FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2025] CSIH 5
XA66/24

Lord President
Lord Malcolm
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Special Case under section 27 of the Court of Session Act 1988 by

THE FACULTY OF ADVOCATES

First Party

and

THE JUDICIAL APPOINTMENTS BOARD FOR SCOTLAND

Second Party

First Party: Dean of Faculty (Dunlop KC), R MacLeod; Balfour & Manson LLP
Second Party: C O'Neill KC (sol adv); Brodies LLP

31 January 2025

Introduction

[1] In order to be eligible for the office of sheriff, an applicant must be legally qualified throughout the period of 10 years immediately preceding appointment. A person is legally qualified if he or she is a solicitor or an advocate. The issue in this Special Case is whether, when an applicant has been a solicitor and subsequently becomes an advocate, the 10 year

period is interrupted by, what will normally be, the required nine months period of devilling (pupillage) prior to passing advocate.

Legislation

[2] The Sheriff Courts (Scotland) Act 1907 provided (s 12) that a person appointed as a sheriff (then sheriff-substitute) had to be "an advocate or a law agent within the meaning of the Law Agents (Scotland) Act 1873… of not less than five years' standing in his profession". This was repealed by the Sheriff Courts (Scotland) Act 1971 (Sch 2 Part I). Instead, the 1971 Act provided (s 5(1)) that a person "shall not be appointed" as a sheriff unless he "is, and has been for at least ten years, legally qualified". A person was legally qualified if he was "an advocate or a solicitor". Solicitor and advocate were not defined in the 1971 Act. *Quantum valeat*, the Solicitors (Scotland) Act 1980 provides (s 65) that an advocate is a member of the Faculty of Advocates and a solicitor is a person enrolled as a solicitor in pursuance of that Act.

[3] Section 5(1) of the 1971 Act was, in turn, repealed by the Courts Reform (Scotland) Act 2014 (Sch 5 para 6). The 2014 Act provides:

> "*14 Qualification for appointment*
>
> (1) An individual is qualified for appointment [as a sheriff[1]] … if the individual—
>
> …
>
> (b) at the time of appointment—
>
> (i) is legally qualified, and
>
> (ii) has been so qualified *throughout the period of 10 years immediately preceding* the appointment. (*emphasis added*)
>
> …
>
> (3) … an individual is legally qualified if the individual is a solicitor or an advocate".

[1] or a sheriff principal, summary sheriff or part time sheriff and summary sheriff

The interpretation section of the 2014 Act (s 136), is prefaced by the words "unless the context requires otherwise". It goes on to define an advocate as "a member of the Faculty of Advocates". A solicitor means a solicitor "enrolled in the roll of solicitors kept under … the [1980 Act]".

[4] In the Policy Memorandum relating to the Courts Reform (Scotland) Bill, it was stated (at para 45), in relation to what was to become section 14, that "The policy on qualification is to retain the approach in section 5 of the 1971 Act". In the Explanatory Notes to the section, it is said that "It re-enacts the substance of section 5 of the [1971 Act] by requiring that an individual must have been a solicitor or advocate during the 10 years immediately prior to appointment".

[5] The words "immediately preceding" also appear in section 20A of the Judiciary and Courts (Scotland) Act 2008, which regulates the eligibility of solicitor advocates for appointment to the Court of Session bench. Such a solicitor can be appointed if he or she has been such "throughout the period of 5 years immediately preceding the appointment". Section 20A was introduced by section 123 of the 2014 Act. Previously, in the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (Sch 4 para 1), the wording had been that a solicitor advocate had to have had rights of audience "for a continuous period of not less than 5 years". In terms of Article XIX of the Union with England Act 1707, the requirement for an advocate was, and is, to have "served … for the space of five years" and for a Writer to the Signet "for the space of ten years". The 1990 Act was intended to equalise eligibility between advocates and solicitor advocates.

