



OUTER HOUSE, COURT OF SESSION

[2022] CSOH 94

P657/22

OPINION OF LORD WEIR

In the petition

HUGH HALL CAMPBELL KC

Petitioner

against

JAMES FINLAY (KENYA) LIMITED

Respondents

Petitioner: Smith KC, C Smith; Thompsons

**Respondents: Lord Davidson of Glen Clova KC, A McKenzie KC, Boffey; CMS Cameron
McKenna Nabarro Olswang LLP**

20 December 2022

Introduction

[1] On 24 August 2022 Lord Braid granted interim interdict and an interim order under section 46 of the Court of Session Act 1988. He issued both an opinion ([2022] CSOH 57) and a note of reasons subsequent to a discussion on the precise terms of the orders to be pronounced. The circumstances giving rise to the orders are fully set out in those documents. The respondents have now applied for recall, or more properly a variation, of parts 3(a) and 3(c) of Lord Braid's order to enable them to file written submissions in the

Kenyan anti-suit petition currently before the Employment and Labour Relations Court in Nairobi. I heard submissions on the respondents' motion on 14 December 2022.

Background to the motion

[2] The petition, and associated group proceedings have a protracted procedural history. I have already set out the background to the granting of the interim interdict of 24 August 2022, and other procedural developments in the group proceedings, this petition process, and the petition P305/22 (in which the petitioner seeks interdict of certain alleged conduct on the part of the respondents), in the note which I prepared and issued with the interlocutors following the preliminary hearing in the group proceedings, and the calling of the petition processes, on 30 September 2022. In dealing with the submissions advanced in support of the application for recall it is assumed that those considering this decision will be familiar with the contents of that note. It is sufficient to notice that, on 30 September, in both petition processes, I fixed an evidential hearing on the petition and answers, with a diet due to proceed at the end of February 2023. Both petitions were appointed to call for a case management hearing on 25 November 2022. Meantime, I allowed minutes for breach in both petitions to be received and answered, with a procedural hearing fixed in the first instance for 11 November 2022. I sisted the group proceedings meantime for a period of six weeks, for the reasons set out in paragraph [39] of my note of 30 September 2022, and appointed them to call by order (alongside the minutes for breach) on 11 November 2022.

[3] The petitioner then raised a third petition for interdict against the respondents (P866/22). Against a background in which new claimants wished to opt into the group proceedings, the purpose of the petitioner's application was to protect the identities of such new claimants from disclosure to third parties all for the reasons narrated in the petition.

On 1 November 2022, having heard parties on the petitioner's opposed motion, I granted interim interdict in the following terms:

“interdicts *ad interim* [the respondents] from providing any information to any third party (viz a party not employed by the respondents) which identifies or is capable of identifying any person added after 30th September 2022 to the list of Group Members in the Group Proceedings with Court of Session reference number GP1/22, with the intention on the part of the respondents that that information be utilised by any such third party for the purpose of raising anti-suit proceedings in Kenya ...”

Lest it be of any interest, my reasons for pronouncing that order are explained in the note of reasons attached to the interlocutor of 1 November 2022. The petition is currently sisted.

[4] At the hearing on 11 November 2022 I was addressed by parties on further procedure in both the group proceedings and the minutes for breach. It being accepted for the time being by the present petitioner that the anti-suit injunction in Kenya precluded any further progress being made in respect of claimants who were respondents to the Kenyan petition, but there now being no objection to this course of action by present respondents, I ordered that the group proceedings progress in respect of group members who joined those proceedings after 30 September 2022 (ie those unaffected by the Kenyan anti-suit injunction). I also made ancillary procedural orders on the matter of adjustment in both the group proceedings and minutes for breach, and management of the group register.

[5] At the hearing on 11 November I was also advised that the Kenyan court had disposed of, and repelled, the preliminary objection to the Kenyan anti-suit petition. The petition was to proceed by way of written submissions with the current respondents ordered to file and serve submissions within 14 days of 28 October. Such were the circumstances in which senior counsel sought permission from this court for the respondents to do so notwithstanding the terms of Lord Braid's order of 24 August 2022. I declined to do so. It seemed to me that, given the Kenyan court's decision to deal with the

Kenyan petition by way of written submissions, I was in effect being invited to recall Lord Braid's interlocutor without a motion having been enrolled and without being properly and fully addressed on whether the developments in Kenya amounted to a material change of circumstances.

