EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2015] CSIH 8
XA65/14

Lord Menzies
Lord Drummond Young
Sheriff Principal Pyle

OPINION OF THE COURT

delivered by LORD MENZIES

in the appeal

by

STANLEY FRANCIS MAZUR

Pursuer and appellant;

against

PRIMROSE & GORDON WS

Defenders and respondents:

Act: Party
Alt: Watts; CMS Cameron McKenna LLP

22 January 2015

The issue

[1] The issue in this appeal is whether, in a question between Mr Mazur and the defenders, Mr Mazur is bound by the actings of the solicitor acting on his behalf in an action for damages in the sheriff court agreeing settlement of the action with the solicitors acting for the defenders. To put it another way, were the defenders entitled, in the circumstances of this case, to rely on the ostensible authority of the solicitor acting for Mr Mazur to settle the action?

The factual circumstances

[2] In about October 2010 Mr Mazur raised an action for damages against the defenders. The basis of this action, as averred on behalf of the pursuer, was the alleged breach of contract and professional negligence of one of the partners of the defenders in giving inadequate and ambiguous advice to the pursuer. The context in which this advice was given may briefly be summarised as follows. In about 2003 Mr Mazur raised a sheriff court action for reparation and instructed Blackadders, solicitors, to act on his behalf in those proceedings. He terminated their agency and Blackadders sought payment of their professional fees. An interim award of judicial expenses was made in the action against Mr Mazur in favour of Blackadders. Subsequently,

Blackadders raised an action against the pursuer in Dumfries Sheriff Court for their fees, and obtained decree for payment against him. In September 2005 Mr Mazur received a charge for payment in respect of the extract decree. By this time, he had instructed the defenders to act on his behalf. He had the choice of allowing Blackadders to raise a petition for his sequestration, or to pay the sum of £2,300.30 in respect of the charge. He sought advice from the defenders, and following this he allowed sequestration to proceed. He was sequestrated on 28 November 2005.

[3] In 2010 Mr Mazur instructed Mr Hugh Grant of Grant Brown Lindsay, solicitors, Glasgow to act on his behalf and to raise these proceedings. In the action it is averred on behalf of Mr Mazur that as a result of the defenders' breaches of contract *et separatim* fault he has suffered loss and damage. It is averred that he lost the sum of £14,868.62 as a direct result of his bankruptcy. In addition, he avers that his credit history and reputation have been permanently and irreparably damaged, and that it is now extremely difficult for him to obtain credit or insurance for personal or business projects. His loss and damage is quantified at £40,000, which is the sum sued for.

[4] The action was defended on liability and quantum. Of consent it was sisted from January 2011 to March 2012 for investigations. After sundry procedure a four day proof before answer was fixed to commence on 8 October 2012.

[5] In preparation for the proof an expert report on behalf of the pursuer was lodged on 29 September 2012 which concluded that the defenders' equivocal advice to the pursuer had fallen below the standard which the pursuer ought to have expected from an ordinarily competent solicitor. On 4 October 2012 the defenders' solicitors sent a fax to Mr Hugh Grant enclosing a minute of tender offering to settle the action by paying the pursuer the sum of £10,000 together with the expenses of the action in full and final settlement. Mr Grant sought the pursuer's instructions and recommended acceptance of the offer. The pursuer indicated that the offer was not sufficient. Mr Grant made a further call to the pursuer on the evening of 4 October seeking to persuade him to settle the claim but this advice was not accepted. It was agreed that Mr Grant should seek an enhanced offer.

[6] Mr Grant spoke to Mr Mazur on 5 October and Mr Mazur again advised Mr Grant that he did not wish to accept the offer. Later that day, when Mr Mazur was unavailable, Mr Grant telephoned Mr Mazur's home and persuaded Mr Mazur's wife to accept the offer.

[7] By letter dated 4 October faxed to the defenders' solicitors at 15.04 on 5 October 2012 Mr Grant confirmed his instructions to accept the tender and to discharge the proof fixed for 8 October.

[8] On 8 October 2012 a solicitor acting for the defenders appeared of consent and the diet of proof was discharged and the cause sisted for settlement. On 10 October the defenders' solicitors wrote to Mr Grant enclosing a joint minute for signature; this was returned by Mr Grant on the following day duly executed.

[9] A cheque for £10,000 was sent to Mr Grant by the defenders' solicitors by letter of 29 October 2012. On 1 November 2012 the pursuer sent an email to the defenders' solicitors indicating that he had instructed the arrangements made be cancelled and that he intended to continue the action with another solicitor.

