HOUSE OF LORDS SESSION 2006–07

[2007] UKHL 29

on appeal from:

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Wilson (Respondent)

v.

Jaymarke Estates Limited and another (Appellants)

Appellate Committee

Lord Hoffmann
Lord Hope of Craighead
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Carswell

Counsel

Appellants:
David Sellar QC
Gavin MacColl
(Instructed by Russel + Aitken LLP)

Respondents:
Malcolm Scott QC
Eric Robertson
(Instructed by Brodies LLP)

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ON
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HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

Wilson (Respondent) *v.* Jaymarke Estates Limited and another (Appellants) (Scotland)

[2007] UKHL 29

LORD HOFFMANN

My Lords,

1. Jaymarke Estates Ltd ("Estates") was incorporated in Scotland in 1991 but remained dormant until towards the end of 1994, when it was used by its two shareholders and directors, Mr Shaw and Mr Wilson, to carry out a property development near Aberdeen. In early 1996, shortly before the development was completed, the directors fell out with each other and Mr Wilson resigned. Mr Shaw, who held 70% of the issued share capital, continued as sole director. In November 1997 Mr Wilson, who held the remaining 30%, presented a petition under section 459 of the Companies Act 1985, claiming that the company's affairs had been conducted in a manner unfairly prejudicial to the interests of a part of its members, namely, himself.

2. After a nine day hearing the sheriff at Aberdeen declared herself satisfied that the petition was well founded. The unfairly prejudicial conduct upon which she relied was (a) an irrecoverable loan of £88,125 to a company of which Mr Shaw's son was a director (b) a payment of £150,000 purporting to be management charges in respect of the year ended 30 September 1995 to Jaymarke (Northern) Ltd ("Northern"), a company wholly owned by Mr Shaw and his wife (c) a payment of £85,000 purporting to be management charges in respect of the year to 30 September 1996 to Jaymarke Developments Ltd ("Developments"), a company in which Mr Shaw held 63% of the issued shares, Mr Wilson 27% and a third party 10% (d) the company's failure to hold annual meetings or lodge annual returns. Pursuant to section 461(2)(d) of the Act she ordered Mr Shaw to buy Mr Wilson's 30% interest for 30% of the net asset value of the company as at 30 September 1996, which, after hearing valuation evidence, she fixed at £49,345. For the purposes of

the valuation she deemed the sums paid as management charges to be assets of the company.

3. On appeal the Inner House adhered to the sheriff's interlocutor. The appeal to your Lordships' House does not challenge the finding of unfair prejudicial conduct based upon the £88,125 loan or the failure to hold meetings or make returns. Nor is there in principle any objection to the exercise of the statutory power to order Mr Shaw to buy Mr Wilson's shares. But Mr Shaw says that the sheriff was wrong to treat the payment of management charges as unfairly prejudicial and that they should therefore not have been added back. Without this adjustment, Mr Wilson's shares would have been worthless and Mr Shaw should therefore have been ordered or allowed to buy them for a nominal consideration. In the alternative, he submits that there should be a discount to allow for the fact that Mr Wilson has a 27% interest in Developments, the company to which £85,000 was paid in respect of the year ended 30 September 1996.

4. The reason why the sheriff found that the payment of the management charges was unfairly prejudicial was that neither Northern nor Developments had done anything for Estates by way of management or anything else. There had been no contract for management, express or implied, between them and Estates. They were simply amounts transferred out of Estates at the time when the accounts were signed off, a considerable time after the end of the accounting years to which they related, in the interest of minimising the tax liabilities of the Jaymarke companies as a whole. They had, said the sheriff, no commercial reality. The payments were therefore not in the interests of Estates and a breach of fiduciary duty by Mr Shaw as director. Mr Wilson was not consulted about them and the sheriff therefore concluded that the improper depletion of the company's assets by £235,000 was unfairly prejudicial to his interests as a shareholder.

5. None of these findings of fact are challenged by the appellant. But he submits that the payments were not unfair because Mr Wilson, although not consulted at the time, must be taken to have consented to them in advance. The basis for this argument was that up to 1993, Mr Shaw and Mr Wilson had been together involved in a number of developments carried out by various companies in which they held shares in varying proportions. For most of the time Northern, previously called Jaymarke Investments Ltd, had acted as treasurer, borrowing funds from the bank and paying the interest, and as employer of the staff working on all the projects. It reimbursed itself for these payments by

charging the other companies for management. But the amounts charged against each company were agreed each year when its accounts had been drawn up and were not fixed by reference to the services rendered but in order to secure the most favourable taxation treatment.