[6] The Explanatory Notes to section 123 of the 2014 Act state that it "re-enacts (without significant modification)" the previous law (ie that in Sch 4 para 1 to the 1990 Act). There was some discussion in Parliament about the effect of the words "immediately preceding" in section 123, which had been a late amendment to the Bill. The question was whether this would

unfairly discriminate against a person who had been on maternity or paternity leave or a person who had been absent from work because of caring responsibilities. The response from the Minister (7 October 2014, p 77) was:

> "I regret to say that we are where we are. [The amendment] was intended purely as a tidying-up amendment to repackage what is currently in two separate Law Reform... Acts…".

[7] Regulation 2 of the Act of Sederunt (Regulation of Advocates) 2011 provides that a person is to be admitted to the office of advocate if he or she meets the criteria prescribed in rules made by the Faculty of Advocates. An application for admission is made by petition to the court (Regulations as to Intrants reg 1(1)). On presentation of the petition, the court pronounces an interlocutor remitting the application to the Faculty to assess whether the applicant meets the criteria for admission and to report accordingly to the court. The applicant becomes an intrant. The intrant must pass an examination in evidence, practice and procedure in addition to other subjects, most of which will probably have been taken during the intrant's law degree. A solicitor must have his or her name removed from the appropriate roll of solicitors before beginning devilling (pupillage) (reg 5(6)).

[8] Devilling is a period of about 9 months training, including a month long intensive foundation course, which an intrant is required to undertake before he or she can pass advocate (reg 5(1)). Devilling involves the intrant being attached to, and learning from, one or more members of the junior bar in both civil and criminal law, evidence and procedure. It will significantly enhance the intrant's legal skills base. Along with practice at the Bar, it will, as a generality, better equip a person, who has been a solicitor, for judicial office. The period of devilling can be shortened in certain circumstances, perhaps to as little as 4 weeks in the case of a solicitor advocate who is a King's Counsel.

The Question

[9] A practising member of the Faculty of Advocates applied for the office of sheriff. He or she had been an advocate for less than 10 years. That person had previously been a solicitor. The total period during which the applicant had been an advocate and a solicitor exceeded 10 years. In accordance with the former practice of the Judicial Appointments Board for Scotland, the candidate had previously been deemed eligible to be a sheriff and had been offered an interview to that end.

[10] By letter of May 2024, the JABS intimated to the applicant that he or she was ineligible as he or she had not been legally qualified as an advocate for "the entirety of the ten years immediately before the appointment". Devilling had interrupted the period of continuous legal qualification which was necessary for appointment.

[11] The question for determination by the court is:

> "Is the period of 10 years of continuous legal qualification stipulated in section 14(1)(b)(ii) of the Courts Reform (Scotland) Act 2014 interrupted in the case of a person who has had his name removed from the appropriate Roll of Solicitors in order to begin a period of devilling … with a view to attaining Membership of the Faculty of Advocates[?]"

Submissions

Faculty of Advocates

[12] The period of 10 years of continuous legal qualification in section 14(1)(b)(ii) of the 2014 Act was not interrupted by the removal of a name from the roll of solicitors in order to begin a period of devilling. The 2014 Act should be interpreted in a manner which gave purposive effect to the enactment, avoided absurdity, and produced a result which was consistent with what had been the JABS's settled practice.

[13] In interpreting a statute, the court was seeking to ascertain the meaning of the words used in light of their context and the purpose of the provision (*In Re JR222* [2024] 1 WLR 4877 at para 73). A phrase must be read in the context of the section as a whole. Other provisions and the entire statute may provide relevant context. The words used are the primary source by which meaning is ascertained (*ibid* at para 74 citing *R (O)* v *Home Secretary* [2023] AC 255 at para 29). External aids must play a secondary role. The modern approach is to have regard to the purpose of a provision and to interpret it in a way which best gives effect to that purpose (*ibid* at para 75 citing *Barclays Finance* v *Mawson* [2005] 1 AC 684 at para 28).

