN700-19

Sheriff Principal D L Murray
Appeal Sheriff A L MacFadyen
Appeal Sheriff N L Ross

OPINION OF THE COURT

delivered by APPEAL SHERIFF A L MACFADYEN

in appeals by

(FIRST) SUZANNE HENDERSON; (SECOND) MICHAEL HENDERSON; (THIRD) KIERAN HENDERSON

Appellants

against

MAPFRE MIDDLESEA INSURANCE PLC

Respondent

Appellants: Wilson, advocate; Digby Brown LLP
Respondent: Stuart QC; Kennedys

25 May 2021

Introduction

[1] These are three actions before the All-Scotland Sheriff Personal Injury Court ("ASSPIC") arising out of a road traffic accident in Malta on 9 April 2018 involving an open topped tourist sightseeing bus operated by City Sightseeing, which collided with branches of overhanging trees causing significant damage to the vehicle. Many passengers, including the pursuers, on the bus were injured. The defender was the insurer of the bus. A fourth

action, *Morrison* v *Mapfre Middlesea Insurance plc*, is proceeding in the Court of Session. Lord Braid is case managing *Morrison*. There are also actions proceeding in other European jurisdictions in respect of the accident.

[2] On 29 January 2021 the sheriff in ASSPIC refused a motion by the pursuer to request a remit of an action to the Court of Session in terms of section 92 of the Courts Reform (Scotland) Act 2014 due to the importance and difficulty of the action. The sheriff's decision is set out and explained in a note of that date.

[3] The sheriff's decision and reasoning in all three case were the same. Likewise our decisions in all three cases are identical and we have issued this single opinion.

[4] Remits of actions from the sheriff court, including ASSPIC, to the Court of Session are governed by section 92 of the Courts Reform (Scotland) Act 2014. If the action, such as the instant case, is one to which section 39 of that Act applies, namely one which is within the exclusive competence of the sheriff court by reason of the amount of the sum sued for not exceeding £100,000, but would otherwise be within the competence of the Court of Session, then the procedure is set out in section 92(4) to (7), which is in the following terms:

> "(4) On the application of any of the parties to the proceedings, the sheriff may, at any stage, request the Court of Session to allow the proceedings to be remitted to that Court if the sheriff considers that the importance or difficulty of the proceedings makes it appropriate to do so.
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> (5) On receiving a request under subsection (4), the Court of Session may, on cause shown, allow the proceedings to be remitted to the Court.
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> (6) If the Court of Session allows the proceedings to be remitted to that Court, the sheriff is to remit the proceedings to that Court.
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> (7) Where the proceedings are remitted to the Court of Session under subsection (6), the proceedings may be dealt with and disposed of by that Court despite section 39(2)."

[5] The wording of subsection (4) makes it clear that, once the sheriff has been satisfied that there are matters of importance or difficulty making it appropriate to request the remit, he has a discretion whether to make the request. Subsection (5) gives the Court of Session a discretion whether to allow the action to be remitted.

The sheriff's decision

[6] The sheriff was satisfied that there were matters of importance and difficulty in these actions which would make it appropriate to remit to the Court of Session. However, having regard to all relevant factors and circumstances mentioned by him, in the exercise of his discretion he concluded that the motion to remit should be refused.

[7] The importance and difficulty arose from the following circumstances. Liability and quantification of damages required to be determined in accordance with *lex loci delicti*, that is the law of the country where the accident occurred, namely the Republic of Malta. It was contended by the respondent that under Maltese law the policy of insurance was limited to 6.07 million Euros, irrespective of the number of victims, the number of claims pending before courts or in which jurisdiction they were brought.

[8] The implications of the Maltese implementation of the Motor Insurance Codification Directive 2009/103/EC, an instrument which allows European Union states to impose an overall limit per claim in a multiple claimant incident such as the accident of 9 April 2018, and the lack of Maltese judicial authority on that Directive, were difficult questions.

[9] In the Court of Session action, *Morrison*, the defender (the same defender as in these three actions) had served a third party notice on Transport for Malta ("TfM"), the roads authority in Malta, alleging liability for failure to maintain the tree. In response TfM was claiming state immunity under the State Immunity Act 1978.

[10] A proof in *Morrison* had already been assigned in the Court of Session for July 2021 and the Lord Ordinary case managing *Morrison*, Lord Braid, was endeavouring to retain that diet.

[11] There was a dispute between parties as to whether the findings of an ongoing "Magisterial Inquiry" in the Maltese Courts would affect any civil proceedings such as the instant case.

