OUTER HOUSE, COURT OF SESSION

[2017] CSOH 131

P147/17

OPINION OF LORD BRAILSFORD

In the Petition of

(FIRST) DRIKA BVBA,
(SECOND) ROGER VAN CRAEN
& (THIRD) NV MALU

Petitioners

against

CLAIRE GILES

Respondent

Petitioners: Bell; Russel + Aitken LLP
Respondents: Reid; Brodies LLP

20 October 2017

[1] In this petition the petitioners sought registration of a judgment of the 9B Division of the Court of First Instance of the judicial district of Antwerp dated 24 December 2013. The petitioners narrated that they were parties having an interest to enforce the judgment because it was granted in their favour for payment of a sum of money due by the respondent to them. The petitioners sought warrant to register the judgment for execution in terms of Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters in accordance with the Civil

Jurisdiction and Judgments Order (SI 2001 No 3929) 2001 Schedule 1 paragraph 5(2). The petition was presented under the provisions of Rule 62.28 of the Rules of the Court of Session 1994. By interlocutor dated 16 February 2017 Lord Boyd of Duncansby granted warrant to the Keeper of the Registers of Scotland to register a copy of the said judgment and appointed the petitioners to serve a copy of the interlocutor on the respondent. The interlocutor stipulated that the respondent had a period of one month after such service to appeal against the grant of warrant for registration. Answers were lodged by the respondent within the stipulated time period and after sundry procedure a Substantive Hearing on the issues raised in the answers was ordered to take place on 29 September 2017.

[2] Prior to the Substantive Hearing Notes of Argument were lodged for the petitioners and the respondent. It was apparent from the terms of these Notes that there was agreement between the parties that in the context of the present case the relevant part of Rule of Court 62.28 was no longer in existence on 16 February 2017 when warrant for registration was granted. Counsel for both parties agreed that this was the situation when they addressed the court at the Substantive Hearing. The common position of the parties may be summarised as follows. The judgment which the petitioners seek to enforce is a judgment to which Regulation (EC) 44/2001 applies. That regulation requires that a judgment be registered for enforcement in the manner specified by the law of the relevant Member State: Article 38(2) and 40(1). The petition proceeds under Rule 62.28 of the Rules of the Court of Session. Part V of Chapter 62 of the Rules of the Court of Session was amended by the Act of Sederunt (Rules of the Court of Session Amendment) (Regulation (EU) SI No 1215/2012 2015. This Rule provides in paragraph 2 that Chapter 62 is no longer to apply to cases brought under the "Council Regulation" – that is Regulation (EC) 44/2001 (see Rules of the Court of Session Rule 62.26(1). That Act of Sederunt came into force on 7 February 2015. It

follows that the part of the Rules of Court upon which the petitioners rely is no longer in existence. The Belgian judgment upon which the petitioners found is one to which Regulation (EC) 44/2001 applies. The consequence of all this is that the judgment can no longer be enforced under Rule 62.28 of the Rules of Court. As I have already narrated this conclusion was common ground between the parties.

[3] Against the foregoing background there appeared to be general consensus between counsel appearing for both parties that there was a lacunae in the law. Neither party attempted to suggest that there was any intention to prevent decrees from other member states of the European Union being registered. Mr Bell for the petitioners expressly submitted "… that the Rules Council over looked the fact that the Brussels I Regulation remains in force (and in practice is likely to govern the majority of applications for the next few years)" and therefore suggested that the lacunae arose as a result of an error. Mr Reid for the respondent submitted that he had no explanation for the lacunae but in the absence of any information was not prepared to concede that it was the result of any error in those responsible for the Rules.