[14] Explanatory Notes may cast light on the meaning of a provision. Other sources may disclose the background and assist the court in identifying the mischief addressed and the intended purpose, thereby assisting purposive interpretation (*ibid* at para 77, citing *R (O)* at para 30). None of the external aids displaced meanings which, after consideration of the context, were "clear and unambiguous and which do not produce absurdity" (*ibid*). If the purpose of section 14 was, as the Explanatory Notes said, to re-enact section 5 of the 1971 Act, that purpose must have failed. Instead of keeping the requirement at 10 years' legal experience, an additional requirement had been introduced whereby that experience needed to be continuous, immediately prior to appointment. There was no debate upon this section in Parliament and no indication that anything other than re-enactment was intended. The same applied to the Notes to section 123 which said that it re-enacted "without significant modification" the requirements for appointment to the Court of Session bench.

[15] Absurdity was to be given a broad meaning, including "unworkability, impracticality, inconvenience, anomaly or illogicality" (*In Re JR222* at para 76, citing *R* v *McCool* [2018] 1 WLR 2431, paras 23 and 24 which in turn refers to *Bennion on Statutory Interpretation* (6th ed) 1753). Unfairness might be added to the list, since it was to be presumed that Parliament did not

intend any unfairness. A literal interpretation would subvert the purpose behind the section. It would be absurd in that it would produce a result which was anomalous, illogical and unfair (*R (Edison First Power)* v *Central Valuation Officer* [2003] 4 All ER 209 at paras 116 and 117; *Mykoliw* v *Botterill* 2010 SLT 1219 at para [20]).

[16] The material requirement under section 14 was that an advocate was legally qualified by virtue of his experience. When a solicitor commenced devilling, he remained legally qualified. The Faculty's requirement of removal from the Roll had no bearing on legal qualification. On the JABS's reading, an advocate who had nine years' experience at the Bar, after one or more years as a solicitor, would be eligible for appointment to the Court of Session bench but not as a part time summary sheriff. Other examples of anomaly were given. The JABS's interpretation would act as a disincentive to solicitors, who were considering a shrieval career, gaining experience as an advocate beforehand. It would be unfair to those solicitors who had come to the Bar on the basis of their understanding of the settled practice.

[17] Settled practice could offer a legitimate pointer when considering statutory interpretation (*R (N)* v *Lewisham LBC* [2015] AC 1259 at paras 89-95, citing *Bloomsbury International* v *Sea Fish Industry Authority* [2011] 1 WLR 1546 at paras 57-60 and *Isle of Anglesey CC* v *Welsh Ministers* [2010] QB 163 at para 43). Where a provision had been interpreted in a particular manner without dissent over a long period, those interested should be able to continue to order their affairs on that basis without the risk of it being upset by a novel approach. Section 14 had been in force since 1 April 2015. Since then, the JABS had recommended the appointment of a number of individuals who would not be eligible on their current reading of the section.

[18] The correct construction of section 14 cannot involve unlawful discrimination in terms of Article 14 of the European Convention on Human Rights (*R (Stott)* v *Justice Secretary* [2018]

3 WLR 1831 at para 207). The applicant's economic interests fell within the ambit of Article 1 of Protocol 1 of the Convention (see *Tre Traktörer Aktiebolag* v *Sweden* (1989) 13 EHRR 309 at para 53; *Van Marle* v *Netherlands* (1986) 8 EHRR 483 at para 40). Eligibility was achieved by many years of practice. It had a clear economic value to the applicant. The applicant had experienced differential treatment because, as a solicitor advocate with 15 years' experience, he or she would be eligible for appointment as a part time summary sheriff, but as an advocate with 15 years' experience as a solicitor advocate and 5 years' experience as an advocate, he or she would not be.

[19] The 1980 Act distinguished between a solicitor and an enrolled solicitor. It was coherent to say that a solicitor, who had been removed from the roll in order to undertake a period of devilling, remained a solicitor. Such a person could not practise as a solicitor, but he or she remained a solicitor. As the context required, the word "solicitor" simply meant someone who had been admitted as such. Accepting that simple proposition would result in all of the perceived difficulties disappearing.