[12] On limitation of indemnity, the defender claimed that the 6.07 million Euros figure, mentioned above, included all expenses including the defender's legal expenses. While in the United Kingdom damages would be paid out on a first come first served basis, the defender claimed that every claim in Europe must be decided before any aggregation of claims could be made and paid out on a percentage basis. There was no judicial authority on how funds were to be distributed in these circumstances.

[13] The Maltese law of vicarious liability was substantially different from Scots Law. In other proceedings, the defender claimed the driver of the bus may have been under the influence of alcohol. Under Maltese law, if the driver were under the influence of alcohol, an employer would not be vicariously liable and the defender in these actions would not require to indemnify City Sightseeing. The pursuers were not aware of any evidence that the driver was under the influence of alcohol. This was another area of difficulty. Finally, the defender wished one of the English cases to be decided first. That case could use up all of the indemnity. There would be real and substantial prejudice to the pursuers.

[14] The sheriff having found those to be factors of importance or difficulty, went on to consider whether in the exercise of his discretion to remit. The facts and circumstances which persuaded him to exercise his discretion in favour of not remitting the action to the Court of Session were summarised by him at paragraph [38] of his note as follows:

> "The actions are not related actions; there is no issue of immunity raised in the sheriff court actions; there is no issue of vicarious liability raised in the sheriff court actions; if remitted, further procedure and expense would be necessary, including serving third party notices, unless the actions were sisted forthwith; it has already been decided in this court that the two other sheriff court actions should be sisted pending the outcome of the lead action, being this action; all matters relating to indemnity and apportionment can be determined in *Morrison*."

He therefore decided not to remit any of the three sheriff court actions to the Court of Session and, on the defender's motion, sisted the three actions in ASSPIC pending the outcome of the Court of Session action *Morrison*.

Grounds of appeal and answers thereto

[15] The pursuers appealed against that decision. The grounds of appeal were:

1. The sheriff had erred in holding that the sheriff court actions were not "related actions" in terms of Article 29 of EC Regulation 1215/2012. He had misdirected himself by relying on Article 29 of that Regulation. Had he referred to the appropriate Article, Article 30, he should have found that these actions were related in terms of the Directive.

2. Article 30 of Regulation 1215/2012, rather than Article 29, accordingly applied to the issue in question in relation to whether the present action should be sisted. It was understood that action of *Suzanne Henderson* and the related action of *Michael Henderson* against the defender were the first raised. This court was accordingly the "first seised". In these circumstances, it was not appropriate or permissible for ASSPIC, being the "court first seised", to sist the present proceedings: Article 30(1). The sheriff accordingly had erred in so doing.

3. The sheriff had erred in that while he held that the test set out in section 92(4) of the 2014 Act had been met, he had refused the motion on the basis of what, in his

> opinion, (i) he thought the Court of Session might do procedurally with the proceedings if they were remitted and (ii) questions of potential costs implications if the cases were remitted to the Court of Session. The questions of what further procedure might be adopted in the Court of Session (and any related issues of costs), were matters for the Court of Session which the learned Sheriff was not in a position to determine or assess.

Before us, the appellants could not conclusively confirm that any of the instant sheriff court actions had been the first raised, as defined in the Directive, in Europe. Accordingly the second ground of appeal was not insisted upon at the hearing before this court.

[16] The defender opposed the appeal. Its answer on ground 1 was that the actions were not related actions, whether under Articles 29 or 30. The Sheriff identified at paragraph [38] the reasons for his conclusion that the actions were not related actions. In any event, Articles 29 and 30 related to proceedings pending before the courts of different Member States and were, accordingly, not relevant to the proceedings in question in this appeal.

[17] On ground 3 the defender's answer was that the sheriff had identified and applied the correct test. Under section 92(4) of the 2014 Act the Sheriff retained a discretion whether to request a remit. Thus, importance and difficulty were necessary conditions but, on their own, are not sufficient conditions. If all cases where the importance or difficulty of the proceedings made it appropriate to request a remit to the Court of Session the inclusion of the discretion, expressed in the word "*may*" would be otiose and section 92(4) would read "the sheriff *shall* ".

[18] At paragraph [37] of his note the sheriff confirms that for the reasons he then sets out at paragraph [38] he was not prepared to exercise his discretion to remit the three cases to the Court of Session. The sheriff's decision was one that was reasonably open to him in the

circumstances.