[6] On 25 November 2022 this petition and petition P305/22 called for a case management hearing. The group proceedings called by order on the same date and I made various orders concerning adjustment and the exchange of lists of witnesses etc. in each process. I also directed that the pleadings in the group proceedings focus on the issues of jurisdiction and *forum non conveniens*, it being anticipated that those issues would require to be disposed of *ab ante*. Senior counsel for the respondents also moved for leave to reclaim my refusal to grant permission for submissions to be lodged in the Kenyan petition. I observe, in passing, that it did not appear that the respondents had been penalised for not lodging submissions timeously. I refused leave for substantially the same reasons as I refused permission in the first place. It was still open to the respondents to lodge a motion for recall of Lord Braid's order but they had elected not to do so in the intervening period. That position has been altered by the lodging of the present motion.

Submissions for the respondents

[7] The respondents sought in effect a modification of paragraphs 3(a) and 3(c) of the order of 24 August 2022 to the extent of enabling the respondents to comply with extant orders of the Kenyan court and such orders as the Kenyan court may make from time to time. The immediate purpose of the proposed modification was to enable the respondents to comply with the order to lodge written submissions in the petition process.

[8] Senior counsel submitted that the position had materially altered since Lord Braid pronounced his interim orders on 24 August 2022 and Lord Ericht's refusal to recall them. He relied, in particular, on (i) the appearance of the petitioner in the Kenyan proceedings to challenge the competency of the petition; (ii) the now acceptance by the petitioner that the claims of the initial 1044 group members required to be sisted in recognition of the anti-suit injunction; (iii) the absence of any resolution to the question whether the respondents had sought a stay in the Kenyan proceedings wrought by the lodging by the petitioner of the preliminary objection; (iv) the fixing by the Kenyan court of "a full hearing of the range of issues raised in the Kenyan petition" for 2 December 2022; (v) the willingness of the Kenyan court to hold a full hearing notwithstanding the passing of the 2 December date; (vi) the unsoundness of the petitioner's contention that the respondents' petition would be discharged by the Kenyan court on being seised of the terms of the interim interdict; and (vii) the starkness of the conflict in jurisdictions given the Kenyan court's rejection of the preliminary objection and the ordering of a full hearing on the petition.

[9] On the last of the enumerated points senior counsel observed that, notwithstanding the respondents' appearance before it, the Kenyan court had declined to recall its interim order or stay the Kenyan proceedings. That much was clear from the terms of its order of 25 August 2022 (to which, I observe, Lord Ericht was referred in the motion for recall before him). There remained a dispute as to whether the respondents' counsel had actually applied for a stay of the Kenyan petition. The respondents had sought to return to the Kenyan court for clarification on that matter but that was overtaken by the lodging of the preliminary objection. Following the Kenyan court's refusal of that objection and holding that the respondents' "clarificatory application" was spent, the Kenyan Court had fixed *ex proprio motu* a full hearing and ordered the filing in advance of written submissions.

[10] These changed circumstances justified recall to the extent sought by the respondents. Such recall was, in any event, justified by reference to the principle of comity and as a matter of utility. It was plain that the Kenyan court perceived Lord Braid's order to have extra-territorial effect (cf *Turner v Grovit* [2002] 1 WLR 107, paragraphs 23; 28-29). Comity was a term of elastic content but its requirements entailed respect for the dignity and independence of sovereign states. It was characterised by deference, sensitivity and respect where there was a risk of intrusion beyond the limits of Scottish territory (*Dicey, Morris and Collins on Conflict of Laws*, 16th Edition, paragraphs 7-002-7-019; 12-126-12-127). Preservation of comity between foreign sovereign nations required caution and sensitivity. Reference was made to *Masri v Consolidated Contractors International (UK) Ltd (No 3)* [2009] QB 503; *Stichting Shell Pensioenfond v Kryss and another* [2015] AC 616, and *Star Reefers Pool Inc v JFC Group Co Ltd* [2012] EWCA Civ 14. The group proceedings exhibited a strong, even overwhelming, connection with Kenya. The strength of that connection justified greater caution on the part of this court and a greater need to temper its intervention. Comity would be negatively affected if the respondents were prevented from complying with orders of the Kenyan court.