[20] The definition in section 136 worked without difficulty for the vast majority of the uses of "solicitor" within the 2014 Act. The one situation in which it did not, because otherwise it would run counter to the statutory purpose, was productive of absurdity and unfairness, ran contrary to settled practice and amounted to unlawful discrimination in violation of the Human Rights Act 1998. Where a solicitor had his name removed from the roll in order to commence a period of devilling, the context required a different meaning.

JABS

[21] The period of 10 years of continuous legal qualification in section 14(1)(b)(ii) of the 2014 Act was interrupted by the removal of the applicant's name from the appropriate roll of

solicitors in order to begin a period of devilling. The words used in the 2014 Act were the primary source by which the meaning of the relevant provision was to be ascertained (*R (O)* v *Home Secretary* at para 29). Parliamentary materials played a secondary role (*ibid* at para 30). The words were to be read in the context of the section in which they appeared, in the wider context of any relevant group of sections and the statute as a whole (*Blue Metal Industries* v *RW Dilley* [1970] AC 827 at 846).

[22] Sections 14 and 136 of the 2014 Act, on the definition of solicitor, were clear and unambiguous. Given that any solicitor could be admitted and/or enrolled and/or have a practising certificate, the 2014 Act made who should be identified as a solicitor for the purposes of eligibility clear. That was a person who was on the roll. Where a word or phrase appeared in legislation for a purpose, the court had to endeavour to give meaning to it. Section 14 provided that a person must be legally qualified "throughout" the period of 10 years immediately preceding appointment. Parliament had legislated for continuity of legal qualification.

[23] There was nothing in the context of the provisions of the 2014 Act that warranted displacing the application of the definition of “solicitor” in section 136. The construction contended for by the JABS involved no absurdity and no conflict or contradiction with any other provision of the 2014 Act. Construing “solicitor” as a reference to one who had been admitted, rather than being on the roll, was not consistent with the requirement of continuity. A solicitor who had left the roll was not a solicitor. A person who was devilling was not an advocate. Admission was an event, whereas being on the roll could be continuous or broken. The JABS did not wish to exercise a discretion on eligibility relative to how long a period of absence was acceptable. Clarity was the overriding objective. Parliament would have intended a certain and predictable meaning (*R (Burkett)* v *Hammersmith LBC* [2002] 1 WLR 1593 at

para 46). There was no "clear and gross balance of anomaly" (*Stock* v *Frank Jones (Tipton)* [1978] 1 WLR 231 at 237 and 238). *Mykoliw* v *Botterill* involved an absurdity within the four corners of the Act. There was nothing of a similar nature here. The difficulty that may be faced by individual applicants, who wish to become advocates, was created not by the 2014 Act but by the terms of the Regulations as to Intrants, over which the Faculty had control. The Faculty were asking the court to construe the words contrary to their natural and ordinary meaning because of their own internal rules. The requirement that an intrant must not be an enrolled solicitor during their period of devilling was not required by the Act of Sederunt (Regulation of Advocates) 2011. If the policy underlying that requirement was that a person ought not to practise as a solicitor while devilling, provision could be made for such a prohibition while allowing the solicitor to remain on the roll until admitted as a member of Faculty.

[24] There required to be an ambiguity in the legislation for settled practice to be a factor in interpreting a provision (*R (N)* v *Lewisham LBC* at paras 53, 79 and 81, 148 and 168). No issue of compatibility with A1P1 of the Convention arose. A right to seek appointment to a public office was not a possession (*Denisov* v *Ukraine*, (App no 76639/11), 25 September 2018 at para 137). The JABS's construction did not involve any interference with a possession. There were many types of discrimination but, for Article 14 to be engaged, a Convention right had to be involved (*R (Stott)* v *Justice Secretary* at para 207).

