

SCOTLAND / JUDGMENT

McLeod Prentice v Sandeman [2011]

ScotCS CSOH_18 (28 January 2011)

[2011] ScotCS CSOH_18

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[2011] ScotCS CSOH_18 [New search] [Help] OUTER HOUSE, COURT OF SESSION [2011] CSOH
18 A594/09 OPINION OF LORD STEWART in the cause HAMISH McLEOD PRENTICE
Pursuer; against RICHARD ALLAN SANDEMAN Defender: ____ Pursuer: Party Defender:
Haldane QC ; Dundas & Wilson 28 January 2011

- [1] This case called on the Procedure Roll on 14 January 2011 for a debate on the defender's preliminary pleas, namely (1) a plea that the action is incompetent and (2) a plea that the pursuer's averments are irrelevant and lacking in specification. The pursuer appeared on his own behalf. The defender was represented by senior counsel, Ms Shona Haldane QC. At the outset the pursuer moved for amendment of the Closed Record in terms of the pursuer's Minute of Amendment. I granted the motion dispensing with reprinting for the purposes of the debate. The pursuer moved for a continuation to put his pleadings into order. I refused the motion on the basis that, as evidenced by the interlocutors and the Minute of Proceedings, the pursuer had already had months to put his case in order.
- [2] Senior counsel for the defender moved for the defender's preliminary pleas to be sustained and for the action to be dismissed. The pursuer responded and moved the Court to allow a proof before answer, failing which to allow the pursuer further time to put his pleadings into order. Having made avizandum I have decided, with a degree of hesitation, that the defenders' preliminary pleas should not be upheld at this time and that the pursuer should be given a further opportunity to put his pleadings in order as regards both form and substance. Competency of the action

- [3] This is, or is primarily, an action of reparation for professional negligence arising out of the alleged mishandling by a solicitor of a claim for unfair dismissal. The action is an ordinary action initiated by summons. The competency issue raised by the defender is whether the action is "in competent form". The particular point concerns the form of closed record lodged by the pursuer.
- [4] Senior counsel for the defender submitted that failure to lodge a closed record meaning, according to senior counsel, a closed record in proper form could result in dismissal in terms of Rule 22.3 (3).
- [5] The Rules of Court and the forms annexed thereto do not contain comprehensive, prescriptive provision for the form of a closed record. The omission might be thought curious given the centrality of the closed record to our writtenpleadingsbased system of procedure. Finding out what the proper form might be, as far as the Rules of Court are concerned, involves working backwards from the provisions relating to a closed record, through the open record provisions to the summons.
- [6] Rule 22.3 (1) implies that a closed record requires to be in the same form as the open record, the difference being that the closed record is closed to alteration except with leave of the Court. Rule 22.1 (3) provides that "An open record shall consist of the pleadings of the parties and the interlocutors pronounced in the action or cause." It can be inferred that the pursuer's "pleadings" at the stage of the closing of the record consist of the summons with conclusions, condescendence of facts and pleas in law as adjusted, if adjusted.
- [7] In terms of Rule 13.2 a summons has to be in Form 13.2A and the conclusions "in a summons" are to be stated in accordance with the appropriate style, if any, in Form 13.2 B. In terms of the rule there should be annexed to the summons (a) a statement, in the form of numbered articles of the condescendence, of the averments of fact which form the grounds of the claim; and (b) appropriate pleas in law. It appears from the foregoing that there could be ambiguity as to the meaning of "summons": does it consist of the heading, instance and "summons" properly so called beginning "Elizabeth II, by the Grace of God..." and ending "... Given under our Signet at Edinburgh on (date)"; or does it consist of the summons properly so called together with the conclusions? There is room for the interpretation apparently adopted by the pursuer that the conclusions, not being required to be "annexed to the summons", should go where their name suggests, at the very end of the pursuer's pleadings.
- [8] What the Rules do not say is: (1) that the conclusions should follow the summons properly so called and precede the condescendence; (2) that the condescendence and answers should be integrated, with numbered articles of condescendence and relative answers alternating; (3) that the pleas in law, like the articles of condescendence, should be numbered; (4) that the defenders' pleas should immediately follow the pursuer's; (5) that adjustments should be integrated with the pleadings to which they relate; (6) that adjustments which add to the condescendence should contain factual matter. The pursuer told me that the General Department kindly provided him with copies of the relevant rules: but he did not have

access to the annotated version, which offers additional guidance; he did not have access to any style books; nor did he have any specimen closed records.

