

OPINION OF LORD BONOMOY OUTER HOUSE, COURT OF SESSION : 8<sup>th</sup> April 2003

THE CASE

- [1] The pursuer was expelled from the Society and seeks orders reducing the decision to expel him and declaring that he remains a member. He advances two grounds for seeking these remedies: firstly, that the defenders acted contrary to natural justice by not giving him a proper hearing; and secondly, that the decision made by the defenders was in breach of their rules.

MOTION TO AMEND

- [2] At the outset of this procedure roll hearing I was invited by the pursuer to allow amendment of the record in terms of a Minute presented on 27 November 2002 and the defenders' Answers. The essential purpose of the amendment was to change the basis on which the "natural justice" case was presented. The existing averments were that the defenders' actings at the meeting were contrary to natural justice *"in that they did not inform him that a final decision was to be taken at that meeting and led him to believe that more time might be available to him to negotiate his position and he was not given the opportunity to make a final submission to the defenders."*

The pursuer sought to delete the words "at that meeting" and substitute "in closed session *et separatim*". He also sought to supplement the "natural justice" ground by adding an additional ground in these terms: *"that the decision was not taken at a meeting in terms of Rule 16"*.

The point of these amendments was to present an argument that the meeting was not conducted in accordance with the rules and that the breach of the rules amounted to denial of natural justice. The case that the pursuer proposed to make in relation to natural justice was thus a quite different case. The case pled was of a failure to inform the pursuer of what would happen at the meeting. The case proposed related to the manner in which the meeting was conducted.

- [3] The defenders opposed amendment on the ground that it was proposed much too late in the day and was a new case based on facts which had hitherto been uncontentious.
- [4] The expulsion occurred in August 1988. The action was raised in 1993. Between then and an interlocutor purporting to recall a sist in October 2001 nothing happened. When asked why it was proposed to introduce a new case over nine years after the action was raised, Mr Stewart QC, for the pursuer, was unable to offer any explanation. His contention was that, since the amendment was necessary for determining the real question in controversy between the parties, it should be allowed.
- [5] I refused the pursuer's motion. For a period of over nine years the issue in relation to natural justice has been identified as related to the form of notice calling the meeting. The pursuer sought to depart from that and make his case on a different basis without explaining why it was only at this late stage that he had decided to identify the issue as a different one from that originally presented. Such a fundamental change of tack so late in the day requires some explanation and no attempt was made to give one.

APPLICATION FOR LEAVE TO RECLAIM

- [6] The pursuer sought leave to reclaim that decision on the basis that the points he sought to make were important to the case, that no new factual matters would be introduced and the defenders had not suggested that they would be prejudiced by the amendment. While each of these points may be accurate, the decision was one for my discretion and none of these points appeared to me to provide a basis on which it could be argued that I had exceeded my discretion. I accordingly refused the motion for leave to reclaim.

THE PARTIES' MOTIONS

- [7] Mr Howie QC, for the defenders, invited me to sustain either the second or the third plea in law for the defenders to the extent of dismissing the action so far as it relates to the question of natural justice (and in conjunction with that to repel the pursuer's first plea-in-law), and also to sustain the seventh plea-in-law for the defenders and sist the action *quoad ultra* to await the outcome of arbitration to determine the true interpretation of Rule 16 of the defenders' Rules.
- [8] Mr Stewart QC, for the pursuer, invited me to repel the seventh plea-in-law for the defenders and *quoad ultra* to allow a proof before answer.