[11] Finally, it was submitted that there was considerable utility in the Kenyan court making a decision on a matter of Kenyan law (*Dana Gas PJSC v Dana Gas Sukuk Ltd* [2018] EWHC 277 (Comm.)). Where the group proceedings were concerned, the dominant and natural connection was with Kenya. In both the group proceedings and the petition processes the court would have to decide on questions of Kenyan law. The Kenyan court was better placed to issue a judgment on what Kenyan law was on these matters. A decision from the Kenyan court was likely to be available in advance of the evidential hearing which

was fixed for late February/early March 2023. The petitioner was now a party to the Kenyan proceedings and could make submissions in them.

Submissions for the petitioner

[12] The petitioner moved in the first instance that the motion be continued to enable him to make further adjustments on matters bearing upon access to justice in Kenya (including lack of legal aid, QOCS orders, funding, resources for mass party litigation, delay and confidence in the Kenyan legal system). These issues were relevant to the balance of convenience but had not been fully pled given the order in which parties were currently adjusting in the group proceedings. Ultimately, the petitioner sought a postponement of the hearing of the motion until after the evidential hearing in February/March 2023.

[13] *Esto* the motion was not continued, it should be refused. The principle underlying contentions of the petitioner in seeking interim interdict were (i) the respondents were domiciled in Scotland; (ii) they had already submitted to the jurisdiction of the Scottish courts by making substantial and substantive arguments in the group proceedings (and reclaimed against permission having been granted); (iii) the orders sought were *in personam* and not directed against the Kenyan court; (iv) Lord Braid's order did not offend against the principles of comity; (v) there was no overriding utility in the Kenyan court determining issues of Kenyan law; and (vi) there remained doubts about the ability of the group members to obtain access to the Kenyan courts due to lack of funding, experienced representation and delay in the Kenyan court's handling of the matter. Those contentions were as live now as they were when Lord Braid granted interim interdict, and there had been no material change of circumstances such as would justify any interference with that order.

[14] In particular, the fact that further orders might be made in Kenya did not detract from the point that Lord Braid had ordered the respondents to desist from prosecuting its petition in Kenya, not the Kenyan court from hearing it. Lord Braid was aware that further orders might be made in Kenya. When he heard a motion for recall of the interim orders shortly after they were granted, Lord Ericht determined that they were *in personam* and were not intended to be an interference with the jurisdiction of the courts of Kenya or the sovereignty of Kenya ([2022] CSOH 61, paragraph [21]). The issue of comity had previously been argued in support of the motion for recall before, and considered by, Lord Ericht who had nonetheless refused that motion. The decisions of Lord Braid and Lord Ericht had not been reclaimed. In any event, principles of comity could not require this court to permit *ex hypothesi* vexatious proceedings to continue in the circumstances of this case.

[15] The argument about utility had already been advanced before Lord Braid and rejected by him ([2022] CSOH 57, paragraph [38]). In any event, the orders sought in the Kenyan petition were not just declaratory. The ultimate purpose of the Kenyan proceedings was to obtain a permanent injunction against all and any group members from continuing with proceedings in Scotland. If they succeeded in respect of the original 1044 group members there was every reason to think that the respondents would seek to prevent the group proceedings from progressing in respect of any other group members. "Utility" had to be seen in that context.

[16] In short, there had been no material change of circumstances such as would justify departure from terms of the interim interdict granted by Lord Braid and the motion should be refused.