Submissions for the appellant

[19] In the course of his submission to us counsel for the appellants accepted that the Directive applied only to proceedings in dependence in different states as opposed to those running within a single state. Accordingly he seemed to accept that as stated, ground 1 could not succeed. He did however submit that the sheriff's misunderstanding of the Directive, in confusing Articles 29 and 30, was indicative of the error of the sheriff's approach to the motion to request a remit.

[20] On the substantive issue before us, the third ground of appeal, counsel for the appellants submitted that the sheriff had fallen into error when he had discussed and attached weight to what the Court of Session might do if the cause were remitted. At paragraphs [32] and [34] the sheriff referred to a remit creating additional procedure and cost, including the service of a third party notice, which a sist would avoid. He decided that, even if remitted, the cases would most likely be sisted pending the outcome of *Morrison*, given that a proof in *Morrison* is fixed for July 2021. In saying that, he was usurping the function of the Lord Ordinary who would be presiding over any hearing, in the event that the Court of Session agreed that the cause be remitted. To engage on that exercise was an error. That was a factor of which he ought not to have taken account when deciding whether to exercise his discretion to remit.

[21] The sheriff's decision was vitiated by that error and it was submitted that we should allow the appeal, recall the interlocutor of 29 January 2021 and thereafter request the Court of Session to allow the proceedings to be remitted to that court in terms of section 92(4) of the 2014 Act.

Submissions for the respondent

[22] On the first ground of appeal senior counsel for the respondent submitted that the Directive applied only in respect of proceedings in dependence in separate member states of the European Union, not within a single state. Accordingly, the issues argued by the appellant on this ground were irrelevant. The fact that the sheriff had considered Article 29 instead of Article 30 for that reason was irrelevant.

[23] On the third ground of appeal, the respondent submitted that the question whether to remit had been within the sheriff's discretion. He had not erred in any way. The ambit was a wide one and this court should not interfere with the sheriff's decision.

[24] Similarly, the sheriff had been entitled to grant the defender's motion to sist these actions pending the outcome in the Court of Session of *Morrison*. He invited us to refuse the appeal.

Decision

[25] On the first ground of appeal, it does not matter whether the sheriff erred in considering that the argument concerned Article 29 of the Directive as opposed to Article 30. That is because they are both irrelevant to the questions raised in this action before the sheriff and this court. The Directive only applies to proceedings raised in separate member states of the European Union (which meantime includes the United Kingdom), not to competing or connected proceedings within a member state.

[26] That being the case, we fail to see how any misunderstanding had any effect on his substantive decision to refuse to request a remit to the Court of Session. On the contrary, he clearly gave consideration to the fact that the sheriff court actions and *Morrison* arose out of

the same accident and the sheriff court actions all involved members of the same family as pursuers, with the same solicitors representing all of those pursuers and who also represent Mr Morrison.

[27] Accordingly, to the extent that the first ground was not departed from, we saw no merit in it.

[28] On the third ground of appeal, the issue for this court was whether the sheriff had erred in exercising his discretion in favour of refusing to request a remit of the action to the Court of Session. Although the ultimate decision whether an action such as this, where there is not concurrent jurisdiction, will be remitted rests with the superior court, it can only make that decision if the sheriff has decided that the factors of importance and difficulty are present and he decides to exercise his discretion in favour of requesting a remit.

[29] In *B* v *NHS Ayrshire and Arran* 2016 SLT 977 at page 978 Lord Boyd of Duncansby, sitting in the Outer House of the Court of Session observed:

> "[7] The provisions for remit in the 2014 Act arise out of the report of the Scottish Civil Courts Review (the Gill Review). It considered that the power of remit should be exercised in exceptional cases (Vol 1, Ch 4, para 134). It seems to be both logical and appropriate that the remit provisions should only be used exceptionally. Parliament has determined the exclusive jurisdiction of the sheriff court and that would be undermined if remits became common place."

[30] That in our view is not a controversial statement. To that we would add that the 2014 Act also created ASSPIC. That is a specialist court to deal with personal injury actions with jurisdiction throughout Scotland. It offers streamlined procedure, case management and civil jury trials.