## NATURAL JUSTICE

- [9] The pursuer was a long-standing working member of the Society. After completing 21 years service, and having ceased to be a working member, he was entitled to a superannuation benefit. Following his retirement he was employed by the defenders for a period of six months. When that period of employment ended, he set up in business on his own account as a remover, trading as Pirie's Removals. The defenders considered that that was in contravention of Rule 16 of their Rules and held a meeting to consider the action to be taken.
- [10] The pursuer's case that the defenders acted contrary to natural justice in the arranging and conducting of that meeting is summarised in Article 5 of Condescence as follows:- *"that the defenders' actings at the meeting on 28 November, 1988 were contrary to natural justice in that they did not inform him that a final decision was to be taken at that meeting and led him to believe that more time might be available him to negotiate his position and he was not given the opportunity to make a final submission to the defenders."*
- [11] Mr Stewart submitted that the pursuer's averments in support of this case were not so plainly irrelevant as to hold out no prospect of success at proof. What the pursuer was offering to prove was that he had been deprived of his entitlement to be heard on a matter of importance, viz. the penalty to be imposed on him for a breach of the Rules of the Society. Counsel relied upon the notice calling the meeting which divided the agenda into two as follows:-
- "1. To consider and thereafter vote upon the motion that the activities of Member Mr J. M. Pirie, since the termination of his Contract of Employment with the Society has been and continues to be in contravention of Rule 16 of the Rules and Regulations of the Shore Porters' Society and;*
- 2. In the event of the meeting voting in favour of the above motion by the required proportion laid down in Rule 16 to decide upon what penalty or penalties to impose upon Member Mr J. M. Pirie, all in terms of the Rules and Regulations of the Society."*
- [12] In my opinion it does not follow from the form in which the agenda was intimated that the pursuer would be heard at two separate stages. The question was whether the pursuer had a proper hearing on the important matters in issue at the meeting. I agree with the submission of Mr Howie that the pursuer does not aver that he was not heard on any material issue. In Article 4 at page 11 the pursuer avers that he attended the meeting accompanied by a solicitor, that a formal charge was read to him, that his solicitor spoke to the defenders on his behalf and that he and his solicitor were asked to withdraw from the meeting in order to allow the members to more freely discuss the question of his possible expulsion and, in particular, to consider whether more time should be allowed for further negotiation. In Article 5 at page 14 he admits that he had legal advice available at the meeting, that he knew the charge against him, that he knew that the meeting was called to decide if that charge was made out, that his solicitor presented his defence to that charge and that his solicitor suggested methods of disposal of a breach of Rule 16 other than expulsion. These averments indicate that the pursuer's case on both the question of contravention of the Rule and on the question of penalty was presented to the meeting.
- [13] Mr Stewart founded on averments in Articles 4 and 5 to the effect that the pursuer had anticipated or assumed that he would be given an opportunity to make further submissions about penalty once it had been decided that he had contravened the Rule. The pursuer indicates in his averments no basis for that anticipation or assumption, and gives no indication of any information that he was denied the opportunity of presenting to the meeting. There is no rule of law requiring a decision maker to give an indication of the likely decision so that parties may have a further opportunity to make submissions before a final decision is reached - see *Hoffmann-La Roche & Co. v The Secretary of State for Trade and Industry*. [1975] AC 295 at 369D-E. I have accordingly decided that the pursuer's averments could not on any view of them support a case to the effect that he was deprived of the opportunity to present a case to the meeting on a matter of importance.

## ARBITRATION CLAUSE

- [14] The pursuer's case on this leg is summarised in Article 5 of Condescence as follows: *"in any event, in interpreting the pursuer's decision to set up in business on his own account as an attempt to subvert or injure the business of the Society in breach of Rule 16, given that the stated purpose of Rule 16 was to preserve the*

*character of the Society and to prevent any evil report or disgrace being put upon it by the improper conduct of members, the defenders misinterpreted Rule 16 and acted outwith the powers conferred upon them by the Rules."*

