

Sent to applicants in advance of the interview

Civil Case Study – List of Cases

Smith v Sabre Insurance 2013 SC 569

Johnson v Gore Wood & Co [2002] 2 AC 1

Stuart v Goldberg Linde [2008] 1 WLR 823

Aldi Stores Limited v WSP Group plc [2008] 1 WLR 748

The following information was provided to applicants when they arrived at their interview.

Briefing Note

Procedure

1. This matter comes before Your Lordship / Your Ladyship on a very short point as to whether a plea of *res judicata* should be sustained.
2. Unusually, the matter requires an urgent determination because one of the principals is terminally ill with only a few months to live. Whilst a commission has been held for her evidence to lie *in retentis*, both parties wish an urgent determination which, almost certainly, will be appealed. Parties have requested an *ex tempore* decision and YL has agreed to do so, in the understanding that there is no need for a copious rehearsal of the background facts and in the knowledge there will be the opportunity to state matters more fully in a reasoned Opinion.
3. The pleadings are voluminous and, in order to assist the Court, the parties have agreed the following factual background. They are also agreed that the essential parts of the pleadings are as set out in paragraphs 9 and 11 below.
4. At this morning's hearing the parties will make brief submissions as to what appears to each to be critical in a proper analysis and characterisation of the factual background, together with short submissions on law referring to the authorities identified in paragraph 14 of this Note.

Factual background

5. The present action (“Action 2”) has been raised in respect of issues arising out of the administration of a Scottish family trust (the “New Trust”) during a period, between August 2007 and July 2010, when the defenders (the “former trustees”) were in office as trustees. The pursuer (the “present trustee”) is currently in office as trustee of the New Trust, having been appointed in July 2010.
6. The New Trust was established in 2007 in order to sub-divide the assets of another family trust (the “Old Trust”), with the primary beneficiaries of the New Trust being one of the sons and that son’s family. The arrangements by means of which assets and liabilities were transferred from the Old Trust to the New Trust were complex. These arrangements were put in place at the time of the emerging global financial crisis. The transfer of liabilities necessitated the creation of new loan facilities and these were offered by a bank friendly to the son (the “Bank”). For reasons put forward by the Bank, the transfer arrangements included the creation of a set of intermediate holding companies (the “Companies”) within an existing corporate investment structure. As and when loans were made by the Bank to the New Trust, they were made to the Companies. They were then channelled through the Companies on their way to receipt by the individual company which held the trust investments (the “ultimate investment company”). The former trustees held the entire shareholding in each of the companies within the corporate investment structure.
7. In 2010 disputes had begun to arise regarding past trust administration. The trusteeship of the former trustees was brought to an end, and they had brought proceedings (“Action 1”) seeking not only exoneration and discharge but also seeking declaratory conclusions regarding certain aspects of the administration of the trust.
8. One order sought by the former trustees was that the Companies were not entitled to payment on alleged inter-company loans channelled through them. The former trustees argued that whilst the Companies were potentially liable to the Bank, there were no formal loan agreements from those Companies to the ultimate investment companies. The former trustees pointed out that there was no claim against them by the Bank and that this showed that, whilst the Companies were to be liable to the Bank, the assets of the New Trust were to be ring-fenced from claims by the Bank.