[4] The submission of counsel for the petitioners was that there were two means whereby what, as he submitted, was the obvious intention of Regulation (EC) 44/2001 could be implemented. The first was that the Regulation was plainly of direct effect and therefore conferred a jurisdiction on this court to entertain applications for registration of judgments from other member states. His second submission was that in any event this court had an inherent power to do what was necessary to "discharge its responsibilities". Having regard to the terms of Regulation (EC) 44/2001 counsel submitted that the court had a direct responsibility to ensure that a mechanism existed for the registration of decrees emanating from the court of another member state. This was developed by submitting that the petition

was presented in accordance with Form 62.28 of the Rules of Court which was the previously prescribed mechanism for applications under the Council Regulation. It was submitted that a petition in this general form remained competent notwithstanding the absence of specific provision in the Rules and by exercise of its inherent power the court would be entitled to register the judgment. In relation to the argument on inherent power reliance was placed on the Inner House decision in *Hepburn* v *Royal Alexandra Hospital NHS Trust* 2011 SC 20 and in particular to passages in the Opinion of Lord Carloway at paragraphs [52] and [53].

[5] The submission of the respondent was first to observe that the repeal of the application of Regulation (EC) 44/2001 had been expressly provided for by Act of Sederunt. The present petition had therefore been presented in reliance upon a provision which was no longer in existence. The present application was therefore incompetent because the court had no jurisdiction to entertain the application. It did not follow from that repeal that a lacunae had been created in the law in relation to registration of judgments of other member states. The common law remedy of decree conform could still be relied on. Counsel further submitted that even if he was incorrect in these submissions and there was a lacunae in the law, the correct form of procedure was by application to the *nobile officium* of the Court of Session and not by recourse to the method suggested by counsel for the petitioners.

[6] In response to the argument that Articles 38 and 40 of Regulation (EC) 44/2001 had direct effect and how this avenue could be enforced by use of the procedure formally in place, counsel for the respondent relied on two decisions of the Court of Justice of the European Communities, *Azienda Agricola Monte Arcosu Srl* v *Reginoe Autonoma Della Sardegna* [2002] 2 CMLR 14 (in the Opinion of the Advocate General at paragraphs A6 and A7, in the judgment of the court at paragraphs 26 and 28), and *OBB-Personenverkhr AG* v *Schienen-Control Kommission*

and others [2014] 1 CMLR 51 (Opinion of the Court paragraphs 54-60). The gravamen of these decisions was that where member states were given freedom to devise their own procedural method for implementing Council Regulations, which was the case in relation to Regulation (EC) 44/2001, the doctrine of direct effect did not extend to interference with the member states' procedural provisions for implementation.

[7] In response to the argument that this court had an inherent power to provide a remedy the submission was that such a power requires, in the light of authority, to be exercised sparingly and with care. Counsel for the petitioner was submitted to have overstated the ambit of the dicta by Lord Carloway in *Hepburn (supra)* at paragraph 53. It was observed that the final sentence in that paragraph provides; "Where there is no rule or practice, a court may require, of necessity and in certain circumstances, to create a practice in order to ensure that justice is achievable." It was pointed out that the present circumstances dealt not with the practice of the court but with the procedure stipulated in Rules of the Court. Moreover this was a case where there had been a rule in existence but that rule had been expressly repealed by Act of Sederunt. These circumstances were to be distinguished from a situation where a practice had been superseded or for some other reason had become deficient. In that regard the court's attention was drawn to the decision of the Inner House in *Taylor Clark Leisure Plc* v *Commissioners for HM Revenue & Customs* [2015] SC 595 and in particular to the Opinion of the Lord Justice Clerk (Carloway) at paragraph [30]. In that case the Lord Justice Clerk observed that where a court had been given power by Parliament to promulgate Regulations and had chosen not to do so it would be inappropriate for the court, even the Inner House, to exercise an inherent jurisdiction to create rules. By analogy in the present case a court should not exercise any inherent jurisdiction where the body constituted to make rules had repealed a provision. It was submitted that the correct approach to the use of inherent powers was still that set forth in *Hall*

v *Associated Newspapers Ltd* 1979 JC 1 by the Lord Justice General (Emslie) which in itself was derived from a passage in Erskine's "*An Institute of the Law of Scotland*" in Book 1 Title II paragraph 8. The emphasis on that passage was said to be on the existence of a jurisdiction: "… every power is understood to be conferred without which the jurisdiction cannot be explicated." In the context of the present case a repeal of the relevant rule of court entailed that there was no jurisdiction in the circumstances of the present case to register the foreign judgment. It followed that in the absence of the jurisdiction there could be no scope for the exercise of an inherent power.

[8] In response to the submissions of counsel for the respondent counsel for the petitioners presented a Minute of Amendment. The petition as presented in paragraph 6 simply stated that the petition was "… made under Rule 62.28 of the Rules of the Court of Session 1994". Counsel sought to delete this reference and substitute therefore: "presented under Regulation (EC) 44/2001 *et separatum* Rule 62.28 of the Rules of the Court of Session 1994 and at common law". A motion to amend was formally opposed. It appeared to me that the proposed amendment represented an acceptance by counsel for the petitioner that it was difficult to rely upon a rule which no longer existed and that his proposed amendment reflected the arguments he had in fact advanced in relation to direct effect of the European Regulation which failing a reliance on the exercise of the inherent jurisdiction of the Court of Session. These arguments had been met in submission by counsel for the respondent. In light of these considerations, which appear to me to do no more than allow the court to consider all the arguments before it, I allowed the petition to be amended.

[9] The circumstances in which this petition is presented to the court seemed to me to be highly unusual. Like both counsel who appeared I can think of no plausible reason why the Rules of Court could have been amended in the way they were which seem to impede the

ability to register certain decrees of courts of member states of the European Union. Whilst I find it relatively easy to reach that conclusion I am less certain whether this reflects, as was suggested by counsel for the petitioners, an error on the part of the Rules Council or there exists some other explanation. Whilst the position is apparently unsatisfactory I do not feel able to conclude that there has been an error. The implication of this is that there is no mechanism in the Rules of Court for registration of a decree such as the one in the present petition.

[10] A question therefore arises as to whether there is any other method whereby the decree may be registered thus avoiding the necessity of reliance on the common law remedy of decree conform or, potentially, an application to the *nobile officium* of the Court of Session.

[11] The first suggestion of an alternative route made by the petitioners was that the Regulation had direct effect. I have little difficulty in agreeing with the proposition albeit it was made in very general terms, that Article 38 has direct effect. The terms of the provision are general and the underlying intention is explicable and clear. The problem for this argument is however that Article 40 makes it clear that "The procedure for making the application shall be governed by the law of the Member State in which enforcement is sought." The two authorities relied upon by the respondent appear to me to demonstrate that in circumstances where procedural implementation is left to a member state the ECJ will not recognise direct effect of the procedural requirement. In the circumstances in this case it is plain that the Rules of Court are merely a procedural mechanism for implementing the overall purpose of recognition of foreign decrees. Direct effect for these procedural mechanisms would appear to be precluded by the aforesaid decisions of the ECJ. I accordingly conclude that there is no argument on direct effect available to the petitioners.

[12] Turning to inherent jurisdiction I would firstly observe that on the basis of all the authorities cited to me it is clear that the court must use its powers in this area with caution.

The court should not seek to devise rules in relation to the practice of the court lightly. Whilst the court has some inherent power to regulate matters of practice the scope to interfere or innovate in relation to procedure controlled by Rules of Court is far more limited. That is exactly the position which applies in the present case. It follows that I do not feel able to rely on any inherent power as a means to innovate in the way suggested by counsel for the petitioners.

[13] I appreciate that by rejecting the arguments advanced by the petitioners they may be left with no option but to seek decree conform. I acknowledge that this may involve further procedure and incur additional expense. I would not regard these practical considerations, albeit I acknowledge their significance, as justification for innovation.

[14] In light of all the foregoing I will allow the appeal, recall the warrant for registration, and order cancellation of the registration of the judgment.