6. Although under section 32 of the Court of Session Act 1988 the House has no need to go to the underlying evidence, I note that Mr Wilson explained the procedure in his evidence, which was accepted as "credible and reliable" by the sheriff:

> "Q. Now, can you tell us this, Mr Wilson. What was the process whereby these management charges were agreed and fixed?
>
> A. On the basis of minimising corporation tax for the group of companies as a whole.
>
> Q. At what time would management fees be looked at for any given tax year?
>
> A. They could only be calculated when the accounts had been taken to final draft stage and the corporation tax computation could be prepared for each company.
>
> Q. Was there any benefit being obtained by the company against whom the management charges were being applied?
>
> A. If we look at [Northern] in particular, which carried the payroll for most, if not all, employees then [Northern] generally charged management charges which at that time would reflect to a degree the work that [Northern] had undertaken on behalf of other companies. But the overriding principle was that there was no distinct calculation of the value of the services. To a degree it is reflected in the management charge but the management charge predominantly was fixed on the basis of the corporation tax payable."

7. In 1992, however, there was down-turn in the market and a crisis of liquidity. The companies were unable to repay the bank facility but the bank chose a run-off by the directors rather than receivership and allowed them to realise the assets. No further developments were undertaken by the existing companies. Mr Wilson was asked what effect that had upon the practice of making management charges:

> "A. Well, it left these companies in a situation where any future development was going to be placed in newly formed companies for the purpose of that particular development. In effect, [Northern…was] barely trading other than attempting to realise the assets [it] had."

8. The position therefore was that the practice of providing associated companies with finance or services through a hub or flagship company ceased in 1993 when the companies which had previously filled that role went into a state of suspended animation. Mr Wilson's evidence was that, having regard to the way the associated companies were run up to 1992, he had agreed to the system of levying management charges with a view to reducing the overall tax liabilities. But he was not consulted nor did he consent to the payment of such charges without any commercial justification in 1995 or 1996.

9. In the Inner House, which did explore the evidence, the Lord President (Cullen) dealt with the point succinctly in paragraph 25 of his opinion:

> "It is clear from the evidence that, while the previous practice in regard to debiting management charges to various Jaymarke companies, with the consent of the petitioner, was directed to minimising liability to corporation tax, it rested on a commercial justification, namely the fact that an element of cost had been borne by the company to which the charge was credited. In about 1993 the companies which had borne such costs were in financial difficulties. Certain Jaymarke companies, including Northern, were run down to release assets. Thereafter separate companies, such as Estates, were set up for individual developments, and costs were handled in a different way. The charges debited to Estates were substantial and no services were provided to it by either Northern or Developments. Northern was not even trading. There is no question of there being evidence that the petitioner agreed to there being charges where no service had been provided. In our view the sheriff was entitled to hold that these charges should be added back."

10. This was also reflected in finding 5 which the Inner House added to the sheriff's findings of fact:

> "Until about 1993, with the agreement of the Petitioner and the Second Respondent and on the basis of advice given by Ernst & Young, management charges were levied against certain companies for the purpose of minimising corporation tax within those companies as a whole. At that time Jaymarke Northern Ltd was credited with management charges, it bearing costs and charges for various companies among whom the management charges were allocated."

11. There does not seem to me to be a great deal more to say. In essence, Mr Shaw's case is that because Mr Wilson had regularly agreed (expressly or impliedly) to the management charges recommended by the accountants in the past, he must be taken to have agreed to any management charges which they might recommend to Mr Shaw in the future. That is an impossible argument. All that can be deduced from Mr Wilson's past conduct is that when he and Mr Shaw were both involved in the management of the Jaymarke companies and, as the sheriff found, a relationship of quasi-partnership existed between them, and when the practice was for one company actually to incur costs for the benefit in varying degrees of the others, he did not think that the allocation of management charges was unfair. It cannot be taken as an agreement that after their relationship had broken down Mr Shaw should be entitled, whether in respect of past or future years, to deal with the assets of Estates as if they were his own.

12. As for the discount in respect of the management charge paid to Developments, I think that there is nothing in this point. There is no evidence of the financial state of Developments. For all we know, any money which it has received may have gone to its creditors rather than its shareholders. In any case, Estates is entitled to reclaim the money and Mr Wilson, as a shareholder in Developments, will not be able to complain if Mr Shaw pays it back.

13. The jurisdiction of the House in appeals from the Court of Session where an appeal to the Inner House has been taken from a sheriff proceeding on a proof is limited by section 32 of the Court of Session Act 1988 to questions of law. There must be considerable doubt as to whether the points taken by the appellant can be so described, but

your Lordships did not hear argument on that question because even on the most ample view of the jurisdiction of the House, the appeal must fail.

14. I would therefore dismiss the appeal.

LORD HOPE OF CRAIGHEAD

My Lords,

15. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. I agree with it, and for the reasons he gives I too would dismiss the appeal. There is however one aspect of this case that I find disturbing and on which I wish to comment.