Decision

[25] The principles which should be applied, when construing a provision in a statute, are not in dispute. The court requires to ascertain the meaning of the words used in light of their context and the purpose of the statute (*In Re JR222* [2024] 1 WLR 4877, Lord Stephens at para 73 and, at para 74, citing *R (O)* v *Home Secretary* [2023] AC 255, Lord Hodge at para 29). The

primary source of a provision's meaning will be the natural and ordinary meaning of the words used in their context (*ibid*) as understood from the whole section, group of sections and the Act. External materials, such as explanatory notes, policy memoranda or ministerial statements, may be relevant to understand the context of a provision. They may reveal an ambiguity or uncertainty. Nevertheless, if the words in their context are clear and unambiguous and "do not produce absurdity" then that is an end of the matter (*ibid* para 30). No amount of external material can displace the natural and ordinary meaning of the words. Where possible, courts should strive to avoid an interpretation that produces an absurd result, because that is not likely to be what Parliament had intended. Absurdity is to be given a "very wide meaning, covering, amongst other things, unworkability, impracticality, inconvenience, anomaly or illogicality" (*In Re JR222*, Lord Stephens at para 76; see also *Mykoliw* v *Botterill* 2010 SLT 1219, Lord Pentland at para [20] citing *R (Edison First Power*) v *Central Valuation Office* [2003] 4 All ER 209, Lord Millett at paras 116-117).

[26] The principal question is whether the JABS's current interpretation of section 14 in its context produces an absurd result. What then is its context? The provision is designed to set out the minimum formal criteria for eligibility for appointment as a sheriff. The object is not to exclude persons who have already achieved the necessary experience and who have, in a realistic sense, been continuously in legal practice at the time of appointment.

[27] Although it is possible to trace the origins of the criteria to Sheriff Court (Scotland) Acts of 1825 (s 9) and 1877 (s 4), a reasonable starting point is the Sheriff Courts (Scotland) Act 1907. The phraseology then was "five years' standing in his profession" of advocate or law agent. At that time it would have been unusual, but by no means unknown, for a law agent to switch professions and to become an advocate. The relevant section (s 12) may have been framed with that in mind. There was no mention of being able to combine years of practice in each branch of

the profession. There was no specific reference to the person having to be in continuous practice for five years immediately before appointment. The Sheriff Courts (Scotland) Act 1971 followed the same pattern, but extended the period in practice to 10 years. By that time it was becoming more common for persons to qualify as a solicitor and then to begin devilling. In modern times this has become the norm.

[28] The Courts Reform (Scotland) Act 2014 is phrased differently, principally because, in accordance with modern drafting techniques, it defines, in section 136, "advocate" and "solicitor". There is no difficulty in understanding these definitions. These definitions are, *per se*, clear and unambiguous. In that respect the Faculty's submission that a person remains as a solicitor, despite not being on the roll, falls to be rejected. Equally, a contention that an intrant might be regarded as an advocate would fail to meet the test of absurdity. The definition is again clear and unambiguous.

[29] Returning to section 14, subsection (3) says that an individual is legally qualified if he or she is a solicitor or an advocate. In interpreting that subsection, context is extremely important. The operative and most important part of the section (ss 14(1)) is that the person is to be legally qualified, and to be so throughout the 10 years immediately preceding appointment. Subsection (3) does not say that a person must only be either a solicitor or an advocate throughout the 10 year period. Whether that is the correct interpretation depends largely on whether it would lead to absurdity according to that term's "very wide meaning" (*supra*).

[30] The answer is that it would lead to absurdity. The most obvious example is that it would result in a person, who had been a solicitor for, say, twenty years, enhanced his skills and learning by passing advocate and then practised for another nine years, being rendered ineligible for appointment simply because of the effect of the intervening devilling period. The impact of the devilling period would be to wipe out the 20 years of practice as a solicitor in the

context of eligibility for appointment as a sheriff. That makes no sense and cannot have been what Parliament intended to happen. There is no sensible reason why devilling should re-start the clock in that way. When such a person's period of legal qualification is taken together, it would amount to almost 30 years. On the JABS's interpretation, he or she would not be eligible for appointment, but a person with 10 years of continuous practice as a solicitor would be. That is not only an anomaly; it is an absurdity. It can be avoided by holding that the period of devilling is, as indeed it is, an *interim* stage between being a solicitor and passing advocate. It thereby counts when determining the length of the overall period of legal qualification. On any reasonable view a devil remains legally qualified throughout the period of devilling. This straightforward interpretation remedies the absurdity, but does not result in the legislation being interpreted in a manner inconsistent with its wording. The definition provisions should be regarded as subordinate to the principal requirement of 10 years continuous practice immediately preceding appointment. For these reasons, the question in the special case (quoted at para [11] above) should be answered in the negative.