Analysis and decision

[17] I begin with the petitioner's submission that the hearing of the motion should be postponed until some later date, preferably after the evidential hearing in late February/early March 2023. It is sufficient for me to record that I did not consider it appropriate to defer consideration of the motion until a later date. The matters to which senior counsel pointed as not yet being the subject of averment did not seem to me to impact significantly on the likely arguments of parties, which had been foreshadowed in notes of argument tendered in advance of the hearing of the motion. Nor did I consider that there was any justification for postponing the hearing until after the evidential hearing previously referred to. The scope of that hearing is currently limited to the petition processes and relative minutes for breach. A continuation to a point where the court would be considering whether to make final orders in this petition would be tantamount to taking away the respondents' right to move for a recall meantime in appropriate circumstances. Besides, the court had, at parties' invitation, set aside a half day for consideration of the motion and parties appeared ready to proceed. Accordingly, I decided to hear the motion on its merits.

[18] In addressing the competing arguments the sole and limited question before this court, as it was before Lord Ericht back in August, remains whether the court should alter the orders of Lord Braid because of a material change of circumstances between the granting of the orders on 24 August and the hearing before me. In addressing that issue it is also important to remember that the petitioner accepts that the respondents have the right to argue that the claims of group members should be litigated in Kenya. But, as Lord Braid recorded in his opinion (paragraph [41]) what the petitioner claims to be oppressive is the respondents' conduct in raising (late) the jurisdictional issue and attempting to have it

decided in Kenya rather than in the Court of Session where permission to proceed has already been granted and confirmed on appeal.

[19] In addressing what he submitted were various changes in circumstances since 24 August 2022 senior counsel first of all raised the matter of the petitioner appearing in the Kenyan proceedings with a preliminary objection, it having previously been contended that appearance on behalf of group members was precluded by the expense and difficulty of obtaining separate instructions. I am prepared to accept that this represents a change in the position before Lord Braid, who appears to have accepted the petitioner's argument that, for the Kenyan court to do justice to the arguments before it, the proceedings would need to be opposed in a meaningful sense and that this was unlikely to be possible due to practical difficulties in obtaining instructions and funding. I do not, however, consider that the issue is one of any materiality. Lord Braid's conclusion that the petitioner had made out a strong *prima facie* case does not appear to have been influenced to any extent by practical difficulties associated with opposition to the Kenyan petition (paragraph [42]). Where they did feature in Lord Braid's discussion of the balance of convenience (paragraph [43]) that was in the context of a wider consideration of the ability of the group members to bring substantive damages claims in Kenya. Although that aspect of matters gave rise to the concern mentioned earlier (when senior counsel for the petitioner sought to have this motion continued) the extent to which there were difficulties associated with access to justice in Kenya did not feature to any significant degree in the respondents' submissions where the balance of convenience was concerned. Moreover, it seems evident that Lord Braid's decision on the balance of convenience was affected by what he conceived to be the strength of the petitioner's *prima facie* case. Accordingly, for the purposes of this motion, I do not

consider that any significance should be attached to the fact that the petitioner has been able to present a preliminary objection to the Kenyan court.

[20] Nor do I consider that the taking of the objection by the petitioner itself amounts to a material change of circumstances. I remain of the view, foreshadowed in my note of 30 September 2022, that the fact that the Kenyan court has expressed a view favourable to the respondents on the competency of the anti-suit petition does not detract from the fundamental contention of the petitioner that the raising of the petition was itself vexatious, oppressive and unconscionable. The fact that, as it was represented to me, the petitioner took the objection against the possibility of a default judgment does not, in my view, change the landscape. It is the raising of the petition and the motivation for doing so that is at the heart of the petitioner's complaint in the present petition.

[21] Moving on, the acceptance by the petitioner that the claims of the initial 1044 group members required to be sisted seems to me to reflect the practical reality that, as at 30 September 2022, there was no way in which the group proceedings could progress for the benefit of existing and new claimants alike, without risk of existing claimants being in contempt of the Kenyan court. In that respect it is relevant to recall that the parties remain in dispute about whether a stay was ever applied for pursuant to Lord Braid's direction on 24 August 2022. That dispute is not currently capable of resolution. The information about the matter is opaque, to say the least. All that can be said is that, standing the terms of the decision of the Kenyan court on 28 October 2022, it is questionable whether that court actually held that the respondents' "clarificatory application" was spent, as represented in the respondents' note of arguments. The judgment is silent on that matter. In these circumstances, I do not consider that the sisting of the claims of the initial group members is material to the decision I have to reach.