16. Section 40(1)(a) of the Court of Session Act 1988 enables a party against whom a final judgment has been pronounced in the sheriff court, as happened in this case, to appeal from the Inner House to the House of Lords without leave. He does not require to seek leave from the Inner House, nor does he require to seek the permission of this House before doing so. This is a privilege which is not enjoyed by litigants in the other parts of the United Kingdom from which appeals come to this House. An appeal to the House of Lords from any order or judgment of the Court of Appeal in England and Wales or in Northern Ireland may only be brought with the leave of the Court of Appeal or of the House of Lords: Administration of Justice (Appeals) Act 1934, section 1(1); Judicature (Northern Ireland) Act 1978, section 42. It has been suggested that the privilege should be discontinued when the jurisdiction of the House of Lords is transferred to the new Supreme Court. But the effect of section 40(3) of the Constitutional Reform Act 2005 is that it will continue in the case of that court too. Nevertheless the debate on this issue must not be regarded as closed. If it is at risk of being abused, the public interest may require that the privilege be looked at again.

17. The public interest is served, in the case of appeals from the Court of Appeal in England and Wales and Northern Ireland, by the rule that leave to appeal is granted only where the case raises an arguable point of law of general public importance which ought to be considered

by the House at the time when the appeal is brought: House of Lords Practice Directions (2007), para 4.7. This rule ensures that the time which is available for the consideration of appeals in this House is devoted to appeals which require consideration at this level. It is contrary to the public interest that the time of the House should be taken up with appeals which do not raise an arguable question of general public importance, as this is liable to cause delay in the disposal of appeals which merit its attention.

18. In the case of appeals from the Inner House of the Court of Session the public interest is dealt with in a different way. First, there is the general requirement that the petition of appeal must be signed by two counsel who must also certify that the appeal is reasonable: House of Lords Standing Order IV; Practice Direction 1.9. Secondly, there are the opening words of section 40(1) of the Court of Session Act 1988. These words state that the right of appeal is subject to the provisions of any other Act restricting or excluding an appeal to the House of Lords and of sections 27(5) and 32(5) of the Act. Section 32 applies to appeals from the sheriff to the Court of Session. In substance it re-enacts provisions originally to be found in section 40 of the Judicature Act 1825. Section 32(4) requires the Court of Session in its judgment to distinctly specify in its interlocutor the facts that it finds to be established by the proof. Section 32(5) provides that the judgment of the Court of Session shall be appealable only on a point of law. Judgments delivered in this House over many years have emphasised the importance of this rule and its effect: see, for example, *Laing v Scottish Grain Distillers Ltd*, 1992 SC (HL) 65, 69. As Lord Normand said in *Sutherland v Glasgow Corporation*, 1951 SC (HL) 1, 8, the intention of the statute is to prevent appeals coming to this House unless there is a genuine question of law.

19. It is the responsibility of counsel, when considering whether an appeal is reasonable, to consider the statutory rules, if any, that qualify the right of appeal. In the present case the effect of section 32(4) and (5) of the 1988 Act is that this House is not required, nor is it permitted, to analyse the evidence that was before the sheriff. Its jurisdiction is limited to the questions of law, if any, that were considered by the Inner House in the light of the facts specified in that court's interlocutor. This limitation affects not only the issues that are open for consideration in this House. Inevitably it affects also the time that needs to be set aside for the hearing of the appeal. The limitation on the scope of the appeal must be borne in mind when estimates are submitted to the Judicial Office of the time that needs to set aside for it.

20. I mention these points because I am far from satisfied that proper attention was given to these matters when this appeal was certified as reasonable. I am even less satisfied that proper attention was given to the restriction on the right of appeal that section 32(5) lays down when an estimate was given of the time that was required for it. Four days were set aside for the hearing based on that estimate. In the event the hearing ended before the short adjournment on the first day. Counsel for the respondent was not called on. But it is hard to see how, even if he had been, the hearing in this case could have occupied more than one day. The privilege which appeals from the Court of Session to this House still enjoy, if properly used, can work to the advantage of Scottish litigants and to the development of Scots law. But the limits on it must be carefully and jealously respected if it is to continue to be in the public interest, given the amount of appellate business that now comes before the House from all parts of the United Kingdom.

LORD RODGER OF EARLSFERRY

My Lords,

21. I have had the advantage of reading the speech of my noble and learned friend, Lord Hoffmann, in draft and, for the reasons he gives, I too would dismiss the appeal. I also agree with the additional observations of my noble and learned friend, Lord Hope of Craighead.

LORD WALKER OF GESTINGTHORPE

My Lords,

22. I am in full agreement with the opinion of my noble and learned friend Lord Hoffmann, which I have had the advantage of reading in draft. For the reasons given by Lord Hoffmann I too would dismiss this appeal. I would also respectfully concur in the observations made in the opinion of my noble and learned friend Lord Hope of Craighead.

LORD CARSWELL

My Lords,

23. I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Hoffmann. For the reasons which he has given I too would dismiss the appeal.