- [15] The defenders maintain that these averments put in issue the interpretation or true meaning of Rule 16 and that that is a question that the pursuer is bound to refer to arbitration in terms of Rule 23. The words "*attempt to subvert or injure the business of the Society*" and "to prevent any evil report or disgrace being put upon it by the improper conduct of members" are drawn directly from Rule 16. The arbitration clause, Rule 23, is in these terms:- "*In the event of any difference or dispute arising among the members of the Society, or between the Committee and any individual member regarding the true intent and meaning of these Rules and Regulations, or any part thereof, such dispute shall be referred to the Sheriff of the County of Aberdeen for the time being, and his decision thereon shall be final and binding on all parties concerned.*"
- [16] Mr Stewart submitted that, albeit the words "attempt to subvert or injure the business of the Society" and "to prevent any evil report or disgrace being put upon it by the improper conduct of members" were lifted directly from Rule 16, no question of the determination of the true intent and meaning of that Rule arose. The question in issue between the parties was the application of the Rule in fact. On this point I have no hesitation in accepting the submission of Mr Howie that the pursuer's averments put plainly in issue the true intent and meaning of Rule 16. The interpretation of the true intent and meaning of the Rule is a matter separate from the application of the Rule to the facts of the case. The latter is a matter for the Court in the light of the interpretation placed upon the Rule by the arbiter, in this case the Sheriff Principal of Grampian Highland and Islands.
- [17] Mr Stewart's more substantial argument was that any dispute between this pursuer and these defenders was not one to which Rule 23 applied. It was a matter of agreement between the parties that the dispute was not one between "*the Committee and any individual member*". It had, therefore, to be a difference or dispute "*arising among the members of the Society*" for the Rule to apply. This was a dispute arising between a person, who was at the point of litigation no longer a member of the Society, and the members of the Society. The arbitration clause did not, therefore, extend to this dispute. Mr Howie responded that the pursuer's case was that he is and always has been a member of the defenders because his purported expulsion was null and void. The dispute was accordingly one "arising among the members of the Society".
- [18] In support of his submission Mr Stewart founded upon the opinion of Lord Dunedin in his speech in *Sanderson & Son v Armour & Co* 1922 SC (HL) 117 at 125 to this effect: "*... by the law of Scotland, it has always been possible for the parties in framing the original contract to insert a clause binding themselves to refer future possible disputes to arbitration. This clause may be of two characters. It may be of a limited character, generally known as executry arbitration, providing for the adjustment of disputes concerned with the working out of the contract. But it may also be of a universal character, submitting all disputes which may arise either in the carrying out of the contract or in respect of breach of the contract after the actual execution has been finished. Whether the clause is of the one sort or the other is a matter of construction, but of the admissibility of a clause of the larger character there cannot be the slightest doubt.*"

Counsel seemed to accept that an arbitration clause must fall into one category or the other. However, I doubt that Lord Dunedin meant to suggest that there are two rigid categories into one of which every arbitration clause must fall. I consider that he was doing no more than indicating that such clauses could at that time be broadly categorised in that way. The essential point he was making is that parties are bound to go to arbitration where construction of their contract leads to the conclusion that they have agreed to do so. At page 126 at the end of the passage Lord Dunedin concluded: "*In the same way, the right which in England pertains to the Court under that (Arbitration) Act (1889) to apply or not to apply the arbitration clause in its discretion never was the right of the Court in Scotland. If the parties have contracted to arbitrate, to arbitration they must go.*"

- [19] Although the pursuer contends that he is and always has been a member of the Society, the status quo is that he was expelled and is no longer a member. It is only in the event that his action succeeds that

he will revert to his original situation on reduction of the decision to expel him. In my opinion he cannot in these circumstances be said to be currently a member of the Society.

- [20] Should it be necessary to categorise the arbitration clause as an "executory" clause or a "universal" or "all differences or disputes" clause, then I consider that Rule 23 falls into the former category. The Rules and Regulations of the defenders contain detailed arrangements for conducting the business of the Society, handling their papers, managing their funds, paying superannuation benefits and a number of other matters. The arbitration clause is capable of applying to the interpretation of many provisions of the Rules. It would have been open to the pursuer in the present case to have sought to refer the true intent and meaning of Rule 16 to arbitration in the course of the meeting. Although the meeting was conducted on the basis that there might be penalties short of expulsion which could be applied in the event that the pursuer was held to have contravened Rule 16, the Rule is framed on the basis that in the event that a member commits any of the acts listed and specified in the Rule "he shall in each and all of these cases, on the vote of two-thirds of the members present at any meeting duly called for the purpose, be liable to be expelled from the Society, and in the event of such expulsion, he shall forfeit all benefit and interest in the property and funds of the Society." The arbitration clause provides a means for independent determination of issues of interpretation arising in the ordinary course of the conduct of the Society's affairs among its continuing members including whether a lesser penalty than expulsion might be imposed. Any differences or disputes with third parties or former members are outwith terms of Rule 23. Had the intention been to include them, it would have been a simple matter to refer to disputes involving "former members" or "any party".
- [21] The outstanding matters in this case are, therefore, for the Court to determine and a further sist of the cause is unnecessary.

#### **INTERLOCUTOR**

- [22] I shall accordingly sustain the second and third pleas-in-law for the defenders to the extent of excluding from probation the pursuer's averments relating to his case based on contravention of natural justice, and I shall repel the first plea-in-law for the pursuer and dismiss the action so far as it relates to contravention of natural justice. I shall repel the seventh plea-in-law for the defenders and refuse the motion to sist the cause pending arbitration. I shall allow parties a proof before answer of their remaining averments.

Pursuer: Stewart, QC; Drummond Miller, WS

Defenders: Howie, QC; Harper Macleod