[31] The role of an appellate court when asked to review an exercise of discretion at first instance is limited. *Mullan* v *Anderson* 1993 SLT 835 was a decision of five judges in the Court of Session in an appeal from the sheriff court on the issue of a remit of an action for

damages from the sheriff court to the Court of Session. At pages 837L to 838B the Lord Justice Clerk (Ross) said:

> "As regards the power of the appellate court to review the exercise of discretion by a judge in a court below, the law is clear. In *Thomson* v *Corporation of Glasgow,* 1962 SLT at p 107, Lord Reid observed that the House of Lords would not overrule the discretion of a lower court merely because they might think that they would have exercised the discretion differently.
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> He added: 'I do not attempt to define the circumstances in which this House might take that course. We might do so if some irrelevant factor had been taken into account or some important relevant factor left out of account or if the decision was unreasonable, and we would no doubt do so if the decision could be said to be unjudicial.'
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> *Stevenson* v *Rogers* was a case where the issue to be decided was one of fact and degree where there was room for more than one conclusion. Under reference to *G* v *G* the court observed that there was room for a wide judicial discretion with which an appellate court would not interfere unless it considered that the judge of first instance had 'exceeded the generous ambit within which a reasonable disagreement is possible'."

[32] Parties were agreed that, when an appeal court is considering the exercise of discretion at first instance, the test set out in *Mullan* is still the one to be applied, even though it predates the introduction by section 92 of the 2014 Act of the additional test to be satisfied in the Court of Session before the remit will ultimately be permitted.

[33] As Sheriff McGowan said, sitting in ASSPIC in *Cocker* v *Dumfries and Galloway Health Board* 2019 Rep LR 20 at paragraph [43]:

> "While there was not unanimity among the judges who heard that case (*Mullan*) as to whether the sheriff's task, in applying s 37 (1)(b) encompassed a one or two stage process (see for example 838 J–J and 845 E–F) it appears to have been common ground among all the judges that the making of such a decision encompassed an evaluation of all relevant factors, including what might be called practical issues about the operation of the court."

[34] In terms of section 92(4), the sheriff has, in certain circumstances, a discretion to request the Court of Session to allow the proceedings to be remitted. Those circumstances are where he considers that the importance or difficulty of the proceedings make it

appropriate to do so. In our view, it is immaterial whether that is viewed as a one-stage or two-stage test. Whichever the approach, the outcome will be the same. In this action, the sheriff was of the opinion that there were factors of sufficient difficulty and importance which made it appropriate to remit. However, in the exercise of his discretion, he decided not to remit.

[35] The sheriff's conclusion that factors of importance and difficulty were present was not challenged by the parties to this appeal. Accordingly, in order to succeed, the appellant required to persuade us that the sheriff had erred in the exercise of his discretion.

[36] Parties' submissions at the appeal focused on paragraphs [32], [34] and [38] of the sheriff's note. They were in these terms:

> "[32] In the event the sheriff court actions were remitted to the Court of Session additional procedure and cost would be incurred, including serving third party notices, unless the actions were sisted pending the outcome of *Morrison*.
>
> [34] If the three sheriff court actions were remitted, despite the views of parties that the actions should run concurrently with *Morrison*, it seems more likely than not the actions would be sisted without further procedure pending the outcome of Morrison, given that a proof is fixed for July 2021.
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> [38] The actions are not related actions; there is no issue of immunity raised in the sheriff court actions; there is no issue of vicarious liability raised in the sheriff court actions; if remitted, further procedure and expense would be necessary, including serving third party notices, unless the actions were sisted forthwith; it has already been decided in this court that the two other sheriff court actions should be sisted pending the outcome of the lead action, being this action; all matters relating to indemnity and apportionment can be determined in *Morrison*."

[37] Counsel for the appellant characterised the sheriff's discussion of likely courses or outcomes after a remit, as evidence of the sheriff falling into error. He was, it was submitted, usurping the function of the Lord Ordinary. We disagree. In *Mullan* at paragraphs 848L to 849C Lord Penrose said:

> "In forming an opinion whether it is appropriate to remit the cause to the Court of Session rather than to dispose of it in the sheriff court, whatever other limiting

> factors there might be, one must have in mind at least certain of the characteristics of the two courts, to provide some context for the decision. In my opinion there is nothing in the terms of this provision which would assist one to define exclusively those characteristics of the two courts which alone were relevant to the choice. A court, in general terms, is defined not only by the characteristics of its judicial and other officers, but also, for example, by its forms of procedure, the classes of work it customarily deals with, its location relevant to the residence or place of business of the parties appearing before it, the qualifications and experience of those who are entitled to practise before it, the expense incurred in using the court, and the efficiency of its programming for the disposal of work. Other factors might be identified and added to the list. The question whether it is appropriate for a case of defined importance or difficulty to be remitted from the sheriff courts to the Court of Session appears to me necessarily to require consideration of those factors relevant to the processing and disposal of the particular cause in the respective fora which a sheriff acting reasonably, and being fully conversant with the characteristics of the two courts, would have in mind."