9. The Companies, by then in liquidation, had been made defenders in Action 1 and they counterclaimed for repayment of the alleged loans. The present trustee had also been joined as a defender and it, too, had presented a counterclaim against the former trustees: seeking declarator that, if the loans were enforceable as against the former trustees, the former trustees were not entitled to any indemnity out of the assets of the New Trust. Their argument was that the former trustees had been guilty of unreasonable conduct and breach of trust. They had caused loss to the trust by failing to take steps to arrange matters so that the alleged inter-company loans should not become directly repayable out of the New Trust assets. The action proceeded to a proof. The Lord Ordinary found in favour of the Companies on the enforceability of the loans and against the present trustee on the question of entitlement of the former trustees to indemnity. Cross Reclaiming Motions were unsuccessful.
10. The heart of the pleadings for the present trustee in Action 1 stated: *“The former trustees did not have proper regard to the circumstances surrounding the alleged loans. In creating book entries for each step of the passage of the loans from the Bank, by creating what appeared to be inter-company loans from the Companies through to the ultimate investment company it was their duty to ensure that there was no need for entries suggesting that the moneys had passed through the hands of the Companies. In failing to do so they unnecessarily allowed an apparent loan to be created between the Companies and the ultimate investment company which they controlled. If an enforceable loan has thereby been created between the Companies and the ultimate investment company the trust will have sustained avoidable losses through loss of the value of the ultimate investment company. Such conduct amounts to breach of trust and the former trustees would not be entitled to an indemnity from trust funds.”*
11. In Action 2, the present trustee, as pursuer, is seeking from the present defenders, as former trustees, replenishment of losses sustained by the trust estate. The basis of the claim includes allegations that, during their time as trustees, the former trustees had placed too much reliance on the investment adviser to the New Trust.
12. The heart of the pleadings for the present trustee states: *“The former trustees failed to take their own decisions as to the appropriateness of high risk investments and aggressive investment strategies. They failed to monitor the proper diversification of the assets of the New Trust. They failed to take their own decisions as to the advisability of a commercial relationship with a lending bank with which their principal beneficiary had a close relationship, at a time when the emergence of the global*

financial crisis was well understood by those involved in significant financial matters. In accepting a transfer of assets and liabilities from the Old Trust which included the creation of new loan facilities from a bank friendly to the principal beneficiary, the former trustees failed adequately to analyse the risks for the trust estate. The creation of the intermediate holding companies (the “Companies”) through whom new inter-company loans were, on the instructions of the Bank, to be channelled from the Bank down to the recipient company which held the trust investments, created an unnecessary risk for the trust estate. The former trustees should have rejected that proposal. In failing to do so they caused loss to the trust estate.”

13. It is in these circumstances the former trustees have tabled a plea of *res judicata* which is to be argued before YL.
14. Counsel intimate jointly that the parties will rely on *Smith v Sabre Insurance* 2013 SC 569; *Johnson v Gore Wood & Co* [2002] 2 AC 1; *Stuart v Goldberg Linde* [2008] 1 WLR 823; and *Aldi Stores Limited v WSP Group plc* [2008] 1 WLR 748.

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SUBMISSIONS TO BE DELIVERED TO THE COURT AT THE HEARING

The Defenders' Submissions as to the applicable law

1. The defenders (the former trustees) submit that the plea of *res judicata* should be sustained. It is an abuse of process for the pursuer to bring in Action 2 claims which should have been pursued in Action 1 under the ‘single action’ rule: *Smith v Sabre Insurance* 2013 SC 569; *Johnson v Gore Wood & Co* [2002] 2 AC 1; *Stuart v Goldberg Linde* [2008] 1 WLR 823; and *Aldi Stores Limited v WSP Group plc* [2008] 1 WLR 748.
2. The question in every case is whether, applying a broad, merits-based approach, it appears that the same issue is proposed to be litigated again between the same parties on substantially the same basis: *Smith v Sabre Insurance*, paragraph 21; *Johnson v Gore Wood & Co*, page 31; *Stuart v Goldberg Linde*, paragraph 47. .
3. Whilst *Smith v Sabre Insurance* dwells on the application of the ‘single action’ rule in the context of two actions for damages, the various judicial pronouncements referred to in paragraph 29 show that the proper application of the principle is broader.

4. In reaching its decision, the court is entitled to take into account the public interest in finality in litigation and in preventing a party being vexed twice, as well as economy and efficiency in litigation: *Smith v Sabre Insurance*, paragraph 43.
5. The decision as to whether the proceedings constitute an abuse of process is not a discretionary one: either the second set of proceedings is an abuse of process or it is not: *Stuart v Goldberg Linde*, paragraph 24.
6. The defenders' plea should be sustained.

The Defenders' Submissions as to the essential facts

7. It is critical to take into account the nature, extent and importance of the factual overlap between the actions both generally and in particular. The general factual background to each were the same: the impact of the global financial crisis on the assets of the New Trust and the consequent necessity for continued third party lending after the transfer of assets and liabilities from the Old Trust. At one level the fundamental issue in Action 1 was as to the existence alleged loans: both in the sense that the existence of the loans was essential to the counterclaim by the Companies and also because the present pursuer's then counterclaim against the present defenders turned on the allegation that, assuming those alleged loans to be exigible from the former trustees, the former trustees were in breach of trust for failing to take steps to prevent the loans from the Bank becoming repayable out of the New Trust assets. Accordingly, properly appreciated, a material essence of the litigation, through the present pursuer's counterclaim, was to explore the present defenders' actions and alleged failures, as trustees during their trusteeship, in respect of the alleged losses to the trust estate.
8. It was apparent from the heart of the Condescence in Action 2 that the general factual background was identical to that in Action 1. It was also clear that the essential complaint was the same, namely, that loss had been suffered by the New Trust through act or omission on the part of the present defenders as trustees. Albeit Action 2 sought to found upon allegations that, at the inception of the New Trust, the present

defenders should not have allowed the possibility of inter-company loans becoming repayable out of the trust assets, the key allegations in Action 2 were simply further formulations of what the present defenders should have done to avoid the result complained of in Action 1 (loss to the trust) in the same period of time. It was important to take account of the context within which specific allegations were explored: this highlighted the mutuality of subject matter in the two sets of proceedings. All should have been dealt with in a single set of proceedings. The possibility of separate proceedings on essentially the same subject matter allowed the possibility of inconsistent argument and judicial finding as between the two sets of proceedings.

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SUBMISSIONS TO BE DELIVERED TO THE COURT AT THE HEARING

The Pursuer's Submissions as to the applicable law

1. The pursuers confirm their agreement with the defenders that the applicable authorities are *Smith v Sabre Insurance* 2013 SC 569; *Johnson v Gore Wood & Co* [2002] 2 AC 1; *Stuart v Goldberg Linde* [2008] 1 WLR 823; and *Aldi Stores Limited v WSP Group plc* [2008] 1 WLR 748.
2. Whilst the principal question is whether the same issue is proposed to be litigated on substantially the same basis, the question as to what was litigated cannot avoid proper consideration of the separate legal remedies sought: cf. *Smith v Sabre Insurance*, paragraph 21.
3. The court should be slow to extend the application of the 'single action' rule from the relatively straightforward context of actions for damages to more complex issues where a single factual background may give rise to potential arguments based on different legal relationships and associated remedies: : cf. *Smith v Sabre Insurance*, paragraph 29.
4. Especially in complex commercial matters, a party should have a measure of freedom to choose which issues should be raised in which action, in the knowledge that some

matters would be controlled through appropriate case management: *Aldi Stores Limited v WSP Group plc*, paragraphs 24 and 25.

5. Particularly where the position in Action 1 was that the present trustee had merely presented a counterclaim, that responsive position to protect trust assets should not preclude the taking of a more active position to seek redress once an actual loss had been identified. To suggest otherwise is merely to argue that just because the present claim could have been brought in Action 1 that it should have: *Johnson v Gore Wood & Co*, page 31.

The Pursuer's Submissions as to the essential facts

6. It is agreed that the background facts to each action are the same (impact of the global financial crisis and necessity for third party lending). However, Action 1 was fundamentally about the existence of alleged loans. The essence of that litigation, through the present pursuer's counterclaim, was merely to explore the appropriate position of the former trustees in respect of their claim to be entitled to indemnity from the trust assets for any liability on the loans.
7. When proper regard is had to the Contumaciousness in Action 2, it is clear that the basis of the complaint is quite different. As the result of the determinations in Action 1, it is now clear that an actual loss has been suffered by the New Trust. Albeit no new information had emerged, Action 2 focusses upon a different aspect of the former trusteeship: namely that, at the outset of the New Trust, the former trustees should not have allowed the remotest possibility of inter-company loans becoming repayable out of the New Trust assets. They should have objected to the interposition of the Companies without full ring-fencing. The key allegations in Action 2 were therefore quite different to those in Action 1. The result complained of may have been the same, but the focus of Action 2 was the failure to act at the time when the arrangements for transfer of assets and liabilities were being proposed. When that is understood, there is no mutuality of subject matter between the two sets of proceedings and the defenders' plea should be refused.