- [9] The result of the pursuer applying his undoubted but untutored intelligence to the matter is a "Closed Record" extending to 40 pages consisting of separately and in the following order: "Summons", one page; "Condescendence", five pages, 27 numbered paragraphs; "Pleasin Law", one page, three unnumbered paragraphs; "Conclusions", one page, four numbered paragraphs (i) for payment of the sum of £75,180.00 with interest, (ii) for payment of the sum of £80,340 with interest, (iii) for payment of the sum of £1,575 with interest, (iv) for expenses (total sum sued for £157,185.00 with interest and expenses); Defences (consisting of Answers to the Condescendence, following and responding paragraph by numbered paragraph to the Condescendence, with Pleas annexed), three pages, 27 numbered paragraphs, four numbered PleasinLaw; "First Adjustments by the Pursuer", three pages, 25 numbered paragraphs, two unnumbered paragraphs, PleasinLaw in three unnumbered paragraphs, the last page being a page headed "Footnotes" containing "Footnote 1" and "Footnote 2" extending to almost the whole page with five actual footnotes at the foot of the page; Defences as adjusted 12 November 2009, as previously, three pages with added adjustments underlined; "Second Adjustments (for the Pursuer) as at 23 November 2009" , six pages consisting of 22 paragraphs numbered so as to relate to the original Condescendence with PleasinLaw in three numbered paragraphs; "Third Adjustments (for the Pursuer) as at 17 December 2009" , one page consisting of two paragraphs numbered so as to relate to the original Condescendence with reference to an Appendix attached showing "the sums claimed", and a second page with three PleasinLaw in numbered paragraphs; said Appendix consisting of one page, itemising principal sums and interest amounting to a total of £301,698.00; "Fourth Adjustments by the Pursuer as at 27 December 2009" , eleven pages consisting of numerous paragraphs bearing to relate to paragraphs 12, 13 and 14 of the original Condescendence; interlocutor dated 29 October 2009. The pursuer's adjustments contain much commentary and argumentation.
- [10] In addition the pursuer's Minute of Amendment runs to six pages consisting of 35 paragraphs which propose amendments (mostly deletions) to the Conclusions, the First Adjustment, the Second Adjustment and the Third Adjustment in the order in which those adjustments bore to take effect on the original Conclusions and Condescendence, etc.
- [11] Senior counsel for the defender submitted that the proper form of record is to be derived from the annotations in the Parliament House Book as well as from the rules and forms. The annotation in the Parliament House Book , Vol 2, 21A.1.1 at C 175 states: "In the open record in an action, the summons is set out in full, but, after each article of condescendence there is set out the relative answer in the defences of each defender in turn; after the pursuer's pleas there are set out the pleas of the defender(s). At the end there are set out the interlocutors pronounced before the open record was made up..." While this is certainly useful guidance that takes matters a stage further than the rules, it could not be correct to treat it as having the force of a statutory rule. Compare the commentary on the adjustment

process in the Parliament House Book , Vol 2, 22.2.3 at C 178: "... The adjustments are written on, or typed on papers apart attached to, a copy of the open record. Each party prepares an intimation print incorporating the adjustments which is intimated to the other parties. Different colours should be used for adjustments made at different times and [the] date on which those adjustments were made should be marked on the back of the backing of the open record." This guidance harks back to the practice of preword processor, prelaptop days. Are adjustments now to be rejected or found to be incompetent because they are not "written on, or typed on papers apart" using "different colours" for "adjustments made at different times?" I do however accept as valid the general proposition that the provisions of the rules must be interpreted in the light of established practice having regard to the established meaning of technical terms such as "pleainlaw" and having regard also to the purpose which the closed record is intended to serve.

- [12] Senior counsel submitted that the purpose of the closed record is to encapsulate the case on either side in order to focus the dispute and to enable the Court to know and determine (a) the precise remedy that the pursuer seeks from the Court (so that decree can be pronounced in terms if appropriate); (2) whether the remedy is based on averments of fact that amount to a relevant case in law; (3) what legal propositions, formulated as pleas, connect the facts logically with the remedy (4) whether the evidence led is within the scope of the claim as defined by the averments; and (5) whether the facts found make out the case averred. (I would also add that the pursuer's writ must on its face seek a remedy which it is within the power of the Court to grant.) Senior counsel submitted that on no reasonable assessment could it be said that there was before the Court in the instant case a record upon which a judicial determination could be made.
- [13] Senior counsel developed her submissions by referring to selected elements of the pursuer's pleadings in some detail: there are multiple versions of the conclusions; there seems to be a claim for penal damages; the averments as adjusted contain comment and argumentation; and the so-called pleasinlaw look like conclusions in form and substance. It would be tedious to repeat the detail. Suffice it to say that, subject to the fact that the pursuer's Minute of Amendment has now removed much extraneous material, the pleadings are idiosyncratic.
- [14] The pursuer stated that the General Department of the Court of Session had given him a copy of the relevant rules but not of the annotations. The pursuer had not previously seen the annotations to the Rules of Court. He had bought a text book on Court of Session procedure but the book did not contain the information in the annotation quoted by senior counsel. The pursuer had not consulted the collections accessible through National Library of Scotland. He had not been able to obtain an example of a record. When he lodged his adjustments, they were accepted by the General Department. He now understood that adjustments should be integrated with the pleadings. The pursuer explained that the Appendix referred to in the adjustments was not part of the pleadings.

- [15] The pursuer accepted that his pleadings are a mess. The Minute of Amendment was an attempt, he said, to remove a lot of the mess. He thought that the pleadings were in such a state that it was "probably correct that the case was not fit to proceed" as it stood.
- [16] I agree. The pleadings are a mess; and, yes, my assessment is that there is not before the Court in the instant case, at this time, a closed record upon which a determination can be made without unreasonable and possibly fruitless application of resources. One aspect that is important in the present situation is that it is not practicable in the state of the closed record to specify which averments would fall to be excluded from probation. This is not however a matter of fundamental and incurable incompetence.
- [17] The question then is how will the interests of justice be best served? Should the pursuer be given an opportunity to put matters right, if he can, within the existing process; or should he be required to start again, if so advised? The issue involves considerations of both equity and expediency. One factor is whether and to what extent the pursuer might have a relevant claim. But first, it may be important to know something about the background. Background to the case
- [18] Parties were agreed that I could look at certain of the pursuer's productions for the purpose of understanding the background (which may not be reliably set forth in the pleadings.)
- [19] For more than thirteen years up to 18 January 2004 the pursuer was employed as an unqualified executry assistant or paralegal by Messrs Gair & Gibson, Solicitors, Falkirk . On 18 January the pursuer resigned. On 17 March 2004 the pursuer made an application to the Employment Tribunal claiming unfair constructive dismissal. He sought compensation. He was represented in the proceedings by the defender. The hearing took place on 6 and 7 July 2004 . The pursuer and his former employers gave evidence. The pursuer's application was unsuccessful. The Tribunal issued its decision to that effect by decision letter dated 16 August 2004 . The reasoned decision of the Tribunal was issued on 14 October 2004 . The pursuer instructed the defender to lodge an appeal.
- [20] Notice of appeal was lodged on 22 November 2004 . By letter dated 24 November the Employment Appeal Tribunal advised the defender that the appeal was not in proper form. An appeal in proper form, but out of time, was lodged on 8 December 2004 . By letter dated 10 January 2005 the Appeal Tribunal advised the defender that the appeal was thirteen days out of time and that an application for an extension of time should be lodged. The defender disputed that the application was out of time. A final order appears to have been made on 16 May 2005 , striking out the appeal. By letter dated 13 July 2005 the Appeal Tribunal advised the pursuer personally that his appeal was timebarred and that no application for extension of time had been received in spite of the fact that reminders had been sent to the defender on 10 January, 4 March, 30 March and 25 April 2005.

- [21] By letter dated 29 December 2005 , the pursuer made a complaint to the Law Society of Scotland. The complaint was apparently treated as one of inadequate professional services under seven heads and of professional misconduct under two heads.
- [22] The pursuer's complaint of inadequate professional services seems to have been upheld under a number of heads. The pursuer's averments state, and he repeated at the bar, that pursuer was awarded £1,500 compensation and that the defender has not paid the compensation. The pursuer has not produced documentation to confirm the award but it seems probable that he did receive an award of some amount. The pursuer also states that a note appended to the award stated that the defender was prohibited from charging fees for the inadequate services provided.
- [23] By interlocutor of the Scottish Solicitors' Discipline Tribunal dated 23 August 2007, the pursuer's complaint of professional misconduct against the defender was upheld under one head, namely that the defender misled the pursuer by stating in a letter to the pursuer dated 25 April 2005 that the pursuer's appeal had "failed to get through the sift" when the true position was that the appeal was out of time and the defender knew that no sift had taken place. The defender was censured and fined £1,500. Publicity was ordered to be given to the decision.
- [24] By letter dated 1 September 2009 the defender rendered notes of fee to the pursuer in the total sum of £4,241.74. Copies are produced. At least £3,102.88 seems to be attributable to services rendered in connection with the pursuer's unfair dismissal claim. The defender gave credit for £1,500 in respect of "less credit note" giving a balance due of £2,741.74. The letter states that unless payment were received by 11 September 2009 a writ would be issued. On 24 September a Small Claims writ was served on the pursuer claiming £2,741.74 with interest at 10% per annum from 1 September 2009 . The pursuer stated at the bar that the Sheriff had sisted the proceedings pending the outcome of the Court of Session action. (There must be an issue as to whether these claims have prescribed, relating as they do, or to the extent that they do, to work carried out before 24 September 2004).
- [25] The pursuer stated at the bar that he was and is financially eligible for Legal Aid. In 2006 the pursuer consulted a solicitor on the Law Society of Scotland's Legal Aid panel. The solicitor was based in Dumfries and communications had been by telephone and in writing. The solicitor obtained an independent opinion and told the pursuer that the pursuer's claim against the defender could not succeed because the pursuer "would have lost his claim for unfair dismissal." The inference is that the pursuer could not qualify for Legal Aid for representation because he was thought to have no "probable cause."

- [26] The pursuer explained that he had not consulted the local Citizen's Advice Bureau because the legal adviser was a partner in his former employers' firm. He had not applied to the Faculty of Advocates free representation unit because he understood that he needed a solicitor to do that and he did not have a solicitor. The pursuer had therefore raised proceedings on his own. The "Closed Record" does not disclose the date of signetting. The action has a 2009 reference number, A594/09.
- [27] As best as I can make out, trying to put together the pursuer's six different pleading documents, the pursuer now claims: (1) £75,180 in damages made up of (a) £60,000 for loss of the unfair dismissal award against Messrs Gair & Gibson, his former employers, (b) £12,000 for loss of employment prospects because of damage to professional reputation and (c) £3,180 in respect of loss of bonus entitlement in his former employment for the year 2003; (2) £80,340 in damages made up of (a) £60,000, previously penal damages against the defender for lying, now for inconvenience and discomfort resulting from the repossession of the pursuer's flat and a sixmonth period of homelessness, (b) £15,000 for loss of equity in his flat which was repossessed by the lenders and
- (c) £5,340 being a proportion of his debts which ceased to be covered by a payment protection policy; and (3) payment of £1,500, being the unpaid Law Society of Scotland award against the defender. Relevancy of the pursuer's averments: submissions for the defender
- [28] Senior counsel for the defenders explained that, as she understood the pursuer's claim, it was a claim in respect of the defender's failure to lodge the unfair dismissal appeal in time. She referred to the "closed record", page 5, paragraphs 22 and 24. Senior counsel submitted that though the pursuer's averments of fact in the original condescendence were relevant so far as they went they were not sufficient. There was an entire absence of legally relevant averments as to the content of the professional duty of care and as to the particulars in which the defender was alleged to have fallen short in his duty. Senior counsel referred to *Hunter v Hanley* 1955 SC 200 at per Lord President Clyde. The Lord President set out in that passage the facts necessary to be proved to establish liability on the part of a professional person. What was said in that case about doctors applied to other professionals *mutatis mutandis*. The pursuer did not make the requisite averments. His action was accordingly irrelevant.
- [29] There was also a complete absence of averments making a causal connection between the alleged breach of duty and the losses claimed to have been sustained. If the pursuer wished to recover the consequential losses which he claimed to have sustained as the result of the failure of his unfair dismissal appeal, he must aver for a start that his appeal would have been successful or would have been settled in an amount such that the consequential losses would not have been incurred. The pleadings disclosed no intelligible link between the supposed breach of duty and the losses claimed. Senior counsel very properly reminded me of a decision which, in principle, favours the pursuer, namely the decision in *Kyle v Stormonth Darling* 1993 SC 57. That case is authority for the proposition that when a solicitor negligently fails to prosecute a claim, with the result that the claim fails, the loss of

the opportunity to advance the claim is in and of itself a compensable loss: there is no need to prove that the claim would have been successful. Senior counsel submitted that the pursuer in the instant action did not advance a claim of that sort for loss of opportunity.

- [30] Senior counsel reminded me of the test for dismissal on the ground of irrelevancy under reference to *Jamieson v Jamieson* 1952 SC (HL) at 50 per Lord Normand: "... an action will not be dismissed as irrelevant unless it must necessarily fail even if all the pursuer's averments are proved." Senior counsel submitted that the test was satisfied and that the pursuer's action ought to be dismissed. Relevancy of the pursuer's averments: submissions for the pursuer
- [31] The pursuer explained that his claim was for omissions by the defender in both the first instance proceedings and the appeal. The condescendence referred to three distinct areas of negligence: (1) at article 7 of condescendence it was averred that the defender, who had agreed to represent the pursuer, failed to lodge the application form with the Employment Tribunal; (2) at articles 10, 11 and 13 of condescendence it was averred that the defender failed to give the pursuer an opportunity to review or revise the written submission for the pursuer at the first instance and that had the submission been properly worded the pursuer should probably have won his case; (3) at articles 1618 of condescendence it was averred that the defender had failed to progress the appeal with the result that the appeal became timebarred. I have tried as best I can to understand these three cases by reading the original averments subject to all subsequent alterations.
- [32] The pursuer further submitted that he thought the test for professional negligence was satisfied by the proceedings before the Law Society of Scotland and the Scottish Solicitors' Discipline Tribunal where the defender was judged by his peers.
- [33] The pursuer did not make a distinct submission about the causal connection between the negligence averred and the losses claimed. Relevancy of the pursuer's averments: discussion
- [34] Although I do not accept the submissions for the defender in their entirety, I am satisfied that the *Jamieson* test for dismissal [*supra*] is met, in one way or another, at least as regards the negligence cases. (There is also a claim for payment of the Law Society Award of £1,500.) The pursuer's first case, which concerns the failure to lodge the Employment Tribunal application form, is irrelevant because the omission did not result in loss to the pursuer or at least did not result in the losses for which the pursuer now makes a claim. The pursuer himself lodged the form and the application proceeded.
- [35] The second case, which concerns the defender's failure to incorporate points in the first instance submission, is not adequately pled as a case of professional negligence. To have a relevant case the pursuer must aver, if he has a factual basis for doing so, that no solicitor of ordinary competence would have failed to make the submissions which the pursuer thinks should have been made. If the case is one of failure to follow express instructions, the pursuer ought to plead it that way. He might plead the case both ways. It seems to me that he does not categorically advance either case. In the present state of the averments of breach of

duty this case is also irrelevant. As regards causation the case does contain the averment which is essential to connect the alleged omission with the losses claimed; at article 13 the pursuer avers: "...had the submission been properly worded... the Pursuer should probably have won his case."

- [36] The third case is about the defender's failure to lodge the pursuer's appeal in proper form and on time. The case is relevantly pled as a breach of duty in my view. *Hunter v Hanley* [supra] was about the exercise of professional judgement in departing from standard practice. The pursuer's case is not a standard practice case; and abiding by mandatory procedural deadlines is not a judgement call. Perhaps not everyone shares my view. Clearly if the pursuer wished his pleadings to be uncontroversial he would aver that "no solicitor of ordinary competence would have failed to lodge the appeal timeously and in proper form" etc, even if on one view such averments would be superfluous in this situation. But that is not an end of the matter. In order to succeed with this case the pursuer has to go a step further and prove that the appeal would have succeeded if it had not been timebarred. That is not something that he does offer to prove. This case too is irrelevant. There is a further point: the pleadings do not make it clear whether the appeal could only have succeeded if the desiderated submission had been made at the first instance.
- [37] The pursuer's averments do not disclose a relevant causal connection between the defender's alleged negligence and at least some of the losses referred to above, most obviously loss of bonus, repossession of the flat, loss of equity in the flat and loss of payment protection cover.
- [38] It would have been open to the pursuer to make a relevant case along the lines of *Kyle v Stormonth Darling* [supra], but he does not do so. He claims consequential losses which are contingent on the unfair dismissal application succeeding at first instance or on appeal. There is no reason in theory why he should not make both sorts of claim, namely a claim for the loss of the opportunity to have his appeal presented and a claim for the losses that followed because his appeal failed.
- [39] If the negligence claims are irrelevant, all that is left is the claim for the Law Society award of £1,500. As a standalone claim the sum sued for is below the jurisdictional limit of the Court of Session. There was no discussion during the debate as to whether it was competent to combine this claim with the negligence claims in one ordinary action. The defender does not admit that the award was made. The pursuer does not produce vouching nor does he, or did he at the debate, challenge the relevancy of the defence to this item. In other circumstances it might have been appropriate to grant decree de plano for the Law Society award. Decision

- [40] Clearly there are options for disposing of this matter including giving the pursuer another opportunity to put his pleadings in order as to both form and substance. Factors in favour of that course include the substantive justice of the situation in that, on the pursuer's account, it is entirely possible that he has a good claim at least for the loss of the "right" to appeal and for payment of the Law Society award.
- [41] Factors against prolonging these proceedings include the failure of the pursuer to take advantage of the opportunity previously allowed to put his case in order, the fact that he does not have a supportive professional opinion, the fact that it might take several more Court hearings with a reprinting of the record, deletions and amendment to put the pleadings in order.
- [42] I note that the current proceedings were served on the defender, according to the execution of service, on 18 August 2009, that is five years and two days after the date of the first instance decision letter, 16 August 2004. There is a dispute as to the date the pursuer learned about the first instance decision from the defender. It seems on the pleadings that it could not have been earlier than 19 August 2004. Ms Haldane QC submitted that the fiveyear prescriptive period had been interrupted during the subsistence of the action: D Johnston, Prescription and Limitation (Edinburgh, 1999), paragraphs 5.045.15. I think, when senior counsel made that submission, she was under the impression that the action was solely about the alleged mishandling of the unfair dismissal appeal over a period into 2005.
- [43] Dismissing the action now could well lead to prescription issues in relation to the claim for alleged mishandling of the first instance proceedings in 2004. I am swayed by this consideration. All in all, while recognising that the decision must be a hard one for the defender, I take the view that the appropriate course is to allow the pursuer another opportunity to put his pleadings in order.
- [44] I have considered whether the defender ought to be ordained to make up the record. I have come to the view that the pursuer should do it: he ought by now to understand what a record is meant to look like and he knows best how the various bits of his pleadings are meant to interrelate. I shall ordain the pursuer to lodge a closed record in proper form and put the case out By Order to be addressed on further procedure. In the meantime I would expect the pursuer to seek professional assistance. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotCS/2011/2011CSOH18.html>

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