[10] On 15 January 2013 the sheriff, *ex proprio motu*, having seen a letter from the solicitors acting for Mr Mazur stating that they were no longer acting for him in this case, assigned a diet for

18 February 2013 in order that Mr Mazur might appear personally or be legally represented. Mr Mazur appeared at that diet personally (Mr Grant also being present) and the court assigned 18 March 2013 as a diet for a procedural hearing to enable the defenders to consider a possible minute on the question of the alleged settlement of the action in terms of paragraph 14.70 of *Macphail's Sheriff Court Practice*. On 18 March 2013 the court allowed the defenders 14 days in which to lodge such a minute. In due course the defenders lodged a minute, and Mr Mazur answered it. There was an evidential hearing on 10 and 21 June 2013. The sheriff issued his judgment on 20 December 2013.

[11] The sheriff had no difficulty in accepting that Mr Mazur had made it clear to Mr Grant that the offer tabled by the defenders was not acceptable. The sheriff went on to observe as follows:

> "[18] Equally, I appreciate that Mr Grant felt from a strategic point of view that the firm offer to settle at a five figure sum together with expenses received from the defenders was a good one which should be accepted. I do not consider that Mr Grant acted fraudulently but he did go far further than he should have by seeking the agreement of the pursuer's wife rather than the pursuer himself before confirming to the defenders agents that he had authority to settle the case.
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> [19] It was clear that Mr Grant the pursuer and his wife were known to each other socially. Mrs Mazur is an experienced businesswoman who is no doubt well used to taking decisions of this sort but I accepted her evidence that she felt pressurised and compromised into agreeing with Mr Grant's suggestion.
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> [20] Given that the whole matter a tortuous past (*sic*) involving several firms of solicitors Mr Grant should have been particularly careful in seeking precise instructions from the pursuer.
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> [21] Since Mr Grant did not obtain the pursuer's direct instructions to settle the case he ought to have indicated that he would have to withdraw from acting and would seek to discharge the proof in order that the pursuer could obtain fresh representation to continue the action to proof against the defenders...
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> [24] I find it quite staggering that a solicitor of Mr Grant's experience should put himself in this position. While I appreciate he thought on the eve of the proof that the offer was a good one, it had been tabled at short notice, albeit within a week of the pursuer's expert report being lodged. Mr Grant seemed to put himself under great pressure to settle the matter whereas he should have concentrated on receiving proper instructions directly from Mr Mazur. Mrs Mazur was not a party to the action and should not have been used as a substitute for the pursuer to seek authority to act. It does appear on the evidence before me that Mr Mazur has a claim against Mr Grant but that is a matter which may require to be determined elsewhere and may be of little comfort given the past history of litigation in which the pursuer has been involved. "

[12] The sheriff clearly had some sympathy for the position in which Mr Mazur found himself. However, having regard to the authorities founded on by the defenders (including *Gloag on Contract* at page 147, the *Stair Memorial Encyclopaedia Reissue Volume I on Agency* at paragraph 52, and particularly *Mowbray* v *Valentine* 2004 SC 21) he concluded that the defenders' solicitors were entitled to take the view based on the communications which they received in writing from Mr Grant that the action was settled and accordingly the pursuer was barred from seeking to re-raise the action against the defenders with a view to seeking enhanced damages up to the full amount of the claim contained in the initial writ. He had no difficulty finding on the evidence and in law that the defenders' minute should succeed and that they should be granted absolvitor from further proceedings.

[13] Mr Mazur appealed against the sheriff's decision to the Sheriff Principal. By interlocutor dated 8 April 2014 the Sheriff Principal refused the appeal and adhered to the sheriff's interlocutor dated 20 December 2013.

[14] It is clear from the Sheriff Principal's opinion that she too had some sympathy for the position in which Mr Mazur found himself. In that regard she observed as follows:

> "[14] If the appeal court had the power to deal with cases simply on the basis of what is fair and equitable the outcome in many cases, including this one, would be different. However, the function of the appeal court is to decide on the points of law brought before it by the appellant. It is not the function of this court to look to the evidence when the evidence is not in dispute...
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> [15] The sheriff's findings make it abundantly clear that the appellant's then solicitor Mr Grant, compromised or settled his action by accepting the tender contrary to the client's express instructions to refuse the tender. The actings of Mr Grant in these circumstances are highly questionable. Mr Mazur has consistently refused to accept the principal sum of £10,000 which has been tendered on behalf of the defenders. The appellant seeks the recall of his sequestration and the restoration of his reputation. Neither of these remedies are available to him in the present action involving Primrose & Gordon. The only remedy in that action is one of a pecuniary nature ie damages. Nevertheless, the appellant's position is he wished a judicial determination on the merits in respect of professional negligence...
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> [18] The proper application of the law can result in harsh outcomes and the law is clear to me that Mr Grant, albeit acting contrary to the appellant's wishes, did have ostensible authority to settle or compromise the litigation between Mr Mazur and the defenders as far as the defenders are concerned. Accordingly, although the appeal must be refused for this simple reason nevertheless, Mr Grant will have to answer to Mr Mazur in respect of his actings outwith his client's clear instructions and therefore outwith his actual authority."

[15] It is against the interlocutor of the Sheriff Principal that Mr Mazur now appeals to this court.

Submissions for the parties

[16] Both Mr Mazur and the respondents provided us with helpful and full notes of argument,

which, along with their oral submissions, we have considered carefully.

[17] Mr Mazur's submissions may be summarised briefly as follows:

(a) The circumstances of *Mowbray* v *Valentine* are different from those in the present case, so that case should be distinguished. *Mowbray* v *Valentine* was concerned only with expenses, whereas Mr Mazur's case involved a great deal of other issues. Moreover, *Mowbray* v *Valentine* was concerned only with an agent who, it was alleged, exceeded her actual authority, in contrast to the present case, in which the agent acted in defiance of a direct instruction from Mr Mazur not to settle.

(b) The four requirements of personal bar listed in Reid and Blackie on *Personal Bar* are absent in this case. Mr Mazur was unaware that Mr Grant was acting contrary to instructions. Once the solicitors acting for the respondents received Mr Mazur's email of 1 November 2012 they could have had no reasonable belief in Mr Grant's ostensible authority. Furthermore, there has been no loss to the respondents, their cheque for £10,000 never having been cashed by Mr Mazur. If there has been any loss or prejudice to the respondents, this was not as a result of any inconsistent conduct on the part of Mr Mazur but as a result of the wilfully dishonest representations of his solicitor, of which he had no knowledge and to which he never consented.

(c) There was no concluded agreement to settle the action on the basis of a joint minute providing for absolvitor. If there was any agreement, it was for settlement on the basis of minutes of tender and acceptance.

(d) The application of *Mowbray* v *Valentine* and the doctrine of ostensible authority in the present case is contrary to article 6(1) of the European Convention on Human Rights. Mr Mazur has been deprived of his right to a fair and public hearing of his claim against the respondents.

(e) Because Mr Grant disregarded Mr Mazur's express instructions and lied to the respondent's agents, any resultant contract was fraudulent and void. Fraud subverts consent and the contract is a nullity.

[18] Counsel for the respondents submitted that the circumstances in *Mowbray* v *Valentine* could not be distinguished from the present case. That case is clear authority for the proposition that solicitors acting in sheriff court proceedings possess the ostensible authority to compromise an action regardless of the instructions of their client.

[19] It had been explained to Mr Mazur on numerous occasions (including in the course of the opinions of both the sheriff and the Sheriff Principal) that his remedy lies in raising an action against his former solicitor; despite this, he has persisted with the present appeal. There was no basis for the submissions based on article 6 of ECHR or on fraud.

[20] Counsel drew our attention to the chronological sequence of events in this case. On 4 October 2012 Mr Grant wrote to the respondents' solicitors stating that he had instructions to accept their tender. On the following day the respondents' solicitors faxed Mr Grant suggesting settlement should be implemented by joint minute. On 10 October 2012 the respondents' solicitors sent the joint minute to Mr Grant for signature, and on the following day he returned the signed joint minute to them. On 29 October 2012 the respondents sent a cheque for £10,000 to Mr Grant in settlement of the action. On 1 November 2012 at 8.47pm an email was sent to the general enquiries

desk of the respondents' solicitors, apparently from Mr Mazur, stating that he had instructed his solicitor to cancel the arrangement which had been made.

[21] There was no communication between Mr Mazur and the respondents' solicitors before 1 November 2012. By that date the contract to settle the action was concluded.

[22] Finally, although Mr Mazur appeared to wish to have his sequestration recalled, counsel pointed out that this could not be achieved in the present action, which contained only one crave, namely for payment of damages.

Discussion and decision

[23] As noted above, both the sheriff and the Sheriff Principal expressed some sympathy for the position in which Mr Mazur finds himself. At least on the basis of the averments in the present action, and the findings in fact made by the sheriff following the evidential hearing on the minute and answers, it appears that Mr Mazur has not been well served by successive legal advisors. However, we are clearly of the view that his remedy for this does not lie in the present proceedings. We are unable to detect any error of law in the approach adopted by the sheriff or the Sheriff Principal, and we agree with their disposal of this matter.

[24] The question of the ostensible authority of a solicitor acting as procurator in the sheriff court to compromise an action regardless of the instructions of the client was clearly stated in *Mowbray* v *Valentine*, particularly at paragraph [19]:

> "In these circumstances, we consider that it is not open to the appellant subsequently to challenge such an interlocutor upon the basis that his solicitor did not in fact possess authority to compromise the action in the way in which that was done. Plainly, if counsel had been involved in the transaction, there could have been no argument about the issue, since counsel possess an ostensible authority to compromise an action regardless of the instructions of their client. The authorities brought to our attention persuade us that the position of a procurator responsible for the handling of an action in the sheriff court is not different to that of counsel."

[25] That view is binding on us; in any event, we are in complete agreement with it. We can find no sound basis on which to distinguish *Mowbray* v *Valentine* from the circumstances of the present case. The fact that the point in issue in that case was only whether expenses should be assessed on a party and party basis or an agent and client basis does not appear to us to affect the reasoning of the court in that case. Similarly, the fact that that case was concerned only with a solicitor's actings in excess of instructions, rather than in the face of express instructions not to settle, does not change the issue. The question is whether a party to litigation is entitled to rely on the ostensible authority of the solicitor acting for the opposite party to compromise an action. For sound policy reasons it is our law that he is entitled to do so. Of course, if he becomes aware that the solicitor for the opposite party is no longer instructed by that party, or that there is some other substantial and material defect in the relationship of principal and agent on the other side, that might well change matters – he could no longer rely on the ostensible authority of a person whom he knew not to be acting as agent for the principal. However, there is no suggestion of such a situation in the present case. The first occasion on which Mr Mazur drew the attention of the respondents' solicitors to any dissatisfaction with the compromise settlement was on 1 November

2012, by which time agreement to settle the action had been concluded, Mr Grant had returned the signed joint minute to the respondent's solicitors, and those solicitors had sent a cheque for £10,000 to Mr Grant.

[26] There is in our opinion no force in the submission made by Mr Mazur in relation to personal bar. There was in our view no duty of enquiry on the part of the respondents. They were entitled to rely on Mr Grant's ostensible authority. Similarly, we do not consider that there is any force in the argument that there was no concluded agreement to settle the action by means of a joint minute providing for absolvitor and with a cheque being paid; it is clear from the sequence of events that Mr Grant, in the exercise of his ostensible authority, agreed to such a procedure.

[27] Mr Mazur's note of argument makes the point repeatedly that Mr Grant acted fraudulently, and this fraud subverted consent and rendered the contract to compromise the action void. However, nowhere in the pursuer's answers to the defenders' minute are there averments of fraud by Mr Grant. Nowhere in his grounds of appeal to this court does Mr Mazur mention fraud. The sheriff, who had the benefit of hearing the evidence, observed (at paragraph [18] of his note):

> "I do not consider that Mr Grant acted fraudulently but he did go far further than he should have by seeking the agreement of the pursuer's wife rather than the pursuer himself before confirming to the defenders agents that he had authority to settle the case."

[28] A high degree of specification of pleading is required, even of party litigants, in respect of any allegation of fraud. In the present case, there are no such pleadings at all, and the sheriff has concluded that Mr Grant did not act fraudulently. We do not consider that this aspect of Mr Mazur's submissions to us has any substance.

[29] Finally, Mr Mazur made a rather general and vague reference to article 6(1) of ECHR, and asked this court to "intervene under article 6(1) and on equitable grounds to remedy the position and ensure the pursuer obtains a fair and public hearing of his claim against the defenders." We do not consider that article 6(1) gives us power to do such a thing. In any event, we are not persuaded that any rights conferred on Mr Mazur by article 6(1) have been infringed. He raised an action for damages against the defenders, with a single crave for payment. That action was settled on his behalf by the solicitor then acting for him, on the basis that he would receive payment (albeit of a lesser sum than that sued for). On the basis of the sheriff's findings, it appears that settlement on this basis was not in accordance with Mr Mazur's clear instructions. If that is so, he may have a remedy against Mr Grant. In order to obtain that remedy, no doubt he will require to satisfy the court that his original claim against the present respondents was well founded and, if it had proceeded to proof, would have been likely to result in an award of damages greater than the sum achieved at settlement. Mr Mazur will therefore have the opportunity to make his case, and to have a public and fair hearing. However, as was pointed out by the sheriff and the Sheriff Principal, the case cannot now be made against the respondents. As was observed by the court in *Mowbray* v *Valentine* (at paragraph [21]):

> "In our view, if the appellant has any grounds for criticism of what occurred at the time of the settlement of this action, that is a matter which could only be taken up by him directly with his former solicitors."

That view applies equally to the present case.

[30] For these reasons we refuse this appeal and affirm the interlocutor of the Sheriff Principal.