[31] Absurdity can be analysed differently in terms of inconvenience. This would be created if a person had decided that a judicial career may, in due course, beckon, having practised as a solicitor for more than 10 years. He or she may, or may not, have been rejected as a candidate, possibly after interview. In order to improve his or her skills, that person decides to go to the Bar in order to be better prepared for a judicial career. Such a person does exist in the form of the applicant who has been disappointed by the JABS, having previously been deemed eligible. On the JABS's interpretation, by going to the Bar, he or she will effectively reduce his or her period of legal qualification as soon as he or she commences devilling. This is not only inconvenient, it is very unfair; something which, it might be assumed in the absence of any contrary indicators, Parliament did not intend. It would discourage solicitors from taking

advantage of the devilling scheme; thus improving their skills to be a judicial office holder. This would not be good, in terms of the base experience of those applying to be a sheriff, either for applicants or the appointment process. It is no answer to this inconvenience to say that the Faculty could, as they intend, tweak their Regulations for the future. A real difficulty attaches at present to many advocates of under 10 years call.

[32] In reaching a conclusion on absurdity, it is not necessary to take into account any of the extraneous materials. They do nevertheless point to the actual Parliamentary purpose; that being simply to consolidate the existing provisions rather than to change them in any material way. This is clear from the Policy Memorandum to the Bill, the Explanatory Notes and the Ministerial Statement to which reference has already been made. It is the manner of drafting which has caused the problem; albeit one in which the intended meaning can be rescued by adopting a purposive construction, once absurdity is identified.

[33] Settled practice, in the form of the manner in which, for many years, a public authority, such as the JABS, has interpreted a statutory provision, cannot of itself change the natural and ordinary meaning of the words in a statute. This is so even if the courts at first instance may have endorsed that interpretation. If the language which Parliament has used does not conform to the way in which it has been applied in practice, the "conventional remedy, pending legislative amendment, is to correct the practice, not rewrite the law" (*R (N)* v *Lewisham LBC* [2015] AC 1259, Lord Carnwath at para 79, see also para 95). Since there has been no judicial endorsement of the previous mode of application, the settled practice submission has no direct bearing on the issue. On the other hand, it does lend weight to the inconvenience argument. The fact that the section was interpreted in a settled and contrary manner by the JABS over a period of almost 10 years also points to there being a recognisable ambiguity in the wording, which could be resolved by purposive construction.

[34] Finally, and for completeness, there is no engagement of Article 14 of the European Convention. The interpretation by the JABS may well be seen as discriminatory in a broad or moral sense because, in short, it penalises those who elect to go to the Bar before embarking on a judicial career. That does not result in a breach of Article 14. That Article does not operate as a free standing discrimination prohibition. The discrimination must be linked to a Convention right or freedom. The Faculty's argument is that the discrimination is related to a person's Protocol 1, Article 1 property enjoyment right. The problem with this, in short, is that an applicant's future prospects of becoming a sheriff, and thereby acquiring a judicial salary, is not a possession protected by A1 P1 (*Denisov* v *Ukraine*) (App no 76639/11), 25 September 2018). It is not akin to a licence to sell alcohol (*Tre Traktörer Aktiebolag* v *Sweden* (1989) 13 EHRR 309 at para 53) or an existing right to provide accountancy services (*Van Marle* v *Netherlands* [1986] 8 EHRR 483 at para 41).

[35] As noted above, the court will answer the question posed in the Special Case in the negative. The parties have agreed that they should each bear their own expenses.