[22] I turn then to the decision of the Kenyan court on 28 October 2022 to reject the petitioner’s preliminary objection and make orders for further procedure. The respondents, before Lord Ericht, previously relied on the occurrence of the Kenyan hearing on 25 August 2022 as constituting a material change of circumstances in respect of the reasoning set out in Lord Braid’s opinion. That was the hearing at which the Kenyan court pronounced an order stating *inter alia* that the orders issued by Lord Braid “cannot be enforced in this court, as they are in breach of our constitution, in particular with respect to our sovereignty”. The fact that the Kenyan court also made orders for further procedure on that date was not sufficient to persuade Lord Ericht that a material change of circumstances had arisen. It is useful to recall what Lord Ericht said in reaching that conclusion:

“[21] In my opinion the Kenyan hearing on 25 August is not a material change of circumstances in respect of the reasoning set out in Lord Braid’s opinion. Lord Braid was made aware when granting the orders that the Kenyan hearing would take place the next day. In his opinion he took the view that the orders were directed not at the foreign court but at the wrongful conduct of the party to restrained (paragraph [17]). The Kenyan court has decided that the orders were directed at the foreign court: it states that Lord Braid’s orders cannot be enforced in the Kenyan court as they are in breach of the Kenyan constitution in particular with respect to sovereignty. That decision makes no difference to the reasoning of Lord Braid as to *prima facie* case. Lord Braid’s reasoning was that he was merely exercising his jurisdiction over the person of JFK which is a Scottish company. The orders are *in personam* against JFK and are not intended to be an interference with the jurisdiction of the courts of Kenya or the sovereignty of Kenya (*Sabah Shipyard (Pakistan) Ltd v Republic of Pakistan* [2002] EWCA Civ 1643, paragraph [45]). There is nothing in the decision of the Kenyan court which detracts from that conduct-based reasoning: the decision of the Kenyan court is silent on the conduct of JFK. Nor does that decision make any difference to the balance of convenience: all the matters on which Lord Braid relies in paragraphs [41] and [42] are unaffected by the decision of the Kenyan court.”

[23] Lord Ericht’s decision to refuse to recall Lord Braid’s orders has not been reclaimed. Yet, the same process of reasoning may equally be thought to apply to the issue of whether the Kenyan court’s order repelling the preliminary objection, and fixing further procedure in the petition proceedings, itself constitutes a material change of circumstances. The

respondents themselves drew attention, in their note of arguments, to Rule 27.3 of what I take to be the relevant rules of procedure in Kenya. That rule, which stipulates that the court may proceed with a hearing of a case petition in spite of the wish of the petitioner to withdraw or discontinue proceedings, might serve to indicate that maintenance of Lord Braid's orders does not necessarily give rise to the stark conflict of jurisdictions contended for by the respondents. But what has not changed is the legal basis upon which the petitioner asserts that the raising of the Kenyan proceedings by the respondents was "vexatious, oppressive and unconscionable". The decision of the Kenyan court appointing further procedure, detailed in the judgment of 28 October 2022, is again silent on the conduct of the respondents. It again makes no difference to the reasoning of Lord Braid on the matter of the petitioner's *prima facie* case.

[24] The respondents submitted that there was nevertheless utility to this court in having a decision from the Kenyan court on the matter of jurisdiction. Given that the Kenyan petition is not confined to the obtaining of declarations about the legal position in Kenya it is not immediately obvious why that should be so. Moreover, it was not entirely clear (to me at least) whether the utility of having a decision from the Kenyan court was a factor bearing upon the balance of convenience, the strength of the petitioner's *prima facie* case, or whether it lurked somewhere in between. Either way, there does not seem to me to be anything new about the utility argument which was previously addressed at the hearing before

Lord Braid. At paragraph [45] his Lordship expressed himself in the following terms:

"The argument for JFKL that the Kenyan courts are best placed to decide whether Kenya has exclusive jurisdiction is superficially seductive. However, I consider it to be undermined by what I take to be a general acceptance that it is for the courts of the place where an action has been brought, in this case the Court of Session, to decide whether it has jurisdiction (in this case, over a company, be it remembered, which is domiciled in Scotland), not for a foreign court to determine that issue: cf *Turner v Grovit*, paragraph [26]. The point being made there of course was that it

was not for an English court to determine the jurisdiction of a Madrid court but the observation of Lord Hobhouse is of general application: 'For the foreign court, its jurisdiction and whether to exercise that jurisdiction falls to be decided by the foreign court itself in accordance with its own laws ... Restraining orders come into the picture at an earlier stage and involve not a decision upon the jurisdiction of the foreign court but an assessment of the conduct of the relevant party in invoking that jurisdiction.' It seems to me that the obverse applies, namely, that this court has an interest in protecting its own jurisdiction (a theme which emerges from the case law) ..."

[25] To the extent that the respondents, under reference to *Dana Gas PJSC v Dana Gas Sukuk*, above, sought to invite on the court a different approach to that taken by Lord Braid I do not consider that it is open to me to do so. As previously observed, Lord Braid's decision was not reclaimed. The fact that the Kenyan court may be willing to give a decision on matters of Kenyan law does not innovate on the position as it was when the interim orders were originally granted. Accordingly, I do not consider that the arguments on utility assist the respondents' position.

[26] That leaves for consideration the principle of comity raised by the respondents. I confess to having had some difficulty identifying, from his opinion, the extent to which comity was discussed before Lord Braid. If the decision of *Masri* was discussed before him, as suggested by senior counsel for the petitioner, I can see no reference to it. Comity does appear to have been raised by the respondents in the recall motion before Lord Erich ([2022] CSOH 61, paragraph [11]), but only in the context of the petitioner's then application for an order that the respondents abandon the proceedings in Kenya. Whatever may have been the position before, however, I have no difficulty with the proposition, derived by the respondents from the authorities to which reference was made, that comity is characterised by deference, sensitivity and circumspection and that the preservation of comity between sovereign nations requires the utmost caution and sensitivity. The question is whether the

principle of comity compels me to the view that the variations to Lord Braid's orders should be granted.

[27] In answering that question it would, in my view, be wrong to see the issue purely through the lens of a Kenyan court. The group proceedings were raised, by virtue of the respondents' domicile in Scotland, and also defended, months before the respondents sought to involve the Kenyan court. No issue of comity would even have arisen had they not done so. The petitioner satisfied Lord Braid that he had pled a strong *prima facie* case for an anti-anti suit injunction which the balance of convenience favoured. The Kenyan court order of 25 August 2022, as previously noticed, is silent on the conduct of the respondents in raising the Kenyan proceedings, as is the later order of 28 October 2022. On inquiry at the hearing of this motion senior counsel was unable to elaborate on the extent to which the Kenyan court had been made aware of the background circumstances in which the present petition was raised. That matter remains entirely unclear, and I am not prepared to assume that the Kenyan court has been fully appraised of those circumstances any more than it has been appraised of the fact that jurisdiction is an issue in the group proceedings which has still to be determined and may yet be resolved against the petitioner. I was, however, informed during the hearing of the motion that the Kenyan proceedings are currently "stood over generally". I was given to understand that that meant they would not progress unless active steps were taken by a party to advance those proceedings. Accordingly, it appears that there are currently no imminent dates timetabled in the Kenyan proceedings. There is, however, an evidential hearing fixed on the petition and answers in this case which, at least, is intended to resolve the factual issues which, on a *prima facie* basis, satisfied the test for interim interdict.

[28] Against that whole background, it does not seem to me that maintenance of the existing interim orders, founded on the conduct-based reasoning which gave rise to them, would offend against the principle of comity and I am not prepared to vary or recall them on that basis.

Conclusion

[29] It follows that I am not persuaded that, individually or cumulatively, the factors relied on in support of the motion amount to a material change of circumstances such as would justify the variations sought. The motion is accordingly refused.