[38] In our view the sheriff's reasoning demonstrates that he properly undertook that exercise. If the sheriff's note as a whole is considered, it is clear that the sheriff was not usurping any future function of a Lord Ordinary: he was discussing the various possible outcomes of a remit. That was an appropriate exercise for him to undertake when considering whether to grant the pursuer's motion.

[39] The likely procedure in the Court of Session is very similar to the likely procedure in ASSPIC. The actions could proceed with parties' averments in their current form, that is to say without any third party being brought in or issues raised as to indemnity. Parties' averments might be changed by adjustment and/or amendment to bring them into line with those already on record in the *Morrison* action. The sheriff court actions, might be sisted pending resolution of another action, most likely *Morrison.* The potential difficulty regarding the division of the 6.07 million Euro fund would remain whether the action were remitted or not. The actions would be case-managed in either forum.

[40] Remitting these actions to the Court of Session would not in itself achieve the, admittedly desirable, effect of a single binding decision in all the Scottish cases.

Accordingly, it matters not whether the actions proceed in the sheriff court and Court of Session, or the Court of Session alone.

[41] These were all matters which the sheriff considered in coming to the view that, while factors of importance and difficulty were present, there was no advantage to be gained by requesting the removal of this action from the original forum, itself a specialist personal injury court.

[42] When the entire note is read, it is clear that the sheriff was also influenced in deciding how to exercise his discretion by what had already happened in the instant actions. At paragraph [35] he wrote:

> "In considering all the circumstances, the three sheriff court actions called before this court on 2 March 2020 when the pursuer's motions for decree by default and summary decree were refused. Sheriff Dickson appended a note to the interlocutor which included the following:
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> '… parties were advised that they should ascertain the availability of their witnesses in advance of the hearing on 21 April 2020 with the expectation being that at that hearing:
> (i) a proof of suitable duration will be fixed in respect of the lead action; and
>
> (ii) the other two causes will be sisted pending the outcome of the lead action'."

[43] The sheriff's view in paragraph [34], which was no more than an expression of a view as to what might happen, was clearly influenced by what had already been decided as to the future procedure of these actions. If a decision were made to sist two of the ASSPIC actions and allow one to proceed, or if the decision were to be to sist all three, then it mattered not whether they were sisted in ASSPIC or the Court of Session. What was relevant for the sheriff to consider, which clearly he did, was that these actions were already under way in ASSPIC. Refusing the motion to request a remit would on any view save the additional procedure and cost referred to in paragraph [32] of his note.

[44] A preliminary proof fixed in the *Morrison* action was adjourned by Lord Braid by his interlocutor of 28 April 2021 pending this court's decision. That was clearly not information which was before the sheriff on 29 January 2021. While it may have been a relevant factor it is irrelevant in the context of this court's review of the decision of 29 January 2021.

[45] The decision reached by the sheriff was a reasonable one, comfortably within the wide ambit of discretion open to him. There is no ground upon which we could, or should, interfere with that and the appeal therefore falls to be refused.

[46] Were we to be wrong and the sheriff had indeed trespassed into matters which were for the consideration of the Court of Session and his decision vitiated, it would be for this court to consider whether to exercise discretion to remit the matter for the Court of Session to consider whether to allow the remit. In these circumstances we should also require to have regard to Lord Braid's decision to adjourn the preliminary proof in *Morrison.* Having considered the whole matter afresh we are not persuaded that it would be appropriate to exercise our discretion to remit these actions to the Court of Session in terms of Section 92(4).

[47] In arriving at that decision, we had regard to the following: the relevant factors mentioned by the sheriff in his note of 29 January 2021 and the discharge of the preliminary proof in *Morrison* in the Court of Session.

[48] We have already approved of the sheriff's reasoning and would, for the sake of brevity, adopt that.

[49] It was always foreseeable that *Morrison* would be proceeding, indeed that was the basis upon which the motion to remit was made before the sheriff and the appeal conducted in this court. The procedure in *Morrison* could follow many possible paths, including the assignation and discharge of diets. The sheriff must be taken to have been aware of that, as

we were. Accordingly the fact that the preliminary proof has been discharged in that action does not change the appropriateness of leaving these actions in ASSPIC.

[50] Parties were agreed that expenses should follow success. We have therefore found the appellant liable to the respondent in expenses of this appeal. This was an important matter on the question of remit from ASSPIC and we therefore consider that certification of the appeal as suitable for the instruction of senior counsel